'ORIGINAL' SINS

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The other day, I used an electronic signature feature of Adobe Acrobat to sign some documents for a board of directors on which I serve. After emailing the electronically-signed documents to the company's records manager, he thanked me but asked that I follow up with "an original" by mail.

I understand this gut reaction. Historically, the law focused on "original" documents, because mere "copies" could be altered, incomplete, or otherwise unreliable.[1] The records manager sought to avoid these problems by invoking an old rule of thumb to "treat electronic transmissions as copies, and always get an ink-signed original." I will call this the "belt and suspenders approach," or "BASA."

In this article, I challenge the BASA orthodoxy. I contend that it is time we leave behind the 20th century heuristic that anything arriving via an electronic transmission is a mere "copy," and accept this 21st century truth instead:

Original Signature > Wet Ink Signature

Let's consider the common fact pattern of a real estate purchase agreement negotiation between two parties, Alice and Bob. Bob agrees to pay Alice $100,000 for Blackacre, and Alice agrees to deed Blackacre to Bob in exchange for the payment. What happens if a dispute arises between the two about their agreement?

There are actually two different questions bound up in this fact pattern. The first is whether Alice and Bob *have an agreement*.[2] That is, do Alice and Bob have a meeting of the minds?[3] The

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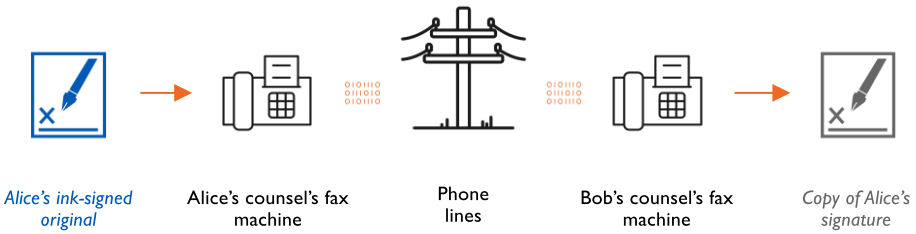
I offer my thanks to Jim Nelson, Chris Hultzman, Justin Scorza, Phil Sholar, Michael O'Neal, and Laura Schmidl for their peer review of this piece. To be clear, the arguments here are solely my own.

[1] *See, e.g., Sauget v. Johnston*, 315 F.2d 816, 817-18 (9th Cir. 1963) ("The primary reason the original of a writing is preferred to a copy is that the copy is always subject to errors on the part of the copyist.").
[2] Restatement (Second) of Contracts § 17(1) (Am. Law Inst. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").
[3] *Id.* cmt. c ("The element of agreement is sometimes referred to as a 'meeting of the minds.'").

second question is what it takes to *evidence the existence* of that agreement in the event one must "prove it" to obtain legal enforcement.[4]

For centuries, we real estate lawyers have been conveniently able to collapse these two questions together, because the Statute of Frauds requires that an agreement to sell or mortgage real property is not enforceable unless it is both "in writing" and "signed" by the party to be charged.[5] Parol contracts to purchase or encumber real estate are generally unenforceable.[6] Therefore, what it takes to *create* a contract and what it takes to *evidence* that contract are, for our purposes, typically one and the same. For generations of lawyers, that meant obtaining a piece of paper with an ink signature upon it.

In the late 1980s, the widespread adoption of the facsimile ("fax") machine threw the first monkey wrench into this worldview. In the fax era, Alice's counsel could place Alice's ink-signed, "original" signature page into a fax machine, dial the numbers for Bob's counsel, and the fax machine in Bob's counsel's office would print out a reproduction ("copy") of Alice's signature page.[7] The fax process can thus be graphically represented as follows:



It is important to recognize that this process was, at its core, *still paper-based*: one could not fax an ink signature page that did not physically exist. The entire fax process thus hinged on the existence of the same traditional, ink-signed "original" as had been the case since time immemorial.[8]

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[4] *See id.* at § 110(1)(d) ("The following classes of contracts are applicable to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception: . . . a contract for the sale of an interest in land . . . .").

[5] *See id.*

[6] *See id.* at § 127 ("An interest in land within the meaning of the Statute [of Frauds] is any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property . . . .").

[7] *See, e.g., Madden v. Hegadorn*, 565 A.2d 725, 728 (N.J. Super. Ct. 1989) ("It is common knowledge that 'fax' machines electronically scan documents, reduce the documents to a series of digital signals and transmit them over telephone lines to a receiving machine which reassembles the signals and then reproduces the [transmitted] documents."). Although this discussion about fax machines may seem trite to seasoned attorneys, it is important to remember that there may well be readers of this document who have never heard a phone's dial tone, let alone seen a fax machine. Some of those same readers will become members of the bar in the next few years. For this next generation, the fax machine will be as much a historical relic as was the telegram for my generation of lawyers.

[8] I recognize that even in the early 1990s it was technologically possible to send a fax via computer, without the existence of a physical piece of paper. *See, e.g.*, Marie A. Piccoli, *Executing Real Estate Contracts by Fax*, 9 PROBATE & PROPERTY 15, 16 (Am. Bar Assoc. May/June 1995) ("Faxing can be done by computer, so the sender may not have a hard copy of the faxed document.") Nevertheless, the law at that time did not clearly support the use of electronic signatures, and so contemporary sources of that time show that the usual course of affairs at the time was still based on the existence of a physical piece of paper singed in ink by the contracting parties.

The fax machine allowed lawyers to transmit signatures across vast physical distances with near immediate effect. But was this reproduction of Alice's signature as received by Bob's counsel enforceable against Alice? Surely it was not an "original" in the prevailing sense of the word at the time. The "original" of Alice's signature was the physical piece of paper that Alice had signed with a pen, and which remained in the physical possession of Alice's counsel. The fax machine was not a teleportation machine. And the so-called "best evidence rule" still loomed over anyone attempting to rely upon a mere "copy" to prove the contents of a document.[9] Several cases from the late 1980s thus evidence a lack of clarity about the law and practice surrounding faxed signatures.[10]

Rightly fearful of a scenario wherein it would prove difficult or impossible to enforce the contract on a mere copy of Alice's signature as emitted by the fax machine, lawyers in the situation of Bob's counsel thus requested that Alice's counsel mail Alice's ink-signed original to them as well. Thus, the BASA was born. As one author of the time period noted, "[T]he custom among cautious users is to mail the fax recipient the original paper as well. The reason is that the legal utility of fax is perceived as suspect."[11] Another contemporaneous author warned that lawyers should "*Always* save the original (with its [fax] cover sheet attached) of any document faxed to another party."[12]

But at least one commentator at the time took a dim view of the BASA, believing it to be unnecessary and self-defeating:

> The same ill-conceived notion of the [in]validity of fax signatures seems to hold that if a faxed document is going to be sent, the sender should follow up with a mailing of the original.
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> The necessity of such duplication is rejected by the law of signatures in general and the reasoning of [*Madden v. Hegadorn*] in particular. But of equal importance, a follow-up mailing practice actually may be counterproductive to its goal.
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> It is loosely thought that a fax sender is protecting himself or herself by making a follow-up mailing of the original. However, the main danger of using a fax is

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[9] Fed. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.").

[10] *See, e.g., Bazak Int'l v. Mast Indus.,* 538 N.Y.S.2d 503, 504 (N.Y. Ct. App. 1989) ("At the heart of the dispute are two issues involving telecopied purchase orders."); *Madden,* 565 A.2d at 726 ("[D]efandant Hegadorn stated her position that the [candidate's election filing] was defective because of the facsimile signatures.").

[11] Benjamin Wright, *Fax Pacts*, NETWORK WORLD, Feb. 5, 1990, at 70, *available at* https://books.google.com/books?id=lBwEAAAAMBAJ&lpg=PA69&ots=yMy3iTF19j&dq=benjamin%20wright%20fax%20pacts%201990&pg=PA1#v=onepage&q=benjamin%20wright%20fax%20pacts%201990&f=false (last visited Jan. 18, 2021).

[12] Piccoli, *supra* n.8, at 16 (emphasis in original).

> fraudulent signature switching and page switching by the recipient. [In the event of a fraud], the best defense the fax sender can have is to produce the original.[13]

At its core, this commentator's critique is that many at the time failed to distinguish between "originality" and "enforceability." With that point I agree, and the problem remains pervasive today. These two concepts are closely related, but as we will see below, they are not the same.

Notwithstanding this debate, the BASA soon became ingrained practice. And shortly after the BASA was accepted as the *de facto* operating procedure for fax signatures, the birth of the internet created electronic mail ("email"). As law offices gained email access, lawyers saw in email an easy parallel to the fax machine: a computer with a document scanner could be used in the same manner as a fax machine. Lawyers therefore reached for the BASA in this analogous context, and simply adapted the BASA to its new technological environment. Instead of "fax a copy, with original to follow by mail," it became "email a scanned copy, with original to follow by mail." This instantiation of the BASA still exists in commercial real estate practice today.

But there is an important change that happened in the years after the BASA became common practice. In 1999 and 2000, the electronic signature laws UETA and E-SIGN (collectively, the "E-Signature Statutes") came into effect. There are numerous other sources that discuss these foundational laws in detail, and I will not recap them here other than to briefly summarize two key provisions of these laws:

> 1) An electronic signature is any "electronic sound, symbol, or process" evidencing assent to an agreement;[14] and
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> 2) An electronically-signed document that can be accurately reproduced is "an original" by statute.[15]

Alas, we lawyers are precedent-based, change-averse creatures. Although the E-Signature Statutes eliminated the legal need for an ink-signed paper "original" in many (if not most) circumstances, we continue to create such ink-signed paper "originals" and to use the BASA for their transmission. In my view, we do so because we often think that an electronic signature has to be some type of formal process provided by a third-party e-signature vendor. But this is not true. As UETA's official commentary notes:

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[13] Richard G. Barrows, *Fax Law – A Compendium of Reported Cases*, 17 LAW PRAC. MGT 28 (Am. Bar. Assoc. Nov. / Dec. 1991) (not paginated in LexisNexis).

[14] Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7006(5) ("The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."); Uniform Electronic Transactions Act § 2(8) ("'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with intent to sign the record.") (hereinafter "UETA").

[15] 15 U.S.C. § 7001(d)(3) ("If a statute, regulation, or other rule of law requires a contract or other record . . . to be provided, available, or retained in its original form . . . that . . . rule of law is satisfied by an electronic record [that can be accurately reproduced]."); UETA § 12(d) ("If a law requires a record to be presented or retained in its original form . . . that law is satisfied by an electronic record [that can be accurately reproduced].").

> The idea of a signature is broad and not specifically defined. . . . No specific technology need be used in order to create a valid signature. . . . [T]he essential attribute of a signature involves applying a sound, symbol, or process with an intent to do a legally significant act.[16]

I therefore submit that the E-Signature Statutes wrought a fundamental change in the BASA that few seem to recognize: the electronic process of emailing a scan of a signature page *is now itself an "original."* Consider the ink-signed "original" signature page as executed by Alice. When Alice's counsel places it into a document scanner, the image rendered on Alice's counsel's computer screen is a mere "copy." But the E-Signature Statutes specify that any electronic sound, symbol, *or process* meant to evidence assent counts as a signature. Email is an electronic process. A reasonable person would surely conclude that when Alice allows her counsel (who is acting within the course and scope of client representation[17]) to email Bob's counsel a scan of Alice's signature page, this electronic process is meant to indicate Alice's assent to the agreement.[18] Therefore, as long as the email with the attached signature page scan can be reproduced in an unaltered form, it is itself an "original" under the E-Signature Statutes.

In short, the electronic process of emailing a scan of an ink signature page to a counterparty can transmogrify what was formerly a mere "copy" (the scan) into an "original" (an email with the scan attached).[19] Thus, using the BASA can result in *two* originals—one the ink-singed paper, and one the result of the emailing process, as shown below:

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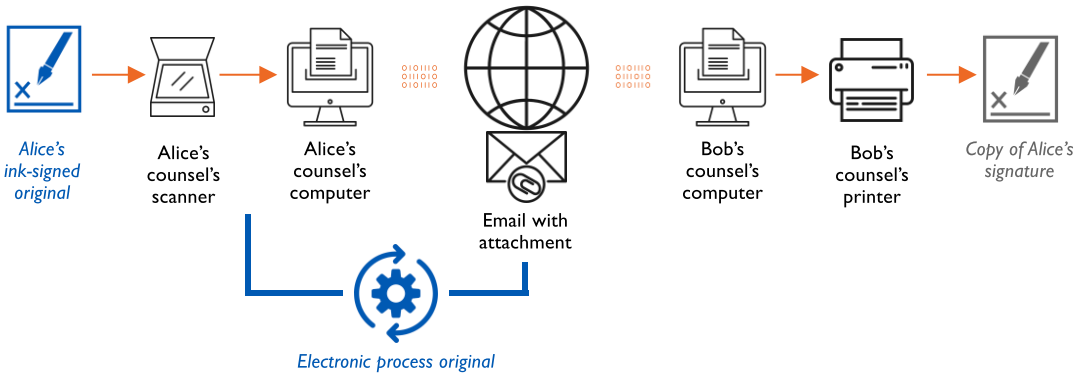
[16] UETA § 2 cmt. (official commentary to the definition of "electronic signature").

[17] *E.g., Link v. Wabash Ry. Co.*, 370 U.S. 626, 634 (1962) ("[E]ach party is deemed bound by the acts of his lawyer-agent . . . ."); Restatement (Third) of the Law Governing Lawyers § 26 (Am. Law Inst. 2000) ("A lawyer's act is considered to be that of the client . . . in dealings with third persons when . . . the client has expressly or impliedly authorized the act . . . ."). It is hard to imagine Alice's counsel emailing Alice's signature page unless Alice has expressly authorized her counsel to do so. But even if counsel erred and "jumped the gun" by transmitting Alice's signature page without express authorization, Alice will still probably have a difficult time escaping the contract, because Alice is probably bound to the contract on account of apparent authority anyway. *See* Restatement (Second) of Agency § 2.03 (Am. Law Inst. 2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes that the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.").

[18] That is, unless there is something specific about the facts and circumstances clearly showing that this electronic process was not, in and of itself, meant to evidence assent to the agreement. That is the key point I take up below. For now, it is enough to say that under the E-Signature Statutes, one claiming that a contract is not binding merely because one didn't send "the [ink] original" is going to have a very hard row to hoe.

[19] Technically, one should hedge this statement with two caveats: First, the email with its scan attachment must be accurately reproduced when called upon. *See, e.g.*, UETA §§ 12(d) & 12(a) (providing that a document is an "original" if it "accurately reflects the information set forth in the record after it was first generated in its final form . . . and remains accessible for later reference"). And second, the facts and circumstances must illustrate that the sender intended to be bound by this electronic act. *See, e.g., id.* at § 2 cmt. ("In any case the critical element is the intention to executed or adopt the sound or symbol for the purpose of signing the record.") (official comment on the definition of "electronic signature"). I submit that in most ordinary circumstances involving Alice and Bob, both caveats will be easily satisfied. Electronic data such as emails are now routinely stored with perfect accuracy and redundant backups, and it's hard to imagine why Alice's counsel would transmit Alice's scanned signature page via email to Bob's counsel if not to indicate Alice's assent to an agreement.



This realization causes one to question why we still utilize the BASA. What *legal* purpose does the BASA now serve? I submit that there is little. At the time the BASA was developed, faxed or emailed signature pages were "copies" of a paper "original," and protecting the sanctity of that ink-signed, physical "original" theoretically had some evidentiary value in the event of a dispute. But the E-Signature Statutes now cause the BASA to collapse upon itself in its ordinary use. Rather than protecting the sanctity of the "original" ink-signed paper, the BASA now creates a competing "electronic original."[20]

As was argued in 1991, so also now 30 years later: "[T]he best defense that a [signature] sender can have is to produce the original."[21] But now, which "original"? The ink-signed paper, or the email with an attached scan of the ink-signed paper? Perhaps the distinction does not matter if there is no difference between the two, but how often does one send an email without any accompanying text? In the hands of an opposing litigator, that accompanying text can become a weapon used to contend that the email text alters or amends the substance of the agreement.

To be clear, I am not contending that using the BASA is always improper, nor am I suggesting that we should wholly rewire the everyday machinery of real estate practice just to avoid it. There are exceptions to the E-Signature Statutes where "an [ink] original" may be legally necessary.[22] I also fully recognize that the BASA has *practical* value, especially since many (particularly in the commercial space) are used to it. My point here is simply to show that the BASA is not risk-free. It has become a bit like the intestinal tract's appendix: generally harmless, but when it goes wrong, watch out!

There is a way out of this vortex. It is to accept that "originals" are now more than ink-signed pieces of paper, and to recognize that what is (or is not) an "original" is generally no longer outcome-determinative as to whether an agreement is "enforceable." This is so for two reasons: First, as set forth above, the E-Signature Statutes can turn many (if not most) electronic things

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[20] This realization has practical consequences. For example, it calls into question the idea of emailing scans of a party's signature pages, "just to show that they're in one's possession but not to indicate final agreement." It is not hard to imagine how this could be misinterpreted by a counterparty, court, or jury. As set forth below, the solution to this problem is to clearly define what signature procedure is required to finalize an agreement.

[21] Barrows, *supra* n.13.

[22] For example, the E-Signature Statutes do not apply to all types of documents or all types of agreements. There are still places where "an [ink] original" is necessary. *See* UETA § 3(b) (specifying those transactions to which UETA does not apply); 15 U.S.C. § 7003(a) (same, for federal E-SIGN).

into "originals." And second, even when something is technically a "copy," the formerly-rigid best evidence rule has now become a low bar to meet in today's electronic age, because computers are not subject to the same scribal errors that humans routinely commit.[23]

I submit that we are thus better served by viewing these issues through classic contract offer and acceptance conditions in most circumstances. Although just about any email (whether or not it has the sender's manually-typed name or an automatically-generated "signature block") can now legally constitute an "original electronic signature,"[24] this matters naught unless the parties have agreed to conduct a transaction by electronic means. And "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."[25] Therefore, the better approach is not to split hairs about whether a signature is an "original," but rather to clearly specify the signature-procedure manner by which an agreement is to become *enforceable*.

A pair of cases indicate the soundness of this approach. In *SN4, LLC v. Anchor Bank*,[26] a distressed property investor and a bank disputed whether the bank had agreed to sell some REO to the investor. The facts were a soupy mess of half-executed contract drafts, emails, and phone calls. The distress investor assembled this muddy fact pattern into a claim that the bank had agreed to sell the REO for a certain price, and sued the bank to enforce the purported deal.[27] Resolving the question in favor of the bank, the court explained:

> [W]hile contracting parties may agree to negotiate and form a contract by electronic means, doing so does not mean that they have also agreed to electronically [sign] whatever agreement may result from their electronic negotiations.
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> Here, there was no express agreement between the buyers and the bank to electronically [sign] the purported agreement. Moreover, their conduct does not evidence an implied agreement to do so.[28]

A similar result entailed in *Powell v. City of Newton*.[29] In this case, a landowner had a trespass dispute with the city in which he lived. The trespass disputed ripened into litigation, and a trial began. Midway through trial, the parties reached an oral agreement to settle the case by means of the city purchasing part of the landowner's property, which oral agreement was discussed and assented-to in open court, but not fully reduced to writing until after court adjourned. By the time

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[23] *See* Fed. R. Evid. 1003 ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."); *id.* Adv. Comm. cmt. ("When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.").

[24] *See, e.g.*, *Khoury v. Tomlinson*, 518 S.W.3d 568, 577-579 (Tex. Ct. App. 2017) ("We hold that the email name or address in the 'from' field satisfies the definition of a signature under existing law.") (collecting and examining cases in accord).

[25] UETA § 5(b).

[26] 848 N.W.2d 559 (Minn. Ct. App. 2014).

[27] *Id.* at 562-65.

[28] *Id.* at 567.

[29] 364 N.C. 562 (2010).

documents were drawn up, the landowner had changed his mind, and refused to execute them.[30] The city attempted to enforce the agreement by claiming that emails between the landowner's counsel and the city's counsel constituted an electronic signature, binding the landowner.[31] The state supreme court rejected this argument, concluding:

> While the attorneys for the parties used e-mail and other electronic means to exchange documents and resolve details of the settlement agreement, their conduct indicated an understanding that the signature required . . . for this conveyance of land would be [the landowner's] physical signature. . . . [W]e conclude that the parties did not agree to use electronic signatures in lieu of physical signatures in this transaction.[32]

Neither of these cases feature any dispute about "originality." I submit that this is because in the wake of the E-Signature Statutes and modern formulations of the best evidence rule, "originality" is rarely a material question. Rather, the material question is whether, under the facts and circumstances, the parties agreed to be bound. And there is no reason that we as scriveners need to leave this to chance.

Contract law gives us the power to tailor specific language defining what it takes to accept an offer. We can make these provisions as broad or as narrow as the circumstances should merit. If we want to make things easy for the parties, we can specify that the agreement can be accepted by simply emailing a scanned copy of an ink signature page.[33] The agreement need only expressly say so.[34] If it does, there is no need for an "ink-signed original to follow by mail" under the BASA. As set forth above, the electronic process of emailing a scan of the ink signature page is itself an "original" under the E-Signature Statutes.

If we want to be more restrictive than that, we can be. There are plenty of fact patterns (*e.g.,* a loan workout) where prudence counsels a harder line on this subject, so as to avoid any uncertainty about whether an agreement is finalized and enforceable. If our agreement can *only* be accepted by mailing an ink signature page to the counterparty, the agreement should expressly say so. If the agreement can *only* be accepted by means of sending a web link to a video recording of the signer performing an interpretive dance of his or her acceptance, the agreement should expressly say so.

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[30] *Id.* at 563-64.
[31] *Id.* at 567-68.
[32] *Id.* at 568.
[33] This is exactly what one author suggested be done with faxes, way back in 1995. Piccoli, *supra* n.8, at 16 ("If the parties agree, the lawyer can add to the contract a written statement that the parties are entering into a binding agreement by faxed documents.").
[34] For example, some contracts expressly recount that an emailed PDF of an ink signature page constitutes "an original, for all purposes." *Cf.* Fed. R. Evid. 1001(d) ("An 'original' of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it."). This is close, but slightly off target, because it continues to focus on what is "original" rather than how the agreement is made "enforceable." Instead, I submit that the contract should specify that it can be accepted by emailing the counterparty a PDF of the signer's ink signature page, and that the parties agree that this electronic process will constitute a binding electronic signature. If the contract does this, I submit that the email with its PDF attachment is by definition "an original" under the E-Signature Statutes. Under this approach, the parties' intentions about this electronic process are made crystal clear.

Defining the exact parameters of how an agreement becomes binding avoids any factual dispute about whether a party intended to be bound. It helps cut through the fronds and brambles of any series of emails, texts, instant messages, phone calls, voicemails, social media posts, smoke signals, carrier pigeon messages, or any other form of communication. Adopting this approach helps us to disentangle the concept of "originality" from the concept of "enforceability." Although combining those concepts made sense in the fax era as a practical rule of thumb, that heuristic has outlived its usefulness. Instead, our focus should be on clearly defining within the text of our agreements what it takes to make those agreements become binding. In so doing, we can avoid the conceptual rabbit hole of "original" sins.