

THE POTENTIAL OF THE BLOCKCHAIN FOR ASSET PROTECTION PLANNING

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Legal scholarship on the blockchain has largely focused on how the law might respond to the challenges it raises or may one day raise. Some scholars have grappled with how cryptocurrency might complicate the administration of wills, for example.¹ Others have focused on fears that the blockchain will be used to evade the power of the legal system.² The literature is only beginning to investigate a more interesting question: how the blockchain might serve the preexisting demands of the law.³

In this article, we argue that the blockchain has the potential to revolutionize the practice of asset protection planning through the use of smart contracts—self-executing programs on the blockchain—designed specifically for legally-sound asset protection. We will refer to such smart contracts as blockchain asset managers, and to the overall concept of using smart contracts for this purpose as blockchain asset management (in either case, hereinafter “BAM.”). Our point is not that the law will change in response to the blockchain—although it may well do so. Instead, the blockchain may affect a paradigm shift in the application of preexisting legal standards. Under current law, the blockchain stands ready to supersede and displace traditional offshore asset protection trusts (“APTs”) as a superior tool for asset protection.⁴

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¹ See, e.g., Michael Alan Goldberg, *Estate Planning for Cryptocurrency*, 106 ILL. B.J. 38, 39 (2018).

² See, e.g., Andrew M. Hinkes, *Throw Away the Key, or the Key-Holder?* 16 NW. J. TECH. & INTELL. PROP. 225 (2019) (hereinafter Hinkes).

³ But see Joshua A.T. Fairfield, *Smart Contracts, Bitcoin Bots, and Consumer Protection*, 71 WASH. & LEE L. REV. ONLINE 35 (2014), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss2/3>

⁴ Cf. Dylan Yaga et al., *Blockchain Technology Overview*, National Institute of Standards and Technology 1, 15 (2018) <https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8202.pdf>

The law of APTs virtually cries out for something like the blockchain. A survey of the case law shows that the primary reason that offshore APTs fail in court is that judges are not satisfied of their factual immutability, and believe, or fear, that they contain contractual or *de facto* backdoors.⁵ This is where the blockchain comes in—for the essence of the technology is its unparalleled immutability. The blockchain offers both functions necessary to create a legally ironclad APT: the capacity for asset storage and publicly verifiable immutability.⁶

This argument should not be mistaken for an already-commonplace observation: that contemnors and criminals might use the blockchain to outmaneuver courts and law enforcement.⁷ Instead, our suggestion is that—within the framework of the law itself—the blockchain stands on more secure footing than traditional APTs. BAM is superior, in both practical and legal terms, in the security it would offer clients who wish to protect their assets. No more will courts and potential contemnors need to quibble over the meaning of contract terms. No longer will settlers need to prove that trustees are not merely feigning noncompliance. A BAM would resolve both issues.

I. Review of cryptocurrency, blockchain, and smart contracts

Although a fully-fledged introduction to cryptocurrency and related issues is beyond the scope of this paper, we will provide a short overview sufficient to introduce uninitiated readers to the ideas presented in this article. At the outset, the most important distinction to grasp is the line between first- and second-generation cryptocurrencies.

In July 2019, President Trump famously tweeted that cryptocurrencies are “based on thin air.”⁸ Trump was not wrong: first-generation cryptocurrencies, including Bitcoin, can in fact be helpfully understood as pretend money. Trump’s mistake was not in describing

(“The fear of missing out on this technology is quite high, and most organizations approach the problem as ‘we want to use blockchain somewhere, where can we do that?’ which leads to frustrations with the technology as it cannot be applied universally. A better approach would be to first understand blockchain technology, where it fits, and then identify systems (new and old) that may fit the blockchain paradigm.”). The device proposed in this paper fits this latter approach.

⁵ See *infra* note 27 to 37 and accompanying text.

⁶ See *infra* note 11 to 17 and accompanying text.

⁷ See, e.g., Hinkes, *supra* note 2.

⁸ Trump Donald J. (@realDonaldTrump), TWITTER (Jul. 11, 2019, 5:15 PM), <https://twitter.com/realdonaldtrump/status/1149472282584072192?lang=en> (“I am not a fan of Bitcoin and other Cryptocurrencies, which are not money, and whose value is highly volatile and based on thin air. Unregulated Crypto Assets can facilitate unlawful behavior, including drug trade and other illegal activity . . .”).

Bitcoin's value as ultimately imaginary, but in implying that the same thing is not true of the US dollar. In both cases, society has constructively agreed to assign value to some arbitrary medium of exchange—paper in one case and computer bits in another.

One difference is that the amount of US currency a person has is, in a certain loose sense, tied to the amount of paper money that he possesses. In contrast, a complex digital file can be effortlessly duplicated an unlimited number of times. The very idea of a digital currency might therefore seem untenable, as one could simply copy and paste the currency, rendering the whole project meaningless.⁹

One apparently simple solution to this problem is for some central administrator—a digital bookkeeper—to maintain an online “ledger” of the amount each person is said to have. If you wish to send me virtual currency in exchange for some physical product, this central bookkeeper would simply subtract a number from your account and add a corresponding number to mine.

On closer inspection, though, this simple model would entail catastrophic risks. This bookkeeper could decide to “steal” the virtual currency, or abolish the economy of the ledger, simply by changing the numbers in each account. He could also be hacked, bribed, or otherwise compromised.¹⁰ Of course, as Weimar Germany and Zimbabwe have demonstrated, paper currency is also susceptible to this kind of mishandling or hacking. But, in the digital context, the problem appears pronounced: the untrustworthiness of a central ledger is the fundamental obstacle to the creation of a viable virtual currency. This is the problem solved by the blockchain.

The blockchain is a network of nodes, each node consisting of a group of computers.¹¹ Every node contains a copy of the entire “ledger.”¹² For any transaction to occur, it must be verified by the other nodes in the

⁹ See Fairfield, *supra* note 3 at 36 (“For example, imagine a list on a whiteboard in a dormitory floor, keeping track of who paid for pizza last time. The advantages to such a list—public availability and ease of editing—are clear. The disadvantages are equally clear. Someone might attempt to edit the list to their personal advantage.”).

¹⁰ See *id.* (“A solution that immediately suggests itself is that the dorm RA might be entrusted to keep the list. Yet then there is the concern that the RA may make a mistake, or be unavailable over the weekend, or be untrustworthy and edit the list to benefit himself.”).

¹¹ See Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARV. BUS. REV. (2017).

¹² *Id.* (“In a blockchain system, the ledger is replicated in a large number of identical databases, each hosted and maintained by an interested party. When changes are entered in one copy, all the other copies are simultaneously updated. So, as transactions occur, records of the value and assets exchanged are permanently entered in all ledgers.”).

blockchain.¹³ This decentralized network of nodes solves the trust problem we encountered with our bookkeeper, namely by removing the bookkeeper from existence. More importantly, the blockchain eliminates the risk that some government or other entity will forcibly assume the role of bookkeeper. In order to seize control of Bitcoin, a government would need to control a majority of the blockchain nodes in the world—a task that could require a totalitarian world-state. The blockchain therefore allows the ledger to be *immutable*, meaning that it is not susceptible to change except on some predetermined set of terms.¹⁴

Bitcoin and other first-generation cryptocurrencies are essentially a ledger of numbers recorded on the blockchain. These first-generation cryptocurrencies are innovative in two senses: besides solving the problem of the bookkeeper, they also afford protections which go beyond those offered by traditional fiat currencies. As noted above, even if you possess a large number of US dollars, the government could transform your savings into worthless paper by printing a large amount of new currency. In contrast, cryptocurrency is only subject to the manipulations that are permitted by its governing algorithm, which no one can unilaterally change.

To some clever programmers, however, what was most intriguing about Bitcoin was never the virtual currency itself, but the blockchain underlying it. If the blockchain could offer immutable protection to a mere ledger, these programmers reasoned, then it could also confer immutability upon whole programs secured on the blockchain. These immutable programs could be used to, among other things, remove the trust element from transactions.¹⁵

To give a classic example, suppose you agree to sell me a digital file. One of us then creates a program designed to execute our contract, and inscribes that program onto the blockchain. This program is designed to take possession of the digital file and then verify that the file is genuine. Once I deposit the agreed-upon sale price into the program, it will automatically execute our transaction—distributing the file to me and the money to you. Because this program is verifiable and immutable, both of

¹³ Yaga, *supra* note 4 at 15 (“The other full nodes will check the validity and authenticity of all transactions in a published block and will not accept a block if it contains invalid transactions.”).

¹⁴ *But see id.* at 34 (describing scenarios in which blockchains are not immutable and how they may be averted).

¹⁵ See generally Edmund Mokhtarian¹ & Alexander Lindgren², *Rise of the Crypto Hedge Fund: Operational Issues and Best Practices for an Emergent Investment Industry*, 23 STAN. J.L. BUS. & FIN. 112, 122 (2017) (“[A smart contract is] a computerized transaction protocol that executes terms of a contract. The general objectives of smart contract design are . . . minimize exceptions both malicious and accidental and minimize the need for trusted intermediaries.”).

us will be able to confirm, and trust, that the program will function as agreed before we initiate the trade.¹⁶

Programs of this kind are known as “smart contracts,” and they are the essence of second-generation cryptocurrencies—the most prominent of which is Ethereum.¹⁷ These second-generation cryptocurrencies are not, as Trump implied, based on “thin air.” Instead, they facilitate a service and thus have intrinsic economic value.

II. The concept of blockchain asset management

It is worth taking a moment to ask how the term “smart contract” arose. Although a smart contract would probably be sufficient to constitute a legal contract under the common law, in most cases any *legal* contract is likely to arise before the parties actually trigger the execution of the digital program. One reason that these programs are nonetheless known as “contracts” is likely that the people who invented them were not lawyers: they were programmers attempting to meet an economic demand known to them.

What these programmers likely did not realize is that, while there is indeed a need to eliminate risk in contractual exchanges, there is probably a stronger and more immediate demand for ironclad and demonstrable immutability in asset protection law. Smart contracts could therefore play an important role by holding sums of money and then releasing all or part of the sum under certain conditions or at certain times, facilitating lawful asset protection. As noted above, we describe a smart contract designed for legally-sound asset protection as a blockchain asset manager or BAM.

Asset protection planning is the legal art of protecting one’s assets from identifiable risks, and has been called one part of a three-piece planning pie, together with building an investable estate and estate planning.¹⁸

¹⁶ See also Iansiti & Lakhani, *supra* note 11 (“Intermediaries like lawyers, brokers, and bankers might no longer be necessary. Individuals, organizations, machines, and algorithms would freely transact and interact with one another with little friction. This is the immense potential of blockchain.”).

¹⁷ See also Yaga *supra* note 4 at 32 (“Smart contracts extend and leverage blockchain technology. A smart contract is a collection of code and data (sometimes referred to as functions and state) that is deployed using cryptographically signed transactions on the blockchain network (e.g., Ethereum’s smart contracts, Hyperledger Fabric’s chain code). The smart contract is executed by nodes within the blockchain network; all nodes that execute the smart contract must derive the same results from the execution, and the results of execution are recorded on the blockchain.”).

¹⁸ Barry S. Engel, *Using Foreign Situs Trusts for Asset Protection Planning*, 20 EST. PLAN. 212, 1993 WL 224115, 1 (1993).

Traditionally, asset protection planning has been accomplished using offshore APTs in locations such as the Cook Islands.¹⁹

Offshore APTs crucially depend upon the legal concept of “impossibility”—a doctrine which, theoretically, is a complete defense to civil contempt. To understand how the defense works, imagine that a court orders a settlor to transfer assets out of an offshore trust, either preemptively or to satisfy a judgment. The terms of the APT, however, do not allow the funds to be released, and the trustee refuses. In some cases, this occurs because the trust terms provide that, if the trustee finds the settlor to be under a “condition of duress,” any distributions at his request are prohibited. A variety of similar devices could produce essentially the same result. For instance, the trust terms could provide that—regardless of what is going in the world—funds will only be distributed to the settlor in certain amounts and at certain times. In either case, the settlor genuinely has no ability to reassert control over the trust and convey the funds to the court. Accordingly, the settlor cannot realistically be held in contempt. Civil contempt is designed to coerce compliance, not to punish a party. As the Supreme Court has said, “to jail one for a contempt for omitting an act he is powerless to perform would reverse the principle and make the proceeding purely punitive, to describe it charitably.”²⁰

¹⁹ *Id.* at 4. These trusts were once viewed with suspicion by lawyers but have stood the test of time; a well-crafted APT is both inaccessible and lawful. In the words of one leading practitioner, an “APT that is correctly drafted and implemented ultimately works because it is legally sound, not because of smoke and mirrors or secrecy.” *Id.* In fact, among expertly drafted foreign integrated estate planning trusts, only a small minority even come under attack by any adverse party. See generally Barry S. Engel, ASSET PROTECTION PLANNING GUIDE – A STATE-OF-THE-ART APPROACH TO INTEGRATED ESTATE PLANNING (2000).

²⁰ *Maggio v. Zeitz*, 333 U.S. 56, 72 (1948). See also *U.S. v. Rylander*, 103 S.Ct. 1548, 1552, 460 U.S. 752, 757 (1983) (“While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production.”); *Ex parte Fuller*, 330 Mo. 371, 375 (Mo. 1932) (“The law will not permit a court to order a party to do that which he has no power to do, then commit him to jail, there to remain until he performs the impossible.”); *Register v. State*, 8 Minn. 214, 217 (Minn. 1863) (“The fraud the Defendant may have been guilty of in disposing of the trust fund, if such was the case, cannot be reached and punished by proceedings for contempt, in not obeying the order to pay it over to the receiver. . . . We think the Defendant fairly purges himself of the charge of disobedience, by showing inability to comply.”); *Clements v. Tillman*, 79 Ga. 451, 455 (Ga. 1888) (“[Contempt] ought never to be resorted to except as a penal process, founded on the unwillingness of the party to obey. The moment it appears that there is inability, it would clearly be the duty of the judge to discharge the party.”)

Unfortunately for settlors of APTs, the inquiry rarely ends there. In the first place, a settlor is subject to contempt if the claimed “impossibility” is in fact a sham. If the settlor could regain the APT funds at any time, then there is no legal reason why courts and creditors should not likewise have access to the funds. Yet even where a party genuinely trades away his access to funds in exchange for asset security, there is a risk that courts will nonetheless conclude that the settlor has backdoor access to the trust—perhaps even inferring that he has a secret understanding with the trustee—and hold him in contempt.²¹ Additionally, it is the settlor’s burden to prove his defense of impossibility, not his opponent’s burden to demonstrate that the APT is a sham.²² Courts may therefore refuse to find impossibility even when there is no affirmative evidence that the party has any access to the trust funds.

Another potential hazard for settlors is the doctrine of “self-created impossibility.” This doctrine states that, even if courts find that impossibility exists, they will hold the party in contempt if he “created the impossibility.”²³ At first glance, this principle might seem to make the whole enterprise of asset protection impossible—not only BAMs, but also traditional APTs. There are two reasons why it does not. First, the cases in which courts invoke this doctrine overwhelmingly involve a nexus in time between the transfer and the legal dispute. A finding of self-created impossibility can therefore be avoided by settling the trust “when the client’s legal seas are calm.”²⁴

It is worth noting, however, that the doctrine of self-created impossibility also has a somewhat dubious constitutional foundation.²⁵ Futile civil contempt sanctions are said to be punitive and therefore to violate the contemnor’s due process rights.²⁶ As the “self-created impossibility” doctrine apparently allows for a futile civil contempt sanction, it is disfavored. As we will soon show, courts prefer to impose contempt under a standard finding of non-impossibility, with “self-created impossibility” sometimes acting as an argument in the alternative. If standard findings of non-impossibility were simply annihilated by the widespread use of BAMs—a possibility we will discuss later—then it is

²¹ See *In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002).

²² See generally *id.*

²³ See generally *id.*

²⁴ Engel, *supra* note 18 at 6.

²⁵ This is a second and more important reason that APTs persist notwithstanding the doctrine of “self-created impossibility”: at bottom, the self-created impossibility doctrine is theoretical and precarious.

²⁶ See *e.g.*, *In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002) (“When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor’s due process rights.”)

unlikely that “self-created impossibility” could actually stand on its own as a reliable justification for civil contempt.

III. Applying blockchain asset management to APT law

One way that settlors of APTs may be subject to contempt is if courts affirmatively find that access to the trust funds is not impossible. In a textbook APT case from 1999, *FTC v. Affordable Media*, the court declined to find that impossibility is unavailable to APT settlors as a matter of law, affirming that the court would “not be blind to evidence that compliance is now factually impossible.”²⁷ Scouring the language of the trust agreement, however, the court found what it considered to be a backdoor to the trust: the settlors had the power to appoint new trustees.²⁸ The court therefore upheld a lower court’s finding that the settlors were in control of the trust and so were in contempt of court.²⁹

Would a BAM have fixed the contemnors’ problem here? Of course, if the contemnors had plotted in bad faith to shield their money from courts while simultaneously *retaining* backdoor access to the funds, then a BAM could be of no help to them. Properly constructed, a BAM would make immediate recovery of the full trust amount impossible. Trusts can be complex, however, and it is possible that the contemnors did not intend to include the “backdoor” the court discovered. Likewise, suppose that there really was no backdoor, but that the court—in its reluctance to allow an APT settlor to escape contempt—was inclined to imagine a loophole in the contract where none existed. In either case, a BAM would have been invaluable: a court could only find that the settlors retained backdoor access to the trust funds if the judge was flat-out objectively mistaken about the relevant aspect of the technology.

Affirmatively finding a backdoor is not the only way to hold an APT settlor in contempt. Courts may also sustain contempt by concluding that the settlor has failed to meet his burden of demonstrating impossibility. In the Seventh Circuit case *American Fletcher*, for instance, the contemnor had entrusted his property to the law firm Barash & Hill.³⁰ When the court ordered the contemnor to turn the property over, Barash & Hill refused to

²⁷ *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (citation omitted).

²⁸ *Id.* at 1242.

²⁹ *Id.*; *See also* *Heroux v. Heroux*, 194 A. 741, 742 (R.I. 1937) (“Assuming, without deciding, that she was unable to pay over to the estate of Onesime Heroux the amount specified in the decree because she had spent it all, as testified, that was no excuse for her failure to file the amended inventory, charging herself as executrix with these amounts as ordered.”).

³⁰ *American Fletcher Mortg. Co., Inc. v. Bass*, 688 F.2d 513, 517 (7th Cir. 1982).

release the property.³¹ The court found that, although the contemnor had written letters to Barash & Hill instructing that his assets be returned, these letters constituted “feeble and half-hearted attempts at mere ‘paper compliance.’”³² The court noted that civil contempt is justified where a party has failed to show a sufficiently diligent attempt to comply with a court’s order.³³

Incidentally, the Seventh Circuit went on to find that the contemnor in fact controlled the assets at issue.³⁴ The court noted with particular interest that “Catherine Steel, an attorney with Barash & Hill, drafted both Bass’s letter of demand and Barash & Hill’s letter of refusal to return the collateral.”³⁵ It concluded that, in fact, “it was well within [the contemnor’s] power to deliver the assets to the clerk of court as a right incident to ownership.”³⁶ Still, let us put this particular contemnor’s chicanery aside: a finding of “paper compliance” would by itself have been sufficient for the court to hold the defendant in contempt.³⁷

Once again, a BAM would have been a clear winner: so long as defense counsel had a competent understanding of the technology, a BAM could not fail to defeat even a “paper compliance” argument. If the terms of the smart contract preclude a full release of the funds at the time of the court’s order, then the settlor plainly cannot comply with the order except by seizing control of most of the nodes in the world.

This brings us to a notable exception to the doctrine of impossibility: the notion that “self-created impossibility is not a defense” to contempt.³⁸ In practice, this exception requires what a prominent scholar and practitioner, the late Barry Engel, called “a nexus in time between the order in question and the creation of the impossibility.”³⁹ In a notable case of self-created impossibility from the Eleventh Circuit, for example, the contemnor created an APT two months before judgment was entered against him.⁴⁰ In a similar case, the court emphasized that that an APT had been created “less than 60 days prior to the entry of the Final Judgment.”⁴¹

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 516.

³⁶ *American Fletcher Mortg. Co., Inc.*, 688 F.2d at 518.

³⁷ *Id.*

³⁸ *Lawrence*, 279 F.3d at 1300.

³⁹ Engel, *supra* note 18 at 8.

⁴⁰ *Lawrence*, 279 F.3d at 1296. Worse, there was no dispute that—even after trust was created—the contemnor retained full control over the trust funds; a duress provision allegedly cutting off his control was not added until two years later. *Id.*

⁴¹ *S.E.C. v. Solow*, 682 F. Supp.2d 1312, 1314 (S.D. Fla. 2010); *see also* *Caswell v. Bathrick*, 169 A. 321, 321 (R.I. 1933) (noting that contemnor was “aware that the other

One way that some courts have framed the nexus requirement is by stating that the self-created-impossibility exception does not apply where, prior to service of a subpoena, the respondent had “previously disposed of the same [property] in good faith,” meaning that “[a]t the time he disposed of the property there was no order requiring him not to do so.”⁴² As we have already seen, though, there may also be a sufficient nexus if the respondent anticipated a specific, impending ruling at the time of the disposal.

A similar rule exists in the separate but related rule of fraudulent conveyance law. Although a conveyance is fraudulent if made to avoid a “probable” future creditor—*i.e.* a specific individual who the defendant has reason to think might become his creditor—a conveyance cannot be fraudulent if made to avoid “possible” future creditors, meaning hypothetical unknown individuals.⁴³

It is for this reason in particular that an APT is said to be best created “when the client’s legal seas are calm,” and that “[a]ttempting to protect assets when the legal seas turn choppy is like trying to buy fire insurance after the fire.”⁴⁴ Clients considering creating a BAM would be well-advised to proceed with the same foresight.

In this respect, BAMs may at first seem to enjoy little advantage over traditional APTs. Yet there is reason to think that the widespread use of BAMs—without substantively altering the law—could make the doctrine of self-created impossibility a thing of the past.

interested parties claimed the funds in question to be part of the estate”); *In re Weaver’s Estate*, 174 A. 905, 906 (Pa. 1934) (noting that contemnor, an executor, created impossibility “during the period of his executorship”); *Id.* at 907 (noting that if appellant “had shown that he . . . had not come into possession, at any time during his executorship, of private funds or property sufficient to pay any part of his indebtedness to the estate, there would have been some merit in this [defense of impossibility].”); *Ex parte Fuller*, 330 Mo. 371, 379 (Mo. 1932) (“In the instant case, the judgment does not find that petitioner had the money in his possession or under his control at the time he was ordered to deliver it to the receiver. Neither does it find that petitioner disposed of the money after the order was made, or in anticipation that it would be made, intending thereby to evade compliance with the order.”).

⁴² *F.T.C. v. Blaine*, 308 F. Supp. 932, 933 (N.D. Ga. 1970).

⁴³ *Hurlbert v. Shackleton*, 560 So. 2d 1276, 1279 (Fla. Dist. Ct. App. 1990) (upholding the decision of a lower court which “found no cases holding a transfer of assets to be fraudulent as to ‘possible’ future creditors”).

⁴⁴ *Engel*, *supra* note 19 at 6.

IV. The blockchain could effectively eliminate the doctrine of self-created impossibility

Some elaboration is necessary to understand this point. Even when courts do sustain contempt using a finding of self-created impossibility, they are strongly inclined to buttress their holding by also finding standard non-impossibility, or by finding that impossibility was not demonstrated. In an Eleventh Circuit case mentioned earlier, the Court—after stating that self-created impossibility was not a defense to the contemnor’s actions—also found that the contemnor in fact retained control over the trust.⁴⁵ Contempt was therefore justified both because of self-created impossibility and because the contemnor “failed to establish his defense of impossibility.”⁴⁶ Likewise, in 2010, the Southern District of Florida—despite finding that a contemnor had created the very impossibility he invoked—went on to emphasize that he had “not made good faith reasonable efforts to retrieve those assets.”⁴⁷ In fact, the court added that it was skeptical that impossibility even existed, saying that it doubted someone would create an APT to which he did not have secret backdoor access.⁴⁸

Perhaps the most peculiar aspect of this trend is that, when courts offer alternative justifications for contempt, these other justifications tend to undercut rather than complement a finding of self-created impossibility. It is rather suspicious to hold a settlor in contempt for “self-created impossibility” while simultaneously finding that it might not be impossible for the settlor to access the trust. One might expect courts to simply stop at the “self-created impossibility” stage of the analysis. Instead, judges strongly prefer to invoke non-impossibility, or an unmet burden of proof, to complement the doctrine of self-created impossibility.

Why are courts willing to embrace this tension rather than let self-created impossibility stand on its own? The answer lies in a flaw within the very nature of the self-created impossibility doctrine: the concept

⁴⁵ *Lawrence*, 279 F.3d at 1300.

⁴⁶ *Id.*

⁴⁷ *Solow*, 682 F. Supp. 2d at 1328.

⁴⁸ *Id.* (“Significantly, in *Lawrence*, the Eleventh Circuit noted, ‘[w]hile it is possible that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, we share the district court’s skepticism.’ I am also skeptical of Mr. Solow’s financial maneuvers.”) (citation omitted); *cf.* *S.E.C. v. Greenberg*, 105 F. Supp. 3d 1342, 1354 (S.D. Fla. 2015) (“The Court finds it to be beyond belief that the Elise Trust would not agree to some compromise where Defendant himself has agreed that in all of his dealings with the Elise Trust, the Trustee has never expressed any kind of concern for the trust funds or expressed any concern that the trust funds were not being used in a way that was beneficial.”).

theoretically allows for civil contempt that is admittedly futile and therefore punitive. The Supreme Court has characterized the essence of civil contempt as “coercive commitment for enforcement purposes, which, as often is said, leaves the contemnor to ‘carry the key of his prison in his own pocket.’”⁴⁹ It follows that “[t]o jail one for a contempt for omitting an act he is powerless to perform would reverse the principle and make the proceeding purely punitive.”⁵⁰ This poses not only moral, but constitutional problems, for—as other courts have observed—“when civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor’s due process rights.”⁵¹

Until now, some readers may have suspected that—in response to the widespread use of BAMs—courts might respond by limiting the defense of impossibility in civil contempt actions. There is a powerful reason that courts are unlikely to do so; the impossibility exception exists because it flows logically from the well-established purpose of civil contempt sanctions—to coerce compliance with the court’s orders. A BAM, competently constructed and presented to the court, would mow down all of the ambiguities which obscure true impossibility, making the imposition of any civil contempt sanction a brazen futility. Openly imposing a futile civil contempt sanction would require rejecting and replacing not just the impossibility defense *per se*, but the very foundation of the law of civil contempt. Put differently, there are good reasons to anticipate that—if sound BAMs collide with the concept of self-created impossibility—then it is the former that will prevail.

As it happens, there are already indications that state-of-the-art APTs are having this very effect. In an unpublished 2014 case before the Southern District of Florida, the court found that the settlor of a traditional APT could not be held in contempt even though he had admittedly created the impossibility at issue, and despite a clear nexus in time between the trust creation and the suit.⁵² In *Branch Banking and Trust Co. v. Hamilton Greens*, the settlor created a \$1.7-million APT in the Cook Islands a full seven months after being sued by the plaintiff.⁵³ The trust was structured to disburse \$7,485 each month to the settlor for his support and to shield the

⁴⁹ *Maggio*, 333 U.S. 56 at 68.

⁵⁰ *Id.* at 72.

⁵¹ *Lawrence*, 279 F.3d at 1300. It follows that “[t]he district court must make an individual determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that, ‘although incarceration for civil contempt may continue indefinitely, it cannot last forever.’” *Id.*

⁵² See generally *Branch Banking and Trust Co. v. Hamilton Greens, LLC*, 2014 U.S. Dist. WL 1603759 (S.D. Fla. Feb. 26, 2014).

⁵³ *Id.* at *1.

remainder of the funds.⁵⁴ The settlor’s uncontroverted testimony showed that he no longer had control of the trust, and he produced letters showing that the Cook Islands trustee had refused his instructions to disburse the trust amount.⁵⁵ The court found that the defendant “clearly does not have the ability to pay the Final Judgment and therefore does not ‘carry the key of his prison in his own pocket.’”⁵⁶ It concluded that, if it were to find the defendant in contempt under these facts, “the civil contempt order would not be coercive, but would rather be punitive in nature.”⁵⁷ Consequently, it did not do so.⁵⁸

V. The potential of blockchain asset management practice

You might point out that, had the defendant in *Hamilton Greens* used a BAM rather than a Cook Islands trust, the same result would have obtained. If a client is in the Southern District of Florida, then, is there any reason for him to use a BAM rather than a traditional APT? Very much so.

Imagine a blockchain-oriented law firm that employs an in-house programmer, allowing the firm to handle both the legal and technological aspects of BAM creation. A one-time interaction with such a firm could entirely replace a Cook Islands trustee. And, while it may one day become necessary for this firm to explain blockchain technology to a judge in legal terms, doing so would be far quicker—and therefore less expensive—than if the same firm had to defend an offshore trust.⁵⁹ By its very nature, the blockchain will have evaporated the fog inherent in contractual language and human relationships. The BAM settlor’s lawyers will not need to parse terms, or to respond to unfalsifiable claims of some *de facto* backdoor arrangement. Instead, all such contractual and factual debates will be replaced by a simple demonstration that access to the BAM is physically impossible.

Hamilton Greens may suggest that state-of-the-art traditional APTs are already exorcising the specter of self-created impossibility by mitigating contractual and factual ambiguities.⁶⁰ For the reasons just mentioned,

⁵⁴ *Id.* at *2.

⁵⁵ *Id.* at *4.

⁵⁶ *Id.* at *4 (citing *Maggio*, 333 U.S. 56 at 68.).

⁵⁷ *Id.* at *4.

⁵⁸ *Id.*

⁵⁹ See also Iansiti & Lakhani, *supra* note 11 (“Consider how law firms will have to change to make smart contracts viable. They’ll need to develop new expertise in software and blockchain programming. They’ll probably also have to rethink their hourly payment model and entertain the idea of charging transaction or hosting fees for contracts, to name just two possible approaches.”).

⁶⁰ See generally *Hamilton Green*, 2014 WL 1603759 at *4.

however, there is only so much that even the most well-constructed Cook Islands trust can accomplish on this front. Insofar as some courts may already be siding with APTs in spite of a nexus in time, BAMs will hasten this already-nascent trend.

In other respects, too, BAMs will take those advantages inherent in APTs and raise them up in a purified, archetypal form. Plaintiffs are already hesitant to target APT settlors because of the “psychological barrier of dealing with foreigners and foreign legal systems,” as well as fears about whether “the judgments and orders of a domestic court will be recognized by a foreign court.”⁶¹ In both respects, APTs are mere shadows of BAMs. The blockchain is less like a foreign country that it is like another dimension of reality. Plaintiffs who do not understand the blockchain will either be too intimidated even to target assets contained in a BAM, or else too confused to understand that pursuing a money judgment is futile. There can be little question about whether the blockchain will recognize a court order: it will not. The blockchain answers to no human authority and recognizes only the immutable language of the smart contract terms.⁶²

Of course, not everyone welcomes these quasi-existential limitations on human authority. Put on the defensive, some commentators have proposed desperate legal changes designed to crack down on cryptocurrency. In a recent law review article, Andrew M. Hinkes suggests that courts should imprison defendants who have cryptoassets in a way that cuts off their “ability to communicate,” so as to keep them from whispering their private keys to visitors.⁶³ On the other hand, one can imagine legal

⁶¹ Engel, *supra* note 19 at 3.

⁶² *But see* Yaga, *supra* note 4 at 35 (“The phrase ‘no one controls a blockchain!’ is often exclaimed. This is not strictly true. Permissioned blockchain networks are generally setup and run by an owner or consortium, which governs the blockchain network. Permissionless blockchain networks are often governed by blockchain network users, publishing nodes, and software developers. Each group has a level of control that affects the direction of the blockchain network’s advancement.”). A more precise way of putting the matter might be that the blockchain brings about the lowest level of human control physically possible. Thus, the fact that it is not strictly impossible for a human group to control the blockchain is relatively unimportant for our purposes: the technology still allows for far greater and more demonstrable immutability than traditional APTs. *Id.*

⁶³ Hinkes, *supra* note 2 at 255. Hinkes’s article does not anticipate that crypto users will openly use smart contracts as APTs: he is focused on more prosaic scenarios, such as a crypto user claiming to have forgotten his keys. In handling claims of lost keys, Hinkes suggests that “courts may conclude that all claims of impossibility due to the contemnor’s loss of her own private keys are self-created impossibility, meriting the imposition of sanctions.” *Id.* at 246. Hinkes asserts that, while this means that contemnors who lose their keys through “ineptitude” or “poor data hygiene” must be locked away, “the policy behind this conclusion is sound. To suggest otherwise would encourage tactical claims of lost keys.” *Id.* at 246. Hinkes then purports to offer alternatives which will expand government control of cryptocurrencies without the need for his more “dystopian”

developments which favor the blockchain. Because it is the burden of a defendant to prove his defense of impossibility, courts could one day prefer BAMs over offshore trusts. If a settlor was genuinely willing to forfeit access to his assets, courts might ask, why wouldn't he use the demonstrable immutability of the blockchain? The mere use of a traditional offshore trust could therefore come to be considered evidence that the alleged impossibility is illusory.

Finally—some may ask—if the blockchain has the latent legal power described in this article, why has the legal community not already utilized it? The answer may be that, while many people understand asset protection, and many more understand the blockchain, few understand both.⁶⁴ Some lawyers may assume that—because a generation of investors has already reaped a fortune from Bitcoin—the blockchain has no more revolutionary breakthroughs to offer. This assumption underestimates our culture's crippling hyper-specialization, the vulnerability of different professions to myopia, and the probability that fields like law and tech remain largely unaware of one another's needs and strengths. The blockchain's potential for superior asset protection is clear. The question is simply when, and how quickly, lawyers who practice asset protection will move to take advantage of it.

suggestions, but he admits that many of these alternatives could be flouted through the use of privacy coins such as Monero. *Id.* at 247. See also Billy Bambrough, *Bitcoin Threatens to 'Take Power' from the U.S. Federal Reserve*, FORBES (May 15, 2019), <https://www.forbes.com/sites/billybambrough/2019/05/15/a-u-s-congressman-is-so-scared-of-bitcoin-and-crypto-he-wants-it-banned/#525592766405>.

⁶⁴ Cf. Iansiti & Lakhani, *supra* note 11 (“That’s because blockchain is not a “disruptive” technology, which can attack a traditional business model with a lower-cost solution and overtake incumbent firms quickly. Blockchain is a *foundational* technology: It has the potential to create new foundations for our economic and social systems.”).