

# LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

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## FOREWORD

*Evan Wright*<sup>1</sup>

On behalf of Lincoln Memorial University's Duncan School of Law, the Law Review Editorial Board would like to extend the warmest welcome to our Volume 4 readers. For the 2016-2017 academic year, the Law Review underwent some significant changes. We welcomed new faculty advisors, Professor Akraim Faizer<sup>2</sup> and Professor William Gill,<sup>3</sup> to our team, and said farewell to Academic Dean Matt Lyon, who had provided leadership and insight to the Law Review staff. We cannot thank him enough for his hard work and dedication. Professors Faizer and Gill will further develop the Law Review's scholarship, focusing on academic excellence and advancing positive change throughout our community.

No discussion of change at the Duncan School of Law would be complete without acknowledging the contributions of former Tennessee Supreme Court Chief Justice Gary Wade.

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<sup>1</sup> Evan Wright, Juris Doctor Candidate (2017) and Editor in Chief of the Lincoln Memorial University Law Review.

<sup>2</sup> See Akraim Faizer, *Exacerbating the Divide: Why the Roberts Court's Recent Same-Sex Jurisprudence is an Improvident Use of the Court's Judicial Review Power*, 24 U. FLA. J.L. & PUB. POL'Y 395 (2014).

<sup>3</sup> See William Gill, *A Tale of Two Ironies: In Defense of Tort*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343 (2012) (with David Partlett).

Having grown up in rural Appalachia,<sup>4</sup> Dean Wade knows exactly what the mission of this law school means to this region. During his tenure, Dean Wade has fostered positive change that will reverberate for years to come. The Law Review Board recognizes these accomplishments, and we are excited about future developments, including Lincoln Memorial University's partnership with East Tennessee Legal Aid. Together we can be an instrument of positive change in the world around us.

Volume 4 will mark a new era for LMU. We now publish online articles in a new rolling format, issuing an article or articles monthly to disperse quality scholarship at times more relevant to the subject matter. No longer will submissions set dormant waiting to proceed through the various stages of the publication and printing process. Each academic semester will feature several articles comprising an issue, each academic year corresponding to a Volume. As the Law Review develops this process, articles will gravitate toward fresh, relevant material elevating the scholarship of this journal.

The Editorial Board would also like to show our gratitude to those who came before us. Volume 4, Issue 1 will contain four articles that the 2015-2016 Editorial Board worked diligently to develop. In addition, two of these articles are authored by our former Editor in Chief, Jacob Baggett.<sup>5</sup> Both submissions elevated the level of scholarship and dedication expected of future students submitting Notes to this publication.

In conclusion, we hope Volume 4's new rolling publication meets and exceeds our reader's expectations. For potential authors, we look forward to publishing submissions earlier, presenting your scholarship to others fresh and untainted by the passage of time. We endeavor to effectuate

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<sup>4</sup>See DUNCAN SCHOOL OF LAW, <http://law.lmunet.edu/2015/07/28/tenn-supreme-court-justice-gary-r-wade-to-be-dean-of-lmu-law/> (last visited Aug. 23, 2009).

<sup>5</sup>Jacob Baggett, Juris Doctor (2015) and former Editor-in-Chief of the Lincoln Memorial University Law Review.

positive change in our region, the legal community, and the entire world around us. If you would like to become part of our mission, please submit your article to our board for review, and together we can elevate the world around us.

# IN RE BABY: BLESSING OR PROBLEM CHILD?

*Jacob Baggett*<sup>1</sup>

“I got into this because the O’Briens needed my help. I never wanted a baby, but now . . . I just wish I could hold him in my arms, and never let him go.”

Major Kira to Odo, discussing her surrogacy, *Star Trek: Deep Space Nine*: Season 5, ep. 12, “The Begotten”

## INTRODUCTION

From legal and sociological perspectives, surrogacy arrangements, along with the accompanying contracts, remain hot topics of debate. In addition to a colorful body of jurisprudence, a New York Times article from September 2014 reported a story in which intended parents attempted to bribe a Connecticut surrogate to undergo an abortion procedure after having learned the developing fetus had heart and brain defects as well as a cleft palate.<sup>2</sup> Refusing to either accept the bribe or

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<sup>1</sup> Jacob Baggett, Juris Doctor (2015) and former Editor-in-Chief of the Lincoln Memorial University Law Review.

<sup>2</sup> Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, September 17, 2014, available at [http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&\\_r=0](http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0). The article was

undergo the abortion procedure, the surrogate fled to Michigan, where surrogacy contracts are illegal.<sup>3</sup>

The birth certificate listed the surrogate as the child's mother, despite the fact the surrogate had no genetic connection with the child.<sup>4</sup> Eventually, a family with other special-needs children adopted the child.<sup>5</sup> The New York Times article also provided several state-by-state diagrams which illustrated the complex legal landscape concerning surrogacy, aptly calling it a "maze."<sup>6</sup> Tennessee's lack of statutory guidance regarding surrogacy issues creates one of the dead ends within this nationwide maze.

Since the mid-1990's, the Tennessee General Assembly has remained entrenched in neutrality with regard to issues terms the parties' surrogacy agreement may legally contain. Of these issues, the most heavily emphasized was public policy.

Part One of this note discusses the relevant surrogacy arrangement terminology and outlines key statutes and cases detailing the nationwide legal maze of surrogacy. Part Two discusses the facts giving rise to *Baby*, the sources of Tennessee law examined, and the Court's analysis and holdings in *Baby*. Finally, Part Three examines Louisiana's legislative efforts as a case study exhibiting the various difficulties legislatures may experience when addressing surrogacy issues. These difficulties may lead a state's highest court to determine it has an obligation to act. The Tennessee Supreme Court did.

## PART ONE: BACKGROUND

### I. TERMINOLOGY OF SURROGACY AGREEMENTS

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published one day before the Tennessee Supreme Court released its opinion in *In re Baby*).

<sup>3</sup> *Id.*; MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

This note concerns two types of surrogacy arrangements: traditional<sup>7</sup> and gestational.<sup>8</sup> Traditional surrogacy arrangements involve a woman, the surrogate mother, whose egg is fertilized by means of artificial insemination and the surrogate mother carries the fetus until birth for the benefit of another.<sup>9</sup> On the other hand, a gestational surrogacy arrangement involves the intended mother supplying her egg to be transferred, housed, artificially inseminated, and the fetus carried to term by another woman, the surrogate mother.<sup>10</sup> Gestational surrogate mothers have no genetic connection with the fetus.<sup>11</sup> However, in traditional surrogacy arrangements, the surrogate mother and the fetus are genetically connected.<sup>12</sup> It is this genetic connection which often ignites legal flames because the corresponding rights, if extinguished, must occur by proper legal procedure.<sup>13</sup>

A number of legal commentators have professed that gestational surrogacy “has rendered traditional surrogacy obsolete and unnecessary.”<sup>14</sup> So, why do people continue to enter into traditional surrogacy arrangements when the gestational counterpart completely avoids the legal issues regarding the unborn’s genetic connection with the surrogate mother? The reasons are numerous.

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<sup>7</sup> BLACK’S LAW DICTIONARY 1582 (9th ed. 2009); see also *In re C.K.G.*, 173 S.W.3d 714, 720 (Tenn. 2005).

<sup>8</sup> See *In re F.T.R.* 833 N.W.2d 634, 643 (Wis. 2013); 7 Samuel Williston, TREATISE ON THE LAW OF CONTRACTS § 16:22 (Richard A. Lord ed., 4th ed. 1992 & Supp. 2013); Christen Blackburn, Note, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 352 (2009) (also identifies and defines donative surrogacy which involves creating an embryo from the genetic contribution of one intended parent with that of an unknown donor’s egg or sperm).

<sup>9</sup> See *In re C.K.G.*, 173 S.W.3d at 720.

<sup>10</sup> See *id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *Baby*, 2014 WL 4815211 at \*5.

<sup>14</sup> Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 690 (2000).

First, artificial insemination, the medical procedure utilized in traditional surrogacy,<sup>15</sup> is a relatively simple procedure which may be performed in the home.<sup>16</sup> The procedure involves using sperm, typically of the intended father, to impregnate the surrogate mother.<sup>17</sup> As a result, it is significantly less expensive than in vitro fertilization, the procedure used to initiate a gestational surrogacy.<sup>18</sup> The low cost and relative convenience of artificial insemination make it an attractive method for many surrogates and intended parents.<sup>19</sup>

Second, there are high success rates among surrogates with proven fertility, and the time between a failed artificial insemination attempt and the time another attempt may be made is a matter of weeks.<sup>20</sup> Conversely, in vitro fertilization, the time between implantation attempts often takes months.<sup>21</sup> Third, perhaps the most pertinent benefit of the traditional arrangement is the safety of both the mother and the unborn.<sup>22</sup> “The main risk to the [gestational] surrogate comes from the pregnancy itself, especially if she is required to carry multiple babies[.]”<sup>23</sup>

Additionally, gestational surrogates are administered a cocktail of prescription medications not involved in traditional

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<sup>15</sup> Intrauterine (Artificial) Insemination (IUI), [http://www.nyfertilitycenter.org/infertility\\_treatment/artificial\\_insemination](http://www.nyfertilitycenter.org/infertility_treatment/artificial_insemination) (last visited Oct. 26, 2014).

<sup>16</sup> *Gestational vs. Traditional Surrogacy: A Comparative Study*, <http://www.surrogatemothers.org/gestational-vs-traditional-surrogacy-a-comparative-study> (last visited Oct. 21, 2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Gestational vs. Traditional Surrogacy*, *supra* note 16.

<sup>19</sup> Ashok Agarwal & Shyam S. R. Allamaneni, Chapter 36: Artificial Insemination, Section 6: Infertility and Recurrent Pregnancy Loss (Jan. 23, 2007), <http://www.clevelandclinic.org/ReproductiveResearchCenter/.../agrach019.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The Center for Bioethics and Culture Network, *Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies*, <http://breeders.cbc-network.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf> (last visited Oct. 21, 2014).

<sup>23</sup> *Id.*

arrangements.<sup>24</sup> Some of these medications come with potentially significant side effects.<sup>25</sup> In preparation for embryo transfer, the surrogate is administered hormones which inhibit the brain from secreting the natural hormones that control the menstrual cycle.<sup>26</sup> “The woman is put into a ‘medical menopause,’ so that the ovaries stop functioning and her menstrual cycle can be completely controlled[.]”<sup>27</sup> One of these hormones, Lupron, carries a Category X classification, which causes harm to the fetus if the surrogate mother becomes pregnant while taking the medication.<sup>28</sup> Despite the potential side effects of the medications, the desire for genetic linkage between the child and the intended parents is a compelling reason why gestational surrogacy is chosen over a traditional arrangement.<sup>29</sup>

## II. FOREIGN STATUTES AND CASES

### *Foreign Statutes*

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (Gonadotropin releasing hormone (GnRH) agonists like Synarel or Lupron. Lupron is administered by injection while Synarel comes in a nasal spray).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The American College of Obstetricians and Gynecologists, Ethics Committee Opinion Number 397, *Surrogate Motherhood*, p. 2, <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co397.pdf?dmc=1&ts=20140324T1309556802> (last visited Oct. 21, 2014). [Eds. note: The American College of Obstetricians and Gynecologists issued Committee Opinion Number 660 replacing Committee Opinion Number 397, <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Family-Building-Through-Gestational-Surrogacy>].



Some contracts cannot be enforced due to their illegal nature.<sup>30</sup> The word “illegal” in contract law has a broader meaning than simply contracts made for a criminal purpose.<sup>31</sup> “Illegal in the contract setting means . . . [that] the contract or clause involved is void as a matter of public policy, whether or not technically criminal.”<sup>32</sup> As a matter of public policy, a contract or contractual term will be nullified if the arrangement violates the precepts of the society in which the court sits.<sup>33</sup>

Approximately one-third of state legislatures have provided statutory guidance regarding surrogacy contract formation and enforceability.<sup>34</sup> Of the legislatures that have spoken, three “camps” have formed.<sup>35</sup> In the first camp of states, all types of surrogacy contracts are prohibited.<sup>36</sup> One state even provides criminal penalties for forming such an arrangement.<sup>37</sup> The second prohibits traditional surrogacy contracts.<sup>38</sup> Finally, the third camp allows both traditional and gestational surrogacy contracts, subject to various regulations and specified limitations.<sup>39</sup> Tennessee’s current surrogacy laws do not fit within any of these three established

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<sup>30</sup> Thomas D. Crandall & Douglas J. Whaley, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 620 (6th ed. 2012).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (noting this potentially powerful theory is often forgotten by attorneys).

<sup>33</sup> *See id.*

<sup>34</sup> *Baby*, 2014 WL 4815211 at \*8.

<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g.*, D.C. CODE §§ 16-401(A)-(B), -402(a) (West 2013); MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013); N.Y. DOM. REL. LAW § 122 (surrogate parenting contracts declared contrary to the public policy of the state).

<sup>37</sup> MICH. COMP. LAWS ANN. §§ 7.22.851- .863 (West 2013).

<sup>38</sup> *See, e.g.*, N.D. CODE §§ 14-18-05, -08 (West 2013); IND. CODE ANN. § 31-20-1-1 (West 2013); NEV. REV. STAT. § 126.580 (2013) (limits applicable to gestational, rather than traditional surrogacy arrangements).

<sup>39</sup> *See, e.g.*, N.H. REV. STAT. ANN. §§ 168-B:1 to - B:32 (West 2013); VA. CODE ANN. §§ 20-156 to 20-165 (West 2013); WASH. REV. CODE ANN. §§ 22.26.210- .260 (West 2013).

camps.<sup>40</sup> Instead, the current Tennessee statute essentially consists of a definition ending with an interpretational caveat found in the statutory section entitled "Adoption."<sup>41</sup> The statute provides that:

(48)(B) "Surrogate birth" means:

(i) The union of the wife's egg and the husband's sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or

(ii) The insemination of a woman by the sperm of a man under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father's wife to parent;

(B) No surrender pursuant to this part is necessary to terminate any parental rights of the woman who carried the child to term under the circumstances described in this subdivision (48) and no adoption of the child by the biological parent(s) is necessary;

(C) Nothing in this subdivision (48) shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the [G]eneral [A]ssembly.<sup>42</sup>

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<sup>40</sup> See TENN. CODE ANN. § 36-1-102(48)(A-C) (West 2014).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

The Tennessee Supreme Court was not the only court which found itself without statutory guidance regarding surrogacy issues.

### *Cases in Other Jurisdictions*

In the absence of guiding statutes, several well-known cases dealing with surrogacy contracts have arisen in jurisdictions other than Tennessee. Some state courts have focused on whether a surrogacy contract embodies a traditional or gestational surrogacy arrangement.<sup>43</sup>

In *Johnson v. Calvert*, the California Supreme Court held gestational surrogacy contracts “differ[] in crucial respects from adoption[.]”<sup>44</sup> As a result, the monetary exchange, meant to compensate the surrogate for her services in gestating the fetus and undergoing labor, detailed within the gestational surrogacy contract was distinguishable from the California adoption statutes prohibiting payment for consent to adopt a child.<sup>45</sup>

In reaching that conclusion, the California Supreme Court pointed to the fact that the surrogacy arrangement was entered into prior to the child’s conception, and as discussed above, the definition of gestational surrogacy rendered the surrogate without genetic connection to the child.<sup>46</sup> Therefore, the surrogate was not vulnerable to financial inducements to part with “her own expected offspring[,]” an element of the prohibitive California adoption statute<sup>47</sup> at issue.<sup>48</sup>

Furthermore, the California Supreme Court was not persuaded by the argument that such contracts violate the public policy of California because the surrogate based her

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<sup>43</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

<sup>44</sup> *Calvert*, 851 P.2d at 784.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> CAL. PENAL CODE § 273 (West).

<sup>48</sup> *Calvert*, 851 P.2d at 784.

argument on the same prohibitive statute the court had just distinguished and thereby, rendered inapplicable.<sup>49</sup>

The Supreme Court of Ohio went a step further in *J.F. v. D.B.*<sup>50</sup> by holding that the public policy of the state remained uncrossed by gestational surrogacy contracts, even when a provision of the contract requires the gestational surrogate to refrain from asserting parental rights so long as the child was generated from another woman's egg.<sup>51</sup> After quickly dispensing with the issue at hand, the Ohio Supreme Court curiously used the final breath of its opinion to predict what it saw as an imminent traditional surrogacy question by stating:

[W]e would be remiss to leave unstated the obvious fact that a gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate, whose pregnancy does involve her own egg. This case does not involve, and we draw no conclusions about, traditional surrogates and Ohio's public policy concerning them.<sup>52</sup>

In contrast, other state courts have articulated a blanket prohibition on surrogacy contracts.<sup>53</sup> In *Doe v. New York City Bd. of Health*, Mrs. Roe agreed to serve as a gestational surrogate for her sister, Mrs. Doe, who had been unable to bear children as a result of cancer.<sup>54</sup> "No consideration, except love and affection, [was] involved."<sup>55</sup> Prior to birth, Mrs. Roe and her husband sought judgment that the named biological parents should appear on each of the resulting triplet's birth certificates, and the New York City Board of Health and the New York City

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<sup>49</sup> *Id.*

<sup>50</sup> *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007).

<sup>51</sup> *Id.* at 741-42.

<sup>52</sup> *Id.* at 742.

<sup>53</sup> *See, e.g., Doe v. New York City Bd. of Health*, 782 N.Y.S.2d. 180 (N.Y. Sup. Ct. 2004).

<sup>54</sup> *Id.* at 182.

<sup>55</sup> *Id.*

Department of Health & Mental Hygiene (“DOHMH”) objected when it answered that doing such would violate New York’s Domestic Relations Law.<sup>56</sup>

The DOHMH conceded that it would not oppose the post-birth amendment of the birth certificates, provided Mr. and Mrs. Doe established they were genetic parents of the triplets or the formal adoption proceedings were completed.<sup>57</sup> Mr. and Mrs. Doe were unwilling and proceeded with their pursuit of favorable rulings on their pre-birth motions.<sup>58</sup> As a final answer to those motions, New York’s Superior Court held that any “surrogacy parenting contract is prohibited and unenforceable in [New York], even where no payment of funds is involved . . . . Domestic Relations Law makes no distinction between gestational surrogacy contracts and traditional surrogacy arrangements[.]”<sup>59</sup>

Moving from cases involving gestational arrangements to those dealing with traditional ones, in *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*,<sup>60</sup> the Kentucky Supreme Court held that traditional surrogacy contracts do not violate the state’s statute prohibiting the buying and selling of children,<sup>61</sup> commonly known as “baby-selling statutes.”<sup>62</sup> The court’s articulated distinction rested on the fact that the agreement to bear the child was entered into before conception, and as result, the expectant, biological mother is free from external “financial inducements to part with the child.”<sup>63</sup> The court elaborated:

The essential considerations for the surrogate mother when she agrees to the surrogate

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 183.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.* at 183 (citing N.Y. DOM. REL. LAW § 122 (McKinney 2014)).

<sup>60</sup> *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986).

<sup>61</sup> *Id.* at 211.

<sup>62</sup> KY. REV. STAT. ANN. § 199.590 (West 2014).

<sup>63</sup> *Armstrong*, 704 S.W.2d at 211.

parenting procedure are not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring. The problem is caused by the wife's infertility. The problem is solved by artificial insemination.<sup>64</sup>

In *In re F.T.R.*, the Wisconsin Supreme Court held that, aside from the termination of parental rights, traditional surrogacy contracts are enforceable under Wisconsin law as long as the agreement is in the "best interest" of the child.<sup>65</sup> The termination of parental rights by the parties' private contract was unenforceable because the surrogate had not consented to that contractual provision, and no basis for the involuntary termination of rights existed.<sup>66</sup>

The legal issues presented in Tennessee's *Baby* are most aligned with the textbook case of *In re Baby M*.<sup>67</sup> In that case, the New Jersey Supreme Court held that traditional surrogacy arrangements were contrary to the State's public policy based on its adoption, custody, and termination of parental rights statutes.<sup>68</sup> Initially, the New Jersey trial court, at the conclusion of a thirty-two-day trial, held that the adoption, custody, and termination of parental rights statutes were inapplicable to surrogacy contracts because the "Legislature did not have [those type of contracts] in mind when it passed those laws, those laws were therefore irrelevant."<sup>69</sup> The New Jersey Supreme Court disagreed and held the provisions at issue "not

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<sup>64</sup> *Id.* at 211-12.

<sup>65</sup> *In re F.T.R.*, 833 N.W.2d 634, 638 (Wis. 2013).

<sup>66</sup> *Id.* at 640.

<sup>67</sup> *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>68</sup> *Id.* at 1240.

<sup>69</sup> *Id.* at 1237-8.

only directly conflict[ed] with New Jersey statutes, but also offend[ed] long-established State policies.”<sup>70</sup>

Other than, perhaps, identifying the pulses of the nation’s state courts and legislatures willing to speak to the relevant issues, the preceding cases have little authoritative weight because the issue of public policy requires the Tennessee Supreme Court to examine and weigh various sources of public policy of the state in which it sits. Thus, for the purposes of the issue of public policy, Tennessee law exists in a vacuum.

PART TWO: IN RE BABY

I. FACTS

A man (the “Intended Father”) and woman (the “Intended Mother”) (collectively “Intended Parents”), both Italian citizens who were unable to have children, turned to a surrogate (the “Surrogate”), a Tennessee resident, for aid.<sup>71</sup> The parties, both represented by legal counsel, contracted into a traditional surrogacy arrangement where the Surrogate, who supplied her own egg, was artificially inseminated by the Intended Father’s sperm.<sup>72</sup> The Surrogate became pregnant in April of 2011.<sup>73</sup> During the pregnancy, the Intended Parents paid the Surrogate approximately \$42,000 in medical expenses and legal fees.<sup>74</sup> The Surrogate also received an additional \$31,000 for pain, suffering, and miscellaneous pregnancy and birth-related expenses.<sup>75</sup>

Prior to the birth of the child, all parties filed a joint petition asking a Tennessee juvenile court to declare the Intended Father as the genetic father of the child, grant custody to the Intended Parents, and terminate the parental rights of the

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<sup>70</sup> *Id.* at 1240.

<sup>71</sup> *Baby*, 2014 WL 4815211, at \*1.

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *Id.* at \*4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Surrogate.<sup>76</sup> The petition was granted.<sup>77</sup> Less than a month later, the Surrogate gave birth to a girl (the “Child”).<sup>78</sup>

The Intended Parents were present at the Child’s birth.<sup>79</sup> Following professional medical advice, all agreed the Surrogate would breastfeed the Child for a short period of time.<sup>80</sup> Soon after the birth, the Intended Mother returned to Italy to care for her ailing parents.<sup>81</sup> The Intended Father, however, remained with the Surrogate to assist in the daily care of the Child.<sup>82</sup>

A week after birth, the winds shifted.<sup>83</sup> The Surrogate had bonded with the Child.<sup>84</sup> Consequentially, the Surrogate sought an emergency ex parte restraining order and injunction which claimed that “the birth of [the] Child did not meet the requirements of ‘surrogate birth’ under Tennessee law” because the Intended Parents had not yet married, a requirement which implicitly appears necessary under the relevant statute because it uses terms such as “husband” and “wife.”<sup>85</sup>

The Surrogate asked the sitting magistrate to vacate the order in which she had waived her parental rights, grant her temporary custody, and enter an injunction prohibiting the Intended Parents from removing the Child from the jurisdiction.<sup>86</sup> The same day motions were filed, the magistrate conducted a hearing.<sup>87</sup> At the conclusion of the hearing, the magistrate denied the Surrogate’s motion for injunctive relief

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* (citing language used in Surrogate’s “Emergency. . . Ex Parte Restraining Order and Injunction).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



and ordered the Surrogate to relinquish physical custody of the Child to the Intended Father.<sup>88</sup>

Three weeks later, the Surrogate returned to the magistrate's court.<sup>89</sup> That day, the Intended Parents were married in Williamson County.<sup>90</sup> The Surrogate filed motions seeking to set aside the order waiving her rights.<sup>91</sup> After the second hearing, the Surrogate's motions were, again, denied.<sup>92</sup> She turned to the juvenile court, which affirmed the magistrate's decision.<sup>93</sup> The Surrogate then appealed the juvenile court's ruling to the Tennessee Court of Appeals.<sup>94</sup>

The Surrogate's argument was fourfold.<sup>95</sup> She argued that the juvenile court lacked subject matter jurisdiction; the surrogacy contract was invalid based on the unmarried status of the Intended Parents at the time of contracting;<sup>96</sup> the proceeding which terminated her parental rights was improper due to lack of counsel at the proceedings; and the juvenile court should have set aside the magistrate's custody order because the magistrate failed to conduct a "best interest" analysis.<sup>97</sup> The Court of Appeals rejected each of the Surrogate's arguments.<sup>98</sup> These issues were accepted by the Tennessee Supreme Court as matters of first impression.<sup>99</sup>

## II. SOURCES OF LAW EXAMINED IN *BABY*

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at \*6.

<sup>95</sup> *Id.*

<sup>96</sup> TENN. CODE ANN. § 36-1-102(48)(A)-(C) (2014) (labels such as "husband" and "wife" are used; however, this statutory definition refers to a gestational surrogacy, not a traditional one as is at issue in *Baby*).

<sup>97</sup> *Baby*, 2014 WL 4815211 at \*9.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

The public policy concern of traditional surrogacy contracts is the main issue in *Baby*. Curiously, neither the Surrogate nor the Intended Parents raised or preemptively answered this contractual defense. Instead, the Court raised the defense *sua sponte*.<sup>100</sup> The Tennessee General Assembly, through a commission, last addressed major surrogacy issues in 1993; however, no substantive action was taken on this relatively new topic.<sup>101</sup> Surrogacy issues remained stagnant until 2014 when the Tennessee Supreme Court granted *Baby* discretionary review under Tennessee Rule of Appellate Procedure 11.<sup>102</sup> When the Tennessee Supreme Court confronted the public policy issue, the Court drew from many sources of state law.<sup>103</sup>

First, Tennessee's traditional principles of contract law were considered.<sup>104</sup> "Contract law in Tennessee plainly reflects the public policy allowing competent parties to strike their own bargains."<sup>105</sup> Tennessee also recognizes several common law contract defenses, including fraud,<sup>106</sup> duress,<sup>107</sup> undue influence,<sup>108</sup> mistake,<sup>109</sup> and incapacity.<sup>110</sup> Surrogacy contracts are not free from these common law defenses, and each defense may be raised in an independent declaratory judgment action.<sup>111</sup> These defenses were inapplicable to the case at hand,

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<sup>100</sup> See *Baby*, 2014 WL 4815211 at \*10.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*11.

<sup>104</sup> *Id.* at \*20.

<sup>105</sup> *Id.* (citing *Ellis v. Pauline S. Sprouse Residuary Trust*, 280 S.W.3d 806, 814 (Tenn. 2009)).

<sup>106</sup> *Id.* (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297, 301 (Tenn. Ct. App. 2001)).

<sup>107</sup> *Id.* (citing *Rawlings*, 78 S.W.3d at 301).

<sup>108</sup> *Id.* (citing 78 S.W.3d at 297, 301).

<sup>109</sup> *Williams v. Botts*, 3 S.W.3d 508, 509-10 (Tenn. Ct. App. 1999).

<sup>110</sup> *McMahan v. McMahan*, 2005 WL 3287475, \*8 (Tenn. Ct. App. 2005).

<sup>111</sup> See TENN. CODE ANN. § 29-14-102 (West 2012).

and the Court held that “none prohibit the enforcement of traditional surrogacy agreements on public policy grounds.”<sup>112</sup>

Second, the Court noted the neutrality of Tennessee’s statute regarding surrogacy.<sup>113</sup> The statute, previously cited, amounts to a definition coupled with an interpretational caveat.<sup>114</sup> Save subsection (C), which expressed the Tennessee General Assembly’s neutral stance, this statutory definition provided little help to the Court.<sup>115</sup> Further lessening its relevance was the fact that this definition describes a gestational surrogacy, not a traditional one, as in *Baby*.<sup>116</sup> The interpretational caveat to the statute states that none of the provisions “shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the [G]eneral [A]ssembly.”<sup>117</sup> The Court analyzed the statute in *In re C.K.G.*, determining that the statute’s caveat expressed a *neutral* “legislative stance” with regard to the enforceability of surrogacy arrangements not memorialized by written contract.<sup>118</sup> The Court could not interpret these neutral statutes to express unfavorable policy with regard to surrogacy arrangements.<sup>119</sup>

The Court next considered Tennessee’s so-called “baby-selling” statutes.<sup>120</sup> Such statutes provide criminal penalties for illegal payments in connection with the surrender of a child or the placement of a child for adoption.<sup>121</sup> The Court agreed with other cases and commentary<sup>122</sup> distinguishing surrogacy

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<sup>112</sup> *Baby*, 2014 WL 4815211 at \*11.

<sup>113</sup> *Id.*

<sup>114</sup> TENN. CODE ANN. § 36-1-102(48)(C) (West 2014).

<sup>115</sup> *See Baby*, 2014 WL 4815211 at \*8-9.

<sup>116</sup> *Id.* at \*9.

<sup>117</sup> *Id.* § 36-1-102(48)(C) (West 2014).

<sup>118</sup> *In re C.K.G.*, 173 S.W.3d at 723 n.6. (Tenn. 2005).

<sup>119</sup> *Baby*, 2014 WL 4815211 at \*11.

<sup>120</sup> TENN. CODE ANN. § 36-1-109 (West 2014).

<sup>121</sup> *Id.*

<sup>122</sup> *Armstrong*, 704 S.W.2d at 211 & n.2.; *See* 704 S.W.2d at 211; *see also In re Baby Girl L.J.*, 505 N.Y.S.2d 813, 817 (Sur. Ct. 1986); Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J.

arrangements as payment “for the services of a surrogate in the conception of a child[,]” rather than payment for the surrender of the child.<sup>123</sup> However, the Court held that “[c]ompensation may not be contingent upon the surrender of the child or the termination of parental rights, and compensation is restricted to the reasonable costs of services, expenses, or injuries related to the pregnancy, the birth of the child, or other matters inherent to the surrogacy process.”<sup>124</sup>

The Court continued by discussing Tennessee’s custody statute and relevant cases which include the proverbial “best interest” determination. If all are applicable, there are fifteen statutorily-enumerated factors that a judge must consider when making a “best interest” determination.<sup>125</sup> No such determination was made in the case of *Baby*, because the juvenile court ruled the surrogacy contract’s waiver of such rights was proper under Tennessee law.<sup>126</sup> The Court disagreed.<sup>127</sup>

The Court held that the state’s obligation to make such a determination could not be relieved by a provision of private contract.<sup>128</sup> In fact, the Court had previously decided the matter in *Tuetken v. Tuetken*.<sup>129</sup> As a result, the Court held the term to be improper and unenforceable.<sup>130</sup>

Consequently, the Court scrutinized statutes involving legal parents and the methods that parental rights may be terminated.<sup>131</sup> In Tennessee, a woman may be properly

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CHILD & FAM. ADVOC. 529, 547(2007); Stacy Christman Blomeke, Note, *A Surrogacy Agreement That Could Have and Should Have Been Enforced: R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998), 24 U. DAYTON L. REV. 513, 529 (1999).

<sup>123</sup> *Baby*, 2014 WL 4815211 at \*14.

<sup>124</sup> *Id.* at \*15.

<sup>125</sup> TENN. CODE ANN. § 36-6-106 (West 2014).

<sup>126</sup> *Baby*, 2014 WL 4815211 at \*5.

<sup>127</sup> *Id.* at \*15.

<sup>128</sup> *Id.*

<sup>129</sup> *Tuetken v. Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010).

<sup>130</sup> *Baby*, 2014 WL 4815211 at \*16.

<sup>131</sup> *Id.* at \*17.

termed a “legal parent” in two ways: being “[t]he biological mother of a child,”<sup>132</sup> or being “[a]n adoptive parent of a child[.]”<sup>133</sup> In *Baby*, the Surrogate was the biological mother of the child, and thus, is the “legal parent” of the Child under Tennessee law.<sup>134</sup>

Under Tennessee law, legal parent’s rights may only be terminated in one of three ways.<sup>135</sup> First, if a statutorily valid ground for termination exists and termination of the biological mother’s parental rights is in the “best interest” of the child, an involuntary termination may be initiated.<sup>136</sup> Second, a biological mother may voluntarily extinguish her rights by signing a “surrender,” a document which provides “that [a] parent or guardian relinquishes all parental or guardianship rights of that parent or guardian to a child, to another person or public child care agency or licensed child-placing agency for the purposes of making that child available for adoption[.]”<sup>137</sup> Finally, when a mother consents to adoption, her parental rights may be terminated as part of the adoption proceeding.<sup>138</sup> While the Court held these statutes did not evidence any public policy against the enforcement of surrogacy arrangements, the Court did hold that the termination of the Surrogate’s parental rights through private contract was unlike any acceptable method of termination and thus, the term was unenforceable.<sup>139</sup>

### III. BABY’S HOLDING & EPILOGUE

The Court held that traditional surrogacy arrangements, including the one at issue, did not violate the public policy of the State of Tennessee.<sup>140</sup> However, the private “best interest”

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<sup>132</sup> TENN. CODE ANN. § 36-1-102(28)(A) (West 2014).

<sup>133</sup> *Id.* § 36-1-102(28)(E) (West 2014).

<sup>134</sup> *Baby*, 2014 WL 4815211 at \*17.

<sup>135</sup> *Id.*

<sup>136</sup> TENN. CODE ANN. § 36-1-113(c) (West 2014).

<sup>137</sup> *Id.* § 36-1-102(47); *see also In re Angela E.*, 303 S.W.3d 240, 247- 48 (Tenn. 2010) (describing the required procedure for executing a surrender).

<sup>138</sup> *See* TENN. CODE ANN. §§ 36-1-102(15)(C), -117(g) (West 2014).

<sup>139</sup> *Baby*, 2014 WL 4815211 at \*18.

<sup>140</sup> *Id.* at \*19.

determination and the private termination of parental rights of the traditional surrogacy contract were improper.<sup>141</sup> Thus, the Court affirmed the Court of Appeals with regard to the public policy issue, vacated the juvenile court's termination of the Surrogate's parental rights, and remanded the case to the juvenile court to determine visitation and child support.<sup>142</sup>

Although the record is unclear as to the exact date the Intended Father exercised and took physical custody of the Child,<sup>143</sup> an interview with the Surrogate's attorney, Shelley Breeding, revealed that the Intended Father reclaimed physical custody of the child the evening following the magistrate's denial of the Surrogate's emergency *ex parte* restraining order and injunction.<sup>144</sup>

On September 18, 2014, the day the opinion was issued, the Child was nearly three years old and resided with the Intended Parents in Italy,<sup>145</sup> and the Child continued to reside in Italy as of December 15, 2014.<sup>146</sup> The attorney for the Intended Parents, Benjamin Papa, and the attorney for the Surrogate, Shelley Breeding, stated that they were communicating with their respective clients to determine how each wanted to proceed in light of the Court's unexpected analysis and holding.<sup>147</sup> As a result of the Court's unexpected public policy analysis and holding, no motions by either side had been filed with the juvenile court to which the case was remanded.<sup>148</sup>

### PART III: LEGISLATIVE DIFFICULTY

#### I. JUSTICE KOCH'S CONCURRENCE

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*24.

<sup>143</sup> *Id.* at \*8, n.4.

<sup>144</sup> Telephone Interview with Shelley Suzanne Breeding, Partner, Breeding & Lodato, LLC (Dec. 15, 2014).

<sup>145</sup> *Baby*, 2014 WL 4815211 at \*8, n.4.

<sup>146</sup> Breeding, *supra* note 144.

<sup>147</sup> *Id.*; Telephone Interview with Benjamin Papa, Attorney-Mediator, Founding Member, Papa and Roberts, PLLC (Dec. 20, 2014).

<sup>148</sup> Papa, Attorney-Mediator, Founding Member, Papa and Roberts, PLLC (Dec. 20, 2014).

Justice Koch, in his concurring opinion, agreed with the other members of the Court to the extent that the contract at issue, save the two invalidated provisions, did not violate the public policy of the State of Tennessee. However, he disagreed with the holding that traditional surrogacy contracts do not violate the Tennessee's public policy, generally.<sup>149</sup> In his view, the Court should have tailored its holding to the facts of the case, refrained from pronouncing a general rule, and thereby, deferred the general rule to legislative determination.<sup>150</sup> Justice Koch stated:

[t]he legal rules governing [surrogacy in Tennessee] are ambiguous, if not non-existent, and they need to be clarified . . . . While the desire to bring some order to the ambiguity is commendable, the case-by-case approach the courts must use is less effective in circumstances like this than the far more dynamic ability of the General Assembly to address . . . Tennessee's acceptance or rejection of surrogacy contracts as a matter of public policy[.]<sup>151</sup>

Surrogacy in Tennessee is "big business[.]"<sup>152</sup> and the need for clear guidance is undoubtedly great and growing,<sup>153</sup> and the Court emphatically called for legislative action.<sup>154</sup> However, one could argue the narrow holding Justice Koch advocates would provide a great deal of the needed clarity while simultaneously relieving the Court of the responsibility of determining the public policy of Tennessee regarding surrogacy as well as and any resulting political backlash.<sup>155</sup>

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<sup>149</sup> *Baby*, 2014 WL 4815211 at \*29 (Koch, J., concurring).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Baby*, 2014 WL 4815211 at \*27 (Koch, J., concurring) (citing Debora L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception* 3 (2006)).

<sup>153</sup> *See id.*

<sup>154</sup> *Baby*, 2014 WL 4815211 at \*26.

<sup>155</sup> Mohamed Akram Faizer, *Exacerbating the Divide: Why the Roberts Court's Recent Same-Sex Jurisprudence Is an Improvident Use of the*

Justice Koch's concurrence would provide sufficient boundaries for practitioners to guide their clients through the traditional surrogacy contract formation process, (i.e., this contract term is proper and enforceable, and this one is not).<sup>156</sup> In addition, the narrow holding would show the Court passed on opportunity to declare a general rule, effectively demonstrating the Court's powerful reluctance to be the governmental branch which invalidates such agreements.<sup>157</sup> As a result, practitioners and citizens of Tennessee would need only watch (or advocate in) one governmental branch, the Tennessee General Assembly, for a general rule, and in the meantime, they may carry on aiding their clients, intended parent(s) or surrogate, through the surrogacy process.<sup>158</sup>

Of course, there is no guarantee the General Assembly will expressly and clearly address the topic soon or ever. Since the General Assembly last spoke to the issue in the mid-1990's, it has had approximately twenty annual opportunities to address the topic.<sup>159</sup> However, a history of legislative inactivity, even coupled with a likelihood of future inactivity, perhaps, does not obligate a state's highest court to announce a general rule.<sup>160</sup> In footnote twelve of his concurring opinion in *Baby*, Justice Koch states:

[T]he courts' response to legislative inaction, whether inadvertent or intentional, should always be tempered by the admonition in Article II, Section 2 of the Constitution of Tennessee that persons belonging to one branch of government should avoid exercising the powers properly belonging to the other branches. The better course at this juncture would be to accredit the presumption, albeit rebuttable, that the

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*Court's Judicial Review Powers*, 24 U. Fla. J.L. & Pub. Pol'y 395, 396 (2013) (emphasizing the power of more narrow court holdings).

<sup>156</sup> See *Baby*, 2014 WL 4815211 at \*28-9 (Koch, J., concurring).

<sup>157</sup> See *id.* at \*27.

<sup>158</sup> See *id.*

<sup>159</sup> *Id.* at \*10.

<sup>160</sup> *Id.* at \*27, n.12 (Koch, J., concurring).



members of the General Assembly, like other public officials, will discharge their duties in good faith.<sup>161</sup>

To save the Court from public and political backlash, one could further argue that a court so high in the judicial system should be wary of expressing an opinion beyond what may be required, even if such an opinion would please a significant segment of the population.<sup>162</sup> The immediate judicial outcomes should not “solely be evaluated according to their apparent desirability.”<sup>163</sup> “Instead, decisions should also be evaluated according to their institutional legitimacy, their jurisprud[ential] soundness, and finally, the manner in which these decisions will affect and interact with both [the] U.S. government and society.”<sup>164</sup>

Regarding the *Baby* decision, the immediate judicial outcome is that traditional surrogacy contracts expressly withstand public policy scrutiny. Lawyers who practice in a directly or indirectly related field find it desirable. Lawyers dealing with surrogacy contracts also gain a great deal of guidance with which they will use to guide their clients.

Additionally, future surrogates in traditional arrangements are protected by the invalidity of contractual terms that deprive them of parental rights by private agreement, and proponents of surrogacy gained a much-desired legal victory which will set heavy precedent for an entire state.

Next, institutional legitimacy and jurisprudential soundness appear to be intertwined. Unlike the legislative branch, the judiciary’s power is predicated on its ability to find support for a decision, i.e., its ability to base its decision on pre-existing law, whether it be statutory, case law, or a mixture of several sources. Without a base of precedent or fair

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<sup>161</sup> *Id.* (citing *See State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001)).

<sup>162</sup> Faizer, *supra* note 155, at 411.

<sup>163</sup> *Id.* at 396.

<sup>164</sup> *Id.*

interpretation of an existing statute, the judicial decision and, by extension, the issuing court's legitimacy may be questioned.

In *Baby*, the Court found, cited, and fairly evaluated many relevant sources of state law, including the Tennessee Constitution, relevant Tennessee statutes, Tennessee cases, and sources of contract principles adopted in Tennessee cases. Thus, having tethered its decision to a collection of existing law, the Court's answer and its legitimacy as body are unlikely to be questioned by the reasonable critic. Furthermore, it is unlikely that the *Baby* decision will cause inter-governmental acrimony because the opinion takes no power from the Tennessee General Assembly. It can do what it has always had the power to do—pass laws detailing the requirements for valid surrogacy contracts within the state. Indeed, the Court encouraged the legislature to make a definitive statement on the issue.

As far as the decision's effect on society, the impact is much more speculative. The polar options are either that it has no effect, or that overnight, surrogacy becomes a politically-charged banner issue causing many state election swings during the next cycle. In reality, it is likely to be somewhere in-between. In any event, the citizens of Tennessee, through their representatives, will have an opportunity to speak.

The argument against the Court's broader holding would conclude by stating that legislative inaction is sometimes a consequence of living in a democracy. What is the cause of legislative inaction regarding surrogacy? Perhaps surrogacy-related problems are not high on the agenda of the citizens of Tennessee. If surrogacy-related issues were as pressing as commentators claim, legislative efforts, such as those in Louisiana, may be more likely to occur.

## II. LOUISIANA'S LEGISLATIVE EFFORTS

The Louisiana State Legislature recently attempted to comprehensively address its surrogacy issues; however, its struggles exemplify the difficult position in which courts are placed when waiting on adequate legislative guidance. Louisiana State Representative Joseph Lopinto, R-Metairie,

filed House Bill 187 on February 17, 2014.<sup>165</sup> Louisiana State Senator Gary Smith, D-Norco, sponsor of the corresponding Senate Bill, is the father of two children born through gestational surrogacy arrangements that were formed and signed outside Louisiana.<sup>166</sup> Senator Smith said the Bill helps families become complete.<sup>167</sup> He continued, "[i]nfertility is so private and personal, and . . . this Bill would . . . help[] (parents with fertility problems) to be able to have a biological child of their own" within Louisiana.<sup>168</sup>

After sailing through the Louisiana House Committee on Civil Law and Procedure with a 10-0 vote, the Louisiana House passed the Bill with a vote of 80-14.<sup>169</sup> The Louisiana Senate Judiciary Committee then picked up the Bill.<sup>170</sup> Following the adoption of amendments, the Senate Judiciary Committee passed the Bill with a vote of 22-11.<sup>171</sup> Barely any resistance was encountered on the Senate floor during the 72-7 vote.<sup>172</sup>

One of the first provisions declares traditional surrogacy contracts, termed "genetic surrogacy" contracts within the Bill, "absolutely null."<sup>173</sup> First, the Bill mandates that gestational surrogacy contracts shall be written.<sup>174</sup> After

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<sup>165</sup> Louisiana State Legislature, H.B. 187's Bill Information, <http://www.legis.la.gov/legis/BillInfo.aspx?i=223852> (last visited Oct. 26, 2014).

<sup>166</sup> Emily Lane, *Bobby Jindal Again Vetoes Bill Allowing for Legal Surrogacy Births in Louisiana*, [http://www.nola.com/politics/index.ssf/2014/05/bobby\\_jindal\\_again\\_vetoes\\_bill.html](http://www.nola.com/politics/index.ssf/2014/05/bobby_jindal_again_vetoes_bill.html) (May 31, 2014 at 1:25 PM, updated May 31, 2014 at 10:38 PM)

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> H.B. 187's Bill Information, *supra* note 165.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> H.B. 187, Reg. Sess. § 2719 (La. 2014); Enrolled House Bill 187, <http://www.legis.la.gov/legis/ViewDocument.aspx?d=904605> (last visited Oct. 26, 2014).

<sup>174</sup> H.B. 187, Reg. Sess., at § 2720.

memorialization, the contract must be signed by the “gestational mother,” the gestational mother’s husband, if applicable, and the intended parents.<sup>175</sup> With such an uncertain statutory requirement, one could argue that the Bill would exclude single parents from legally contracting with a surrogate.<sup>176</sup>

Second, the Bill states that the gestational surrogacy contract is enforceable only if the contract is approved by a court “in advance of in utero embryo transfer[.]”<sup>177</sup> The surrogate must be at least twenty-five and no older than thirty-five years old<sup>178</sup> and have previously given birth to at least one child.<sup>179</sup> Next, the Bill forbids the surrogate from receiving compensation for her services.<sup>180</sup> Compensation, as defined in the Bill, means “a payment of money, objects, services, or anything else having monetary value.”<sup>181</sup>

However, compensation does not include reimbursement of actual expenses<sup>182</sup> to the gestational mother or payment for goods or services incurred by the intended parents as a result of the pregnancy.<sup>183</sup> If the contract is for “compensation,” the contract “shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy.”<sup>184</sup>

Furthermore, the Bill would prohibit a contractual term requiring the gestational mother to consent to terminate the pregnancy “for any reason[.]”<sup>185</sup> “Any reason” includes

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<sup>175</sup> *Id.* at § 2720A.

<sup>176</sup> *See id.*

<sup>177</sup> *Id.* at § 2720B.

<sup>178</sup> *Id.* at § 2720.1(1).

<sup>179</sup> *Id.* at § 2720.1(2).

<sup>180</sup> *Id.* at § 2720C.

<sup>181</sup> *Id.* at § 2718(1).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; *contra Baby*, 2014 WL 4815211 at \*21 (permitting reasonable payments for the pain, suffering, and other expenses related to the pregnancy and birth).

<sup>184</sup> *Id.* at § 2720C.

<sup>185</sup> *Id.* at § 2720D.

prenatal diagnoses of actual or potential disability, impairment, genetic variation, or any other health condition, gender discrimination, and “for the purposes of the reduction of multiple fetuses.”<sup>186</sup>

After the Bill received bicameral affirmation, it reached the desk of Governor Bobby Jindal, who sought counsel from, most notably, Reverend Gene Mills, President of the conservative Christian non-profit organization called Louisiana Family Forum.<sup>187</sup> Reverend Mills “told his contact within the administration, ‘I could not advise Bobby sign this bill.’”<sup>188</sup> Reverend Mills cited two “irreconcilable differences” which led to his advisement that Governor Jindal veto the bill.<sup>189</sup>

To Reverend Mills, the *in vitro* fertilization process involved in gestational surrogacy births generated the first irreconcilable difference.<sup>190</sup> According to Reverend Mills, the destruction of excess fetuses was “[t]echnically . . . abortion.”<sup>191</sup> However, the Bill expressly makes a contractual term requiring the surrogate to have such excess fetuses removed unenforceable, while saying nothing about the surrogate consenting to such a procedure in the absence of the contractual requirement to do so. In an interview, Reverend Mills confirmed that this outside-the-contract circumvention is where his first concern with the legislation stemmed.<sup>192</sup> Reverend Mills said he questioned how effectively this provision would be enforced stating that the “police arm, especially within the [in vitro fertilization] industry” is simply not there.<sup>193</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> Lane, *supra* note 166; Louisiana Family Forum, About, <http://www.lafamilyforum.org/about/> (last visited Oct. 26, 2014).

<sup>188</sup> Lane, *supra* note 166.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Telephone Interview with Reverend Gene Mills, President, Louisiana Family Forum (Dec. 9, 2014).

<sup>193</sup> *Id.*

The second irreconcilable difference Reverend Mills cited was the language of the statute that was intended to prevent "commercial surrogacy," i.e., when a surrogate is paid to carry the child.<sup>194</sup> The Reverend "believed [that the] restrictions he requested be written into the Bill to ban surrogacy-for-pay were insufficient."<sup>195</sup> This so-called irreconcilable difference is more difficult to understand because, again, the Bill expressly prohibits such a term.<sup>196</sup> Reverend Mills elaborated during an interview by stating "the [surrogacy for-pay] restrictions were too vague."<sup>197</sup> He continued by expressing concern that "[i]n such new area of the law, such vague language could be a detriment . . . to altruistic surrogacy[,] or surrogacy done for no pay or reimbursement of expenses."<sup>198</sup>

Reverend Mills, and perhaps others, counseled Governor Jindal to veto the Bill, and the Bill was officially vetoed on May 30, 2014.<sup>199</sup> The veto pushed the issue back to the legislative realm for a potential supermajority override; however, Louisiana Representative Joe Lopinto, the bill's sponsor, surrendered just two days after Governor Jindal's veto.<sup>200</sup> Despite the overwhelming support in both houses, Representative Lopinto decided not to attempt to override the Governor's veto because such an action would place the funding of other bills in jeopardy.<sup>201</sup>

Representative Lopinto's loss in the final legislative leg has not deterred Louisiana lawmakers, who envision surrogacy-related legislation on the horizon.<sup>202</sup> The Bill's failure to secure the Governor's signature notwithstanding, the deliberative process succeeded when a constructive, in-depth

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<sup>194</sup> Lane, *supra* note 166.

<sup>195</sup> *Id.*

<sup>196</sup> H.B. 187, Reg. Sess., at § 2720C.

<sup>197</sup> Mills, *supra* note 192.

<sup>198</sup> *Id.*

<sup>199</sup> H.B. 187's Bill Information, *supra* note 165.

<sup>200</sup> Lane, *supra* note 166.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

discussion took place. A similar discussion may happen within the Tennessee General Assembly if the concern of the citizenry were high enough.

#### CONCLUSION

Save the complex custody determination, child support calculation, and parenting plan for the immediate parties, the Tennessee Supreme Court's holding in *Baby* is relatively uncontentious. The Court grappled a difficult legal question, a task with which it is familiar. After predicating its power on an assemblage of existing law, reasonable questions of jurisprudential soundness and institutional legitimacy are non-existent. The decision is unlikely to stir inter-governmental hostility, and properly, the opinion fervently calls for legislative action.

The nearly successful legislative efforts of Louisiana exhibit the frustration some may have with the deliberative process. Preemptory legislative action regarding hotly-contested social issues is a rarity. In *Baby*, the Court, after documenting twenty years of legislative action and strongly noting the damage such prolonged inaction was causing, saw its obligation clearly — to prevent further damage.





# COULD KILL SWITCHES KILL PHONE THEFT?

## SURVEYING POTENTIAL SOLUTIONS FOR SMARTPHONE THEFT

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### INTRODUCTION

In 2013, 3.1 million Americans were victimized by smartphone theft, nearly double the total of a year before.<sup>2</sup> The problem is particularly acute in major cities, where smartphone theft is now involved in 30 to 40 percent of all robberies.<sup>3</sup> In San Francisco, smartphones were stolen in more than half of total robberies in 2012.<sup>4</sup> These thefts cost consumers approximately \$30 billion a year according to the FCC,<sup>5</sup> and law enforcement officials worry that they pose significant public safety costs as well. This is not hard to believe, given that 68% of theft victims would put themselves in some degree of danger to recover their phone.<sup>6</sup> With 1 in 10 device owners now victims,<sup>7</sup> the shocking

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<sup>2</sup> *3.1 Million Smart Phones Were Stolen in 2013, Nearly Double the Year Before*, CONSUMER REPORTS (April 17, 2014), <http://pressroom.consumerreports.org/pressroom/2014/04/my-entry-1.html>.

<sup>3</sup> H.R. 962 § 1(a), 2014 Leg. Counsel, Reg. Sess. (Cal. 2014).

<sup>4</sup> *Id.* § 1(d).

<sup>5</sup> Smartphone Theft Prevention Act, H.R. 4065, 113th Cong. § 2(1) (2014).

<sup>6</sup> *Phone Theft in America*, LOOKOUT MOBILE SECURITY (May 7, 2014), <https://www.lookout.com/resources/reports/phone-theft-in-america>.

<sup>7</sup> *Id.*

growth of smartphone theft and its attendant financial and safety costs has created an apparent epidemic.

But, is this theft problem really unique to smartphones? The increase in stolen smartphones may simply reflect the increase in smartphone ownership. In other words, thieves may not specifically plan ahead and single out phones to steal. Other electronic devices such as laptops and tablets are also stolen regularly, but smartphone theft may occur at a greater rate for a variety of reasons: they are smaller, easier to mine data from, easier to repurpose post-theft, and people carry them around more routinely with less precaution.

Whether the theft problem is unique to smartphones or not, a solution that reduces theft of smartphones in particular and electronic devices in general is desirable if it is possible. Perhaps the most obvious response is to make stolen phones less valuable. If thieves cannot access owner data or connect phones to cellular or Wi-Fi networks, they may be less inclined to risk stealing a smartphone. This is the crux of the leading anti-theft proposal. By mandating implementation of a “kill switch” that can remotely disable a phone’s essential features, legislatures and public officials hope to disincentivize stealing and reverse the theft trend.

This paper analyzes the potential efficacy of current proposals to deter smartphone theft and the broader implications they may have. It surveys arguments of leading stakeholders, examines the relevant literature on technological feasibility and consumer behavior, and assesses the potential pitfalls and shortcomings in implementing a cohesive, effective policy. Developing a sound theft-deterrence policy requires clarity on and a better understanding of kill switch technology, other potential approaches such as carrier registries, smartphone theft psychology, and the mechanics of the smartphone black market. This paper represents the first attempt at studying and answering these questions.

## I. HISTORY OF THE KILL SWITCH DEBATE

### A. A CALL TO MANDATE KILL SWITCHES AND SAMSUNG’S RESPONSE

The movement to mandate the deployment of a kill switch, a technological method to render a stolen smartphone and its data unusable, first gained prominence in 2012 when smartphone theft began increasing rapidly. The Secure Our Smartphones (SOS) campaign, led by New York Attorney General Eric Schneiderman and San Francisco District Attorney George Gascon, gathered supporters around the country as it pressured phone carriers and manufacturers to introduce a default kill switch in new phones.<sup>8</sup>

Following this pressure, on July 18, 2013, Samsung proposed adding the LoJack security system, including a kill switch designed by Absolute Software, to its smartphones at an additional cost to consumers.<sup>9</sup> The LoJack system would work through a desktop app and code buried with the phone's firmware. However, because most smartphones in the U.S. are sold by carriers, Samsung needed the carriers' approval to pre-install LoJack on phones. None of the five major carriers agreed.<sup>10</sup>

## B. CTIA'S PROPOSED ALTERNATIVES AND RESPONSES THERE TO

Carriers and manufacturers, through their representative CTIA—The Wireless Association, initially denounced the SOS kill switch initiative and instead created a collaborative registry aimed at eliminating the stolen phones resale market. Eventually, however, intensifying scrutiny prompted the CTIA to modify its position. It recently created the Smartphone Anti-Theft Voluntary Commitment, in which

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<sup>8</sup> Office of the N.Y. Attorney General Eric T. Schneiderman, *Secure Our Smartphones (S.O.S.)*, <http://www.ag.ny.gov/feature/secure-our-smartphones-sos>.

<sup>9</sup> Martyn Williams, *U.S. Carriers Rejected 'Kill Switch' Technology Last Year*, *COMPUTERWORLD* (Feb. 24, 2014 08:42 AM), [http://www.computerworld.com/s/article/9246557/U.S.\\_carriers\\_rejected\\_39\\_kill\\_switch\\_39\\_technology\\_last\\_year](http://www.computerworld.com/s/article/9246557/U.S._carriers_rejected_39_kill_switch_39_technology_last_year).

<sup>10</sup> Press Release, Eric T. Schneiderman, Attorney General of New York, (Dec. 11, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-requests-information-leading-wireless-carriers-decision-reject-anti>.

signatories declare their intent to make kill switch functionality available on all of their new phones by July 2015.<sup>11</sup>

But many kill switch advocates argue that this voluntary commitment falls short. Citing the need for ubiquity to ward off thieves, consumer rights advocates and a handful of state legislatures have pushed for mandatory, rather than voluntary, adoption of kill switches. One such bill, California's S.B. 962, finally passed the state senate in May 2014 (and was signed into law on August 25, 2014)<sup>12</sup> after Apple, Samsung, Microsoft, and Google withdrew opposition on the conditions that the implementation deadline be pushed back to July 2015 and tablets be dropped from the bill. These companies already include software on their phones that allows owners to lock or erase devices from afar, but they generally accord with the CTIA's position of keeping anti-theft measures voluntary and up to the discretion of consumers.

### C. FINDING A WAY FORWARD

While most interested parties in the debate thus appear to endorse a kill switch option, kill switch implementation is not failsafe. The question remains whether current statutory kill switch mandate proposals "will effectively deter theft without jeopardizing public safety, personal privacy, and civil liberties, or causing other undesirable consequences."<sup>13</sup> It is entirely possible that a kill switch solution could create as many problems as it solves.

## II. OPINIONS OF STAKEHOLDERS ON KILL SWITCHES

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<sup>11</sup> Smartphone Anti-Theft Voluntary Commitment, CTIA – THE WIRELESS ASSOCIATION, (accessed February 3, 2015), <http://www.ctia.org/policy-initiatives/voluntary-guidelines/smartphone-anti-theft-voluntary-commitment>.

<sup>12</sup> H.R. 962, 2014 Leg. Counsel, Reg. Sess. (Cal. 2014).

<sup>13</sup> California Senate, Energy, Utilities and Communications Committee, March 24, 2014,

[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB962&search\\_keywords](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB962&search_keywords) (click Bill Analysis tab, then click the link titled "03/28/14 – Senate, Utilities And Communications").

The debate over curbing smartphone theft has engendered a good deal of controversy. Some legislators have unabashedly attacked carriers and manufacturers for opposing a public safety law in order to retain profits arising from replacement of stolen phones. The carriers and manufacturers respond by arguing that they present consumers with a variety of security options, to which a mandatory kill switch would only be a costly and burdensome addition. On the sidelines of the debate are a number of privacy activists and technologists who worry that mandating kill switches may enable the possibility of widespread hacking or discourage innovation. Finally, smartphone owners provide insights about feasibility of security options with their relative apathy towards anti-theft measures.

#### A. LEGISLATORS AND PUBLIC SAFETY OFFICIALS SUPPORT STRONG KILL SWITCHES

Following the beginning of the Secure Our Smartphones campaign, New York Comptroller Thomas DiNapoli publicly pressured Google, Microsoft, Apple, and Samsung to declare what they were doing to “assure public officials that [they are] acting responsibly” in response to the rise in smartphone theft or else face divestment of nearly \$3 billion from the state of New York.<sup>14</sup> The comments confronted the companies with acting “disinterested when it comes to collaborating with law enforcement agencies in the effort to develop a meaningful technological solution that would effectively eliminate the secondary market in which criminal elements realize their profits.”<sup>15</sup>

Following a decision by the major carriers to reject Samsung’s kill switch in late 2013, supporters of a mandatory kill switch became even less diplomatic in their allegations. San Francisco District Attorney George Gascón accused the carriers of rejecting the Samsung solution “so they could continue to

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<sup>14</sup> Letters from Thomas P. DiNapoli, Comptroller of the State of New York, to Google, Microsoft, Apple, and Samsung (June 11, 2013), <http://www.ag.ny.gov/sites/default/files/pdfs/features/sos/SOS-Letters.pdf>.

<sup>15</sup> *Id.*

make money hand over fist on insurance premiums.”<sup>16</sup> Insurance and phone replacement costs are major components of carrier profits, comprising \$7.8 billion and \$30 billion in revenue, respectively, of the \$69 billion the industry nets every year.<sup>17</sup> Captain Jason Cherniss of the San Francisco Police Department says the police have “tried to blow the whistle on this for years . . . [while] companies have had the ability to prevent for years . . . [and] people have been violently robbed - even killed - and millions of dollars have changed hands on the black market.”<sup>18</sup> Secure Our Smartphones leader Eric Schneiderman blasted the carriers for “knowingly dismiss[ing] technology that could save lives.”<sup>19</sup>

## B. OBJECTIONS TO MANDATORY IMPLEMENTATION

But the carriers (and manufacturers) see kill switches as not only technologically uncertain, but also as potentially becoming conduits of new problems. The CTIA has expressed concern that ubiquitous kill switches would give hackers or other undesired parties the ability to disable entire groups of phones, with particular susceptibility for “random customers as retaliation by a variety of persons or entities.”<sup>20</sup> Manufacturers claim that they have already made commercially available and promoted affordable anti-theft solutions, including Apple’s Find My iPhone and Activation Lock and Samsung’s Reactivation Lock. The major carriers of the CTIA, though initially rejecting wholesale Samsung’s kill switch proposal in

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<sup>16</sup> Paul Wagenseil, *Smartphone Kill Switch: What It Is, How it Might Work*, TOM’S GUIDE (May 14, 2014 9:40AM), <http://www.tomsguide.com/us/smartphone-kill-switch-faq,news-18772.html> (internal quotations omitted, quoting Gascón).

<sup>17</sup> Rachel Swan, *The Life of a Stolen Phone: For the Smartphone Industry, Theft is Part of the Business Model*, S.F. WEEKLY (April 23, 2014), <http://www.sfweekly.com/2014-04-23/news/smartphone-theft-apple-at-t-iphone/full/>.

<sup>18</sup> *Id.*

<sup>19</sup> Schneiderman, *supra* note 10.

<sup>20</sup> CTIA--The Wireless Association, *Why a “Kill Switch” Isn’t the Answer* (accessed February 3, 2015), [http://files.ctia.org/pdf/Why\\_a\\_Kill\\_Switch\\_Isn\\_t\\_the\\_Answer.pdf](http://files.ctia.org/pdf/Why_a_Kill_Switch_Isn_t_the_Answer.pdf)

2013, recently agreed to make available kill-switch solutions on a consumer-voluntary basis.<sup>21</sup>

This voluntary-as-opposed-to-mandatory proposal accords with the position of many technologists and privacy rights activists who worry that consumers may be coerced into increased susceptibility to hackers. Further, consumers already have a variety of security tools available to them, and legally sanctioning more pathways for Big Brother (or Anonymous) to intrude on consumers' ability to communicate is concerning, particularly in light of recent crackdowns in Egypt, BART protests, and Occupy Wall Street. In this regard, consumer safety may be diminished by an inability to reach emergency services or dependent contacts.

Some technologists also fear that mandatory technology may create a barrier to entry for smaller innovators in the smartphone industry or even more simply create more costs than benefits. In comments filed with the California Senate, the San Jose Silicon Valley Chamber of Commerce reminded legislators "to be sensitive to the regulatory environment necessary for innovation" and asserted that different technology mandates in states across the country "could create considerable market barriers for innovative manufacturers and the consumers they serve, and mandating technology is usually a recipe for the creation of an anticompetitive and anti-consumer choice environment."<sup>22</sup>

### C. CONSUMER BEHAVIOR PROVIDES LITTLE CLARITY ON THE POTENTIAL EFFECTIVENESS OF A MANDATORY KILL SWITCH

In the midst of this debate, smartphone owners--perhaps the stakeholders with the most at stake--seem to

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<sup>21</sup> CTIA--The Wireless Association, *Smartphone Anti-Theft Voluntary Commitment* (accessed February 3, 2015),

<http://www.ctia.org/policy-initiatives/voluntary-guidelines/smartphone-anti-theft-voluntary-commitment>.

<sup>22</sup> Comments of San Jose Silicon Valley Chamber of Commerce in Senate Floor Analysis, May 7, 2014, California State Senate, [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB962&search\\_keywords](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB962&search_keywords) (click Bill Analysis Tab, then click the link titled "05/07/14 - Senate Floor Analysis).

collectively demonstrate the least bit of interest. Less than half of smartphone users secure their phones with a homescreen passcode, and among those that do, the most popular passcodes are among the simplest: 1111, 0000, and 1234.<sup>23</sup> Aggregating the passcode with other phone security measures such as antivirus software and data backup, 34% of smartphone owners take no measures at all.<sup>24</sup> This seeming indifference may support the notion that a mandatory anti-theft solution could produce radical effects, but it may also reveal that smartphone users simply prefer more straightforward usage with fewer security barriers. Regardless of what it means, interested parties on both sides of the table have mobilized consumer behavior data to support their positions. Currently proposed kill switch bills in state and federal legislatures, for instance, base their rationales in consumer protection.

### III. HOW THE LEGISLATION CONCEIVES OF KILL SWITCHES

While the various bills<sup>25</sup> active in state legislatures and Congress differ in how they describe the ideal features of kill switches, they all allude to kill switches vaguely as a sort of “technological solution.” The pending federal bill goes even further, exempting from the mandate any smartphone provider that incorporates technology that “accomplishes the functional equivalent of the [defined technological] function.”<sup>26</sup> By keeping the definition broad, the bills enable companies to use technology compatible with their business and design strategies, hence making it more palatable to comply with the mandate. However, the broad definitional scope also reflects a degree of legislative uncertainty on what constitutes the most effective functionality. Reflecting this point, the five pending and passed bills--California, Minnesota, New York, Illinois, and the federal bill--all have important differences.

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<sup>23</sup> Corinne Iozzio, *Kill Switches Will Save Your Smartphone*, POPULAR SCIENCE (May 5, 2014),

<http://www.popsci.com/article/technology/kill-switches-will-save-your-smartphone>.

<sup>24</sup> Stephen Schenck, *US Smartphone Thefts Explode, Nearly Doubling Since 2012*, POCKETNOW (April 18, 2014, 5:18 PM),

<http://pocketnow.com/2014/04/18/smartphone-theft>.

<sup>25</sup> See Appendix for excerpts of selected bill text.

<sup>26</sup> Smartphone Theft Prevention Act, H.R. 4065, 113th Cong. (2014).



While all of the bills agree that a kill switch must involve software or hardware (or a combination of both) that can render inoperable the essential features of the device to an unauthorized user, they vary in their interpretation of “inoperability” and “essential features.” The bills generally accord that the kill switch should disable voice communications, Internet accessibility, and application functionality, but the proposed Illinois and federal bills go further to clarify that this must be achieved “even if the device is turned off or has the data storage medium removed.”<sup>27</sup> In this regard, the Illinois and federal bills would require a permanent solution that prevents re-programmability after the phone is rendered inoperable.

The treatment of data also reveals the bills’ different conceptions of kill switch functionality. The California bill, for instance, is silent on the technology’s effect on user data, whereas the other bills require the kill switch to either lock or disable the stored data. The Minnesota bill requires the kill switch to lock all data, but retain future accessibility, while the Illinois bill would require permanent removal. The federal bill splits the difference between the two and leaves the option open to manufacturers and providers.

Compliance enforcement also varies from bill to bill. Each bill, aside from Illinois’s, supports a per-phone monetary penalty levelled against those who manufacture and sell non-conforming phones, while Illinois would require violating providers to insure the phones for theft at no cost to the customer. Minnesota’s bill contains additional provisions that prevent purchasers of used or secondhand phones from buying in cash and requires these buyers to keep records of their purchases.

In total, the current legislative proposals are united in calling for a mandate on some sort of technological solution that would help consumers render some subset of key features inoperable on a stolen phone. The various approaches on specifics, from definitional differences to dealing with data on a permanent or reversible basis, underscores some of the uncertainty on how a kill switch could work most effectively.

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<sup>27</sup> *Id.* See also IL S.B. 3539 (“SIM card or data storage medium removed”).

#### IV. TECHNICAL ISSUES INVOLVED WITH IMPLEMENTING KILL SWITCHES

The state and federal kill switch legislation as well as the Voluntary Commitment from the CTIA both suffer from a dearth of detail about technical specifications and how a kill switch would be implemented. The bills simply call for any hardware or software “technological solution” that is mandatory and can survive a factory reset.<sup>28</sup> However, a kill switch solution implemented entirely in software will likely not work flawlessly, especially if the software is implemented at a high level of abstraction—in the operating system (OS) or as an app.

##### A. KILL SWITCHES IMPLEMENTED IN SOFTWARE

Software kill switches depend on users running the latest OS and software patches necessary to enable the kill switch feature to work. For example, Apple’s Find My iPhone<sup>29</sup> app and Activation Lock<sup>30</sup> feature in iOS 7 were designed to function as a kill switch. Once enabled, Activation Lock is designed to make a stolen iPhone unusable even if the phone is reset. However, only 85% of iPhones ran iOS 7 at the time the first smartphone bills got introduced.<sup>31</sup> Therefore, there was still a large chance that a stolen iPhone either did not run iOS 7 or have the Find My iPhone app enabled. For example, a recent theft victim had shut off the Find My iPhone app after reading about how it had been abused by a hacker to remote-wipe tech writer Mat Honan’s iPhone, iPad, and laptop.<sup>32</sup> With the large

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<sup>28</sup> See, e.g., H.R. 962, 2013 Leg. Counsel, Reg. Sess. § 2(b)(1) (Cal. 2013).

<sup>29</sup> Apple Computer Inc., *Find My iPhone*, <http://www.apple.com/icloud/find-my-iphone.html>.

<sup>30</sup> Apple Computer Inc., *iCloud: Activation Lock*, <http://support.apple.com/kb/PH13695>.

<sup>31</sup> Christian Zibreg, *According to Apple, 85 percent of iPhone, iPod touch and iPad devices run iOS 7*, iDOWNLOADBLOG (Mar. 24, 2014), <http://www.idownloadblog.com/2014/03/24/apple-85-percent-devices-ios-7>.

<sup>32</sup> Rob Pegoraro, *Will Apple's 'kill switch' tamp down iPhone thefts?*, USA TODAY (May 4, 2014, 7:00 AM),

number of smartphone offerings, OSs, and app versions on the market today, designing a set of reasonably foolproof kill switch apps that have similar levels of protection for users across industry platforms will require a significant standards-setting initiative and frequent communication between smartphone manufacturers and carriers on bug fixes, technology updates, and software patches.

California's kill switch bill and the CTIA's Voluntary Commitment would require any smartphone manufactured in the United States for retail sale after July 1, 2015 to have a kill switch (the latter on a voluntary commitment). However, most users keep their smartphone models for two to three years. Hence, even after July 1, 2015, there will be millions of smartphones that were purchased previously running older OS versions that do not support the kill switch. Moreover, iPhones running iOS 7 (with the kill switch) look almost identical to models without it. Therefore, smartphone thieves will likely not be deterred by kill switches for a few years after July 1, 2015, and will take the chance that a given smartphone does not have a properly functioning kill switch. Even if a stolen iPhone has the kill switch app installed and functional, if a user waits too long to run Find My iPhone, that can give the thief time to unload the device. (The average duration of time from theft to recognition of theft is one hour.)<sup>33</sup>

## B. SOFTWARE KILL SWITCHES CAN BE BROKEN INTO

Thieves may also be able to defeat kill switches if the user has not installed the latest software security patch. For example, Apple recently put out a security fix for a vulnerability that allowed a thief to disable Find My iPhone on iOS 7 without a password.<sup>34</sup> That defense was also

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<http://www.usatoday.com/story/tech/columnist/2014/05/04/will-apples-kill-switch-tamp-down-iphone-thefts/8577215>.

<sup>33</sup> *Phone Theft in America*, LOOKOUT MOBILE SECURITY (May 7, 2014), <https://www.lookout.com/resources/reports/phone-theft-in-america>.

<sup>34</sup> Carly Page, *iOS 7 Exploit Disables Find My Iphone Without a Password*, THE INQUIRER (Feb. 7, 2014, 1:10 PM), <http://www.theinquirer.net/inquirer/news/2327573/ios-7-exploit-disables-find-my-iphone-without-a-password>.

circumvented in cases where a user did not set a screen-unlock passcode.<sup>35</sup>

Most recently, hackers have even broken into Apple's Activation Lock installed on the latest iOS 7 with all the latest software patches. The two hackers who call themselves doulCi (iCloud, fashioned roughly backwards), claimed to have made the workaround "for people who have retrieved their lost or stolen iDevice, in an effort to recover access to contacts, email, notes, and more."<sup>36</sup> The system works by "plugging [an] iPhone or iPad into a computer and altering a file inside . . . trick[ing] the device into connecting to the hackers' server instead" and causing the phone to unlock.<sup>37</sup> Shortly following the release of the doulCi hack, pictures on social media appeared "show[ing] that thousands of locked iPhones around the world [were] bypassed using the tool just [in the first day]."<sup>38</sup> Most of the tweets thanking the two hackers come from outside of the U.S, where stolen smartphones are shipped and sold at a premium on the black market.<sup>39</sup> For example, an iPhone 5S that costs \$707 in the US costs \$1,090 in Jordan and \$1,196 in Brazil.<sup>40</sup> The doulCi hack suggests that software kill switches on phones are certainly not immune, even from the work of a couple of rogue hackers.

### C. REMOTE ACTIVATION OF KILL SWITCHES

A true software kill switch, as opposed to a simple lock-and-wipe app, would require sending a signal to the phone

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<sup>35</sup> Pegoraro, *supra* note 32.

<sup>36</sup> Stephanie Mlot, *Hackers Breach Apple's Activation Lock*, PC MAGAZINE (May 22, 2014, 9:50 AM), <http://www.pcmag.com/article2/0,2817,2458399,00.asp>.

<sup>37</sup> Jose Pagliery, *Hackers Can 'Un-Brick' Stolen iPhones*, CNNMONEY TECH 30 (May 21, 2014, 1:37 PM), <http://money.cnn.com/2014/05/21/technology/security/icloud-hack/index.html>.

<sup>38</sup> *Id.*

<sup>39</sup> Alex Heath, *Apple Too Late to Stop Massive iCloud Breach, Hackers Claim*, CULT OF MAC (May 21, 2014, 4:46 PM), <http://www.cultofmac.com/280189/icloud-hacker-calls-apples-response-little-late>.

<sup>40</sup> Swan, *supra* note 17.

over the cellular network or the Internet to “brick” the phone by deleting the OS or by sending out a poisoned firmware update. Absent of physical damage to the hardware, the phone could still be made functional by installing a new OS or by using special tools to fix the firmware.<sup>41</sup> iPhones, in particular, are “jailbroken” routinely, with the smartphone running a knock-off OS. Therefore, a purely software-based approach to render a smartphone forever nonfunctional is unlikely to work.

A kill switch implemented in software can also be avoided. A thief would have to shut the smartphone off immediately after he steals it, which most experienced thieves already do to avoid tracking software. The thief could alternatively place the stolen smartphone into a Faraday Bag<sup>42</sup> that blocks Wi-Fi, cellular, and GPS signals and wait until he reached a location without a cellular signal, e.g., a metal shed or basement. At that point, the SIM card can be removed and discarded, the phone can be turned on, the data wiped, and the 15-digit International Mobile Equipment Identity (IMEI) number changed.<sup>43</sup> The carrier network, and kill switch that depends on it, would be totally ineffective.

#### D. KILL SWITCHES EMBEDDED IN HARDWARE

Samsung proposed a more permanent solution, the Absolute LoJack kill switch,<sup>44</sup> to carriers in 2013, but the carriers rejected the proposal. The Absolute LoJack method embeds the kill switch in the smartphone’s BIOS (firmware) that can withstand a factory reset and wiping or replacing the hard

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<sup>41</sup> Jesse Emspak, *Why a smartphone ‘kill switch’ won’t deter theft*, MOTHER NATURE NETWORK (Aug 27, 2013, 02:19 AM),

<http://www.mnn.com/green-tech/gadgets-electronics/stories/why-a-smartphone-kill-switch-wont-deter-theft>.

<sup>42</sup> Kelsey D. Atherton, *Hide From GPS With This Signal-Blocking Phone Case*, POPULAR SCIENCE (Aug. 6, 2013, 1:15 PM),

<http://www.popsci.com/gadgets/article/2013-08/how-protect-yourself-your-phone>.

<sup>43</sup> Emspak, *supra* note 41.

<sup>44</sup> *Absolute Persistent Security Software. The Only Solution That Can Survive a Factory Reset*, ABSOLUTE SOFTWARE,

<http://lojack.absolute.com/en/persistent> (last visited May 30, 2014).

drive. However, hacker websites<sup>45</sup> offer instructions for computer-savvy hackers on how to edit a smartphone's BIOS to disable LoJack. Hence, a truly tamper-proof kill switch would have to be either embedded in read-only memory (ROM) or built into the integrated circuits (ICs) on the motherboard itself. The logic on an IC could be programmed to (1) cause the IC to malfunction; (2) reset the memories; or (3) destroy the IC by creating a short in the circuit. Because the kill switch would be within the IC, detecting it and disabling it would be near impossible.<sup>46</sup> In addition, the kill switch would have to be embedded on *every* motherboard manufactured so that if a thief tried to replace the motherboard on a smartphone, the new replacement motherboard would also have the kill switch. At this point, working around the kill switch would still be possible for the thief. However, because a new motherboard costs upwards of \$100,<sup>47</sup> it might serve as a sufficient deterrence to theft.

#### E. HARDWARE REDESIGNS THAT COULD WORK

Modern electronic devices, such as smartphones, have sleep states that are in between fully on and fully off. In sleep mode, some circuits on the smartphone are powered up and others are powered down.<sup>48</sup> "These modes often allow the device to wake up autonomously if certain conditions are met, such as pressing a certain key or even receiving certain data

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<sup>45</sup> See, e.g., *How to Remove Computrace LoJack*, FREAKY ACRES, [http://www.freakyacres.com/remove\\_computrace\\_lojack](http://www.freakyacres.com/remove_computrace_lojack) (last visited May 30, 2014).

<sup>46</sup> Email from Mark Tehranipoor, Charles H. Knapp Associate Professor of Electrical & Computer Engineering, University of Connecticut, to authors (May 30, 2014, 11:06 AM) (on file with authors).

<sup>47</sup> iPhone 5 Replacement Motherboards, EBAY, <http://www.ebay.com> (search "iphone 5 replacement motherboard") (last visited May 30, 2014).

<sup>48</sup> Heather Murphy, *Why Snowden Asked Visitors in Hong Kong to Refrigerate Their Phones*, N.Y. TIMES (Jun. 25, 2013, 9:41 AM), [http://thelede.blogs.nytimes.com/2013/06/25/why-snowdens-visitors-put-their-phones-in-the-fridge/?\\_r=0&pagewanted=all](http://thelede.blogs.nytimes.com/2013/06/25/why-snowdens-visitors-put-their-phones-in-the-fridge/?_r=0&pagewanted=all) (quoting Seth Schoen, Senior Staff Technologist, Electronic Frontier Foundation).

over the Internet. . . .”<sup>49</sup> Therefore, a kill switch that could be activated to wake up and “brick” the smartphone even when the smartphone were switched off by a thief would be useful. In addition, a hardware redesign to thwart thieves that remove the smartphone battery to evade tracking could be to insert secondary power sources within the apparatus. “Some phones [already] use an additional battery for memory management; it’s unclear whether this battery could be used by logging and/or tracking systems. . . .”<sup>50</sup> Such a secret secondary power source could be used to power tracking apps and the kill switch.

#### F. FOOLPROOF BUT EXPENSIVE SOLUTIONS

Militaries around the world have designed “remote shut-down” solutions on defense systems since at least 2008 to disable ICs on equipment that might fall into hostile hands. These generally consist of kill switches or backdoors. A military-style kill switch manipulates the system’s software or hardware to cause the system to die outright, for example, to shut off an F-35’s missile-launching electronics.<sup>51</sup> A backdoor, on the other hand, lets the designer gain access to the system to disable or enable a specific function. Because a backdoor does not shut down the entire system, hostile users remain unaware of the intrusion. For example, a designer could use it to bypass battlefield radio encryption. Similarly, smartphone manufacturers or carriers could use a backdoor to continue tracking a thief while blocking access to the owner’s sensitive data. However, military-style designs, while foolproof, would likely prove too expensive for commercial smartphones unless breakthroughs in technology and design occur.

Boeing recently filed documents with the FCC to build a tamper-proof android smartphone it calls the “Black” phone. The “Black phone will be sold primarily to government agencies and companies . . . related to defense and homeland

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Sally Adee, *The Hunt for the Kill Switch*, IEEE SPECTRUM (May 1, 2008, 7:57 PM), <http://spectrum.ieee.org/semiconductors/design/the-hunt-for-the-kill-switch>.

security,” says a letter accompanying the filing.<sup>52</sup> There are no serviceable parts on Boeing’s Black phone and any attempted servicing or replacing of parts would destroy the product. The phone is sealed with epoxy around the casing and with screws, the heads of which are covered with tamper proof covering to identify attempted disassembly. While such a device would provide high security indeed, the need for commercial devices to be serviced or repaired likely precludes a specialized solution like Boeing’s for commercial smartphones. In addition, Boeing will not provide technical and operational information about the product to the general public for security purposes.<sup>53</sup> Technical information distributed at trade shows will be protected by non-disclosure agreements. With the proliferation of hacker sites instructing the public on jailbreaking smartphones and evading kill switches, commercial smartphone companies might soon decide to follow this route in the future.

Finally, researchers at Rice University and the University of California, Los Angeles recently invented a new method to protect integrated circuits (IC) against piracy. The new method exploits the inherent variability in modern IC manufacturing to create a unique identifier for each IC and integrate the identifier into the IC’s functionality.<sup>54</sup> However, while this novel method solves the IMEI erasing problem and is attack-resilient, it would likely lead to a large overhead cost for smartphone manufacturers and would be difficult to standardize across smartphone platforms.

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<sup>52</sup> Letter from Bruce A. Olcott, *The Boeing Company, Supplemented Request for Confidential Treatment* FCC Identification Number H8V-BLK1 (Model: BLACK), to Joe Dichoso, Chief Equipment Authorization Branch, Office of Engineering and Technology, Federal Communications Commission, <https://apps.fcc.gov/eas/GetApplicationAttachment.html?id=2202965>.

<sup>53</sup> *Id.*

<sup>54</sup> Yousra Alkabani, et al., *Remote Activation of ICs for Piracy Prevention and Digital Rights Management*, Proceedings of the Int’l Conference on Computer-Aided Design of Integrated Circuits and Systems 674-77 (2007), [http://www.cs.ucla.edu/~miodrag/papers/Alkabani\\_ICCAD\\_2007.pdf](http://www.cs.ucla.edu/~miodrag/papers/Alkabani_ICCAD_2007.pdf).



## V. NON-KILL-SWITCH SOLUTION: CARRIER REGISTRIES AND MOBILE DATA MANAGEMENT

### A. CARRIER REGISTRY OPERATION

Seeking to deflect legislation that would mandate kill switches for all smartphones, and seeking to avoid dealing with the technical challenges enumerated above, U.S. carriers implemented databases in November 2013 that use unique GSM and LTE (advanced GSM) smartphone ID numbers to prevent stolen smartphones from being re-activated on GSM or LTE networks in the U.S. and on appropriate international LTE networks.<sup>55</sup> At present in the U.S., consumers that lose their smartphones may call their service provider and have service suspended to the smartphone.<sup>56</sup> However, it is the consumer's responsibility to know the device's make, model number, serial number, and unique device identification number (either the International Mobile Equipment Identifier (IMEI) or the Mobile Equipment Identifier (MEID) number).<sup>57</sup> Different smartphone models and carriers may use GSM networks, CDMA networks, LTE networks, or a mix of the three.<sup>58</sup> Therefore, a stolen smartphone that is blocked on one registry could be activated on a registry using a different network standard.

Additionally, consulting the registries and blocking activation of phones reported as stolen is a *voluntary* action of carriers.<sup>59</sup> Remote phone location, locking, and data-wiping

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<sup>55</sup> Letter from Brian M. Josef, *CTIA Stolen Smartphones Status Update*, to Kris Monteith, Acting Bureau Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, <http://www.ctia.org/docs/default-source/default-document-library/july-2013.pdf?sfvrsn=0>.

<sup>56</sup> FCC, *How to Report a Lost or Stolen Smart Device*, <http://www.fcc.gov/stolen-phones-contact-numbers>.

<sup>57</sup> FCC, *Protect Your Mobile Device*, <http://www.fcc.gov/guides/stolen-and-lost-wireless-devices>.

<sup>58</sup> European Telecommunications Standards Institute (ETSI), *Mobile Communications*, <http://www.etsi.org/technologies-clusters/technologies/mobile>.

<sup>59</sup> Daniel E. Dilger, *Apple Gov't rep says next two iPhones were designed under Steve Jobs*, APPLEINSIDER (April 01, 2013, 12:03 PM),

services depend entirely on whether the manufacturer and carrier provides them on the particular smartphone model; the features are not uniformly offered on all models or by all carriers.<sup>60</sup> Manufacturer or third-party apps available for some models today can locate a stolen device from a computer, lock the device to restrict access, wipe sensitive data from the device, and make the device emit a loud sound (“scream”) to help the police locate it. However, carriers and manufacturers are not required to make such apps available on all phones or on all networks.<sup>61</sup>

Once service is suspended on the smartphone, the consumer cannot wipe or lock it. Monthly plan charges continue while service is suspended, and the consumer must have bought insurance ahead of time to get the smartphone replaced.<sup>62</sup>

#### B. AUSTRALIA’S REGISTRY PROGRAM HAS PRODUCED RELATIVE SUCCESS

Australia implemented an IMEI blocking program a decade ago and has deemed it successful at deterring theft with “net blocking activity [falling] by nearly 25% from 169,000 mobile handsets blocked to 127,750 [from 2004-2011] . . . against the background of an 80% increase in the number of mobile services in operation over this period.”<sup>63</sup> The IMEI is an integral phone “fingerprint” that is transmitted whenever the phone is used. Supporters of an IMEI system claim that it may prove

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<http://appleinsider.com/articles/13/04/01/apple-govt-rep-says-next-two-iphones-were-designed-under-steve-jobs>.

<sup>60</sup> See e.g., AT&T, *Replace your lost or stolen device and suspend service*, [http://www.att.com/esupport/article.jsp?sid=52993&cv=820&\\_requestid=1370759#fbid=COrgqYlcbAL](http://www.att.com/esupport/article.jsp?sid=52993&cv=820&_requestid=1370759#fbid=COrgqYlcbAL).

<sup>61</sup> *Supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> Australian Mobile Telecommunications Association, *Australian Anti-Theft Mobile Phone Technology Highlighted on U.S. Television* (accessed May 21, 2014),

<http://www.amta.org.au/articles/Australian.anti-theft.mobile.phone.technology.highlighted.on.US.television> (additionally noting that “[t]he net blocking figures are derived from subtracting unblocking requests (if the handset is subsequently found and returned to its legal owner) from blocking requests”).

more failsafe than mandatory kill switches. Speaking with American media, Randal Markey of the Australian Mobile Telecommunications Association highlighted the ease of implementing and operating a shared database, which just requires collaboration amongst carriers, and the relative difficulty for unsophisticated thieves to wipe the IMEI number.<sup>64</sup>

### C. PROBLEMS WITH A REGISTRY SOLUTION

However, there are a number of problems plaguing voluntary carrier registries. Many consumers do not know about them and do not report stolen phones. Many stores or fly-by-night operations “will jailbreak a stolen phone ‘no questions asked,’ and thieves can then re-activate the smartphone with a smaller carrier that is not participating in the registry.”<sup>65</sup> Carrier registries may thus simply encourage more black market workarounds. Moreover, the registries mainly apply in the U.S. and Europe and could encourage thieves to ship stolen phones to other areas, where they are more valuable because of export restrictions and tariffs. Additionally, any projected effect of IMEI blocking on theft depends on the assumption that thieves require cell service at all, not just in the registry-covered areas like the U.S. and Europe. Deterrence of an IMEI system may fail to prevent thieves who simply wish to profit off of hardware resales, user data mining, or use of other smartphone functions (digital music, camera, etc.). A hack-proof mechanism to track and shut down stolen devices anywhere in the world, regardless of which carrier is used and without burdening the consumer with the responsibility of purchasing and downloading apps (or remembering the

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<sup>64</sup> C.W. Nevius, *An Easy Way to Curb Smart Phone Thieves*, S.F. GATE (Dec. 3, 2011), <http://www.sfgate.com/bayarea/nevius/article/An-easy-way-to-curb-smart-phone-thieves-2344797.php>.

<sup>65</sup> Josh Harkinson, *For Apple and the Phone Companies, "All a Theft Means Is Another Sale,"* MOTHER JONES (Mar. 18, 2013 8:58 AM), <http://www.motherjones.com/mojo/2013/03/stolen-iphone-theft-imsi> (describing San Francisco District Attorney George Gascón’s views on mobile device makers and carriers doing little to fix the problem).

smartphone's 15-digit IMEI number), would likely be a stronger deterrent to smartphone theft.<sup>66</sup>

#### D. MOBILE DATA MANAGEMENT

Growing employee demand for bringing their personal smartphones to work has driven security-minded employers to use Mobile Data Management (MDM) services provided by third-party vendors. MDM provides increased security for both the devices and the enterprise they connect to by controlling and protecting the data and configuration settings for all mobile devices in the network.<sup>67</sup> MDM solutions can control the apps installed or available on an employee's personal smartphone and disable the camera when on company premises. In addition, MDM software can lock and wipe a lost or stolen smartphone, display a message on its screen, and cause it to emit a high-volume sound. Other options include a wireless or Bluetooth tether that ties a smartphone to a key fob and locks or wipes the smartphone if it is separated from the key fob by a maximum specified distance.<sup>68</sup> However, MDM solutions do not prevent theft; they merely secure data in the event of theft.

#### VI. THE MANDATORY KILL SWITCH SOLUTION'S RELATIVE EFFECTIVENESS AT DETERRING THEFT

In theory, implementing a default kill switch in every smartphone is seen as the ideal deterrent to theft because it would decrease the expected value a thief gets from stealing while presenting fewer points of confusion to consumers and fewer available black market workarounds to thieves, fly-by-night operations, or crime syndicates. However, even assuming that a mandatory switch could be implemented

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<sup>66</sup> *Id.* (quoting Kevin Mahaffey, Chief Technology Officer, Lookout (a maker of anti-theft smartphone apps), "That seems like something that is reachable[]").

<sup>67</sup> *BYOD Requires Mobile Device Management*, INFORMATIONWEEK (May 5, 2011, 4:25 PM), <http://www.informationweek.com/mobile/byod-requires-mobile-device-management/d/d-id/1097576?>

<sup>68</sup> DEBORAH MORLEY, CHARLES PARKER & JANET LAVINE, UNDERSTANDING COMPUTERS : TODAY AND TOMORROW 597 (2004).

without technical difficulties or hacking susceptibility, it may fail to deter thieves for a number of reasons. At the same time, mandating kill switches may help correct, for consumer security, apathy that indirectly encourages theft. Without more information about theft incentives and characteristics, the effects of a kill switch cannot be predicted for certain.

A. THE MANDATORY KILL SWITCH SOLUTION REQUIRES  
MANY ASSUMPTIONS AND MAY MISINTERPRET  
THIEVING BEHAVIOR

The premise that putting kill switches in every phone will stop thieves from stealing phones relies upon a number of assumptions, including that: (1) thieves specifically target phones; (2) thieves target phones for their operability and will actually learn of kill switches; and (3) thieves cannot benefit from workarounds, such as hacks, which may pop up from time to time. Because of legislative requirements, any kill switch underpinning these assumptions must also be costless to consumers, leading to another constraint on likely effectiveness since more expensive and potentially more effective solutions are foreclosed.

1. THIEVES MAY NOT SPECIFICALLY TARGET PHONES TO  
STEAL

First, the increasing incidence of smartphone theft may belie the conclusion that thieves are specifically seeking to steal smartphones. While smartphone theft nearly doubled last year, most of the growth came from large urban areas.<sup>69</sup> It is entirely possible that spikes in smartphone theft simply reflects the fact that more theft victims carry visible smartphones in their bags

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<sup>69</sup> Samantha Murphy Kelly, *What's the Worst U.S. City for Smartphone Theft?*, Mashable (Nov. 8, 2012),

<http://mashable.com/2012/11/08/smartphone-theft-city/> (noting that the top ten locations for smartphone theft are Philadelphia, Seattle, Oakland, Long Beach, Newark, Detroit, Cleveland, Baltimore, New York, and Boston); *Phone Theft in America*, LOOKOUT MOBILE SECURITY (May 7, 2014),

<https://www.lookout.com/resources/reports/phone-theft-in-america> (noting that 55% of thefts occur in urban areas).

or on their person, or that smartphone owners have become less protective of their phones as they take them all over town.

The former point may have some statistically significant effect, as smartphone ownership has increased from 45% of Americans in 2012 to 58% by the end of 2013.<sup>70</sup> Part of this may also have to do with the fact that phones are getting bigger (and thus more apparent to would-be-thief passersby): global shipments of smartphones with screens over 5 inches more than doubled from 25.6 million in 2012 to 60.4 million in 2013.<sup>71</sup>

The latter point is also somewhat reflected in the available data: according to a recent survey by the mobile security firm Lookout, 44% of phones are stolen because they are left behind in a public setting.<sup>72</sup> Though it may be possible that thieves are purposefully staking out public places like restaurants, clubs, or workplaces (the three most common places for phone theft to occur),<sup>73</sup> much of the rise in theft may simply be attributable to growing owner forgetfulness that comes along with increased smartphone usage in public. The fact that the average victim takes an entire hour to realize a theft<sup>74</sup> probably indicates that most stolen phones are not quickly swiped from right under the owner's nose. More likely, a restaurant or club patron leaves her phone on a table and another patron (or an employee) snatches it after the owner has left. If these circumstances are more likely to occur than specific targeting by thieves, then kill switches may not have their intended deterrent effect since many thieves seem to not calculate the risks of a theft ahead of time.

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<sup>70</sup> *Device Ownership over Time*, PEW RESEARCH INTERNET PROJECT (accessed June 2, 2014), <http://www.pewinternet.org/data-trend/mobile/device-ownership/>.

<sup>71</sup> *Global Shipment of Smartphones with a Screen Size of 5 Inches or Larger*, STATISTA (accessed June 2, 2014), <http://www.statista.com/statistics/253350/shipments-of-smartphones-with-screen-size-5-inches-or-larger/>.

<sup>72</sup> *Phone Theft in America*, LOOKOUT MOBILE SECURITY (May 7, 2014), <https://www.lookout.com/resources/reports/phone-theft-in-america>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

## 2. THIEVES MAY NOT LEARN ABOUT KILL SWITCHES OR EVEN CARE ABOUT STOLEN PHONE OPERABILITY

Even assuming that thieves engage in a risk calculus before attempting a theft, they may ignore the presence of a kill switch because they either do not know it exists or they do not care. It is often so easy to steal a smartphone that a thief may not mind the probability that he will be stuck with a bricked device. Thieves' opportunism not only takes advantage of the fact that "people on phones can be so oblivious to surroundings they are not aware of a potential thief"<sup>75</sup> but also of the 44 % of thefts that occur when phones are left behind in public settings. In these cases, taking a kill-switch-enabled phone presents little risk if the thief avoids getting caught, which most often is independent of the presence of a kill switch. If the phone is disabled, thieves may simply discard it and seek to steal another one.

Thieves also have another option. An inoperative smartphone can still retain some resale value, even if only for parts. Smartphone OS consultants and developers have suggested that components like the camera or the screen could fetch a price making it worthwhile to steal, while a thief could even damage a stolen smartphone and then claim the lower price that gadget recycling sites pay for broken hardware.

Would publicity about the mandatory deployment of kill switches in smartphones create a powerful enough deterrent for thieves? That depends on a number of factors, such as (1) whether thieves would find out about kill switches personally, or through their fences; (2) how long would it take for theft to decrease once kill switches are deployed, which in turns depends on how long older versions of smartphones and OSs remain in use with consumers after the July 1, 2015 deadline; and (3) what thieves are stealing smartphones for.

The first factor above is at the center of a debate between state legislators trying to enact kill switch bills and manufacturers of security systems. While legislators want to publicize the deployment of kill switches to deter theft, security companies such as Absolute (the creator of the LoJack)<sup>76</sup> want unwitting thieves to continue connecting to the internet and

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<sup>75</sup> Pegoraro, *supra* note 32 (internal citations omitted).

<sup>76</sup> Absolute, *supra* note 44.

cellular towers so that the company may track the thieves and gain remote access to stolen smartphones.

The third factor above is related to whether smartphone theft is targeted more at sensitive data than at the hardware itself. While a stolen smartphone may fetch a thief a few hundred dollars, access to financial apps, even for a short period of time, may be far more valuable.

What thieves are targeting ties into kill switch technical design choices as well. A software kill switch could protect a phone from getting wiped and reset, but it would not protect sensitive data encrypted on the smartphone. A hardware kill switch would be more secure, as described in Part V. However, while it would protect encrypted personal data, it could make it possible for thieves to reactivate the phone for resale. “We need to understand what the motivation is in the theft before instilling a solution,” says Greg Kazmierczak, CTO of Wave Systems, a provider of hardware-based encryption technology, “What’s the most valuable component — the hardware or the data you are storing in your device?”<sup>77</sup>

### 3. THIEVES MAY TRUST THE BLACK MARKET TO END-RUN AROUND THE KILL SWITCH

Thieves, even if they learn of and care about the effectiveness of kill switches, may still steal because they have access to workarounds or are willing to wait for them. In Washington, D.C., a spokesman for the Metro transit system, Dan Stessel, pointed out that some stolen smartphones could be resold through buy-back programs like ecoATM kiosks that do not require face-to-face transactions.<sup>78</sup> ecoATM responded with a statement: “Our policy is not to knowingly purchase phones with Find My iPhone activated, and we continue to improve our technology to that end.”<sup>79</sup>

Even if no mechanism for resale is available at the time of theft, thieves may still impute some expected value from the

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<sup>77</sup> Jane Porter, *Is a Mandatory Kill Switch the Solution to Smartphone Theft?*, FORTUNE (May 27, 2014, 7:26 PM), <http://fortune.com/2014/05/27/is-a-mandatory-kill-switch-the-solution-to-smartphone-theft>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*



stolen phone by sitting and waiting for a hack or new distribution stream. This is precisely what happened with the doulCi hack mentioned above in Part V(B), where pictures of groups of newly jailbroken iPhones appeared on social media the day the hack was publicized. The hackers posted server data corroborating claims that “more than 5,700 devices [were hacked] in just five minutes.”<sup>80</sup> Precedents like these encourage thieves that “brickable” phones may still be worth stealing, so long as waiting for a value-adding hack to come along is possible. The assumptions in this section highlight the uncertain effect a kill switch may have at deterring theft, if it even has an effect at all.

## B. WHAT MINIMUM LEVEL OF KILL SWITCH TECHNOLOGY WOULD SUFFICIENTLY DETER THEFT?

As discussed in Part V, a kill switch would be less vulnerable to hacking or jailbreaking, as its level of implementation gets lower. For higher levels of implementation in software, a thief could jailbreak the smartphone (done today for security apps installed on top of the OS), replace the OS, edit the BIOS file, or wipe the IMEI number (listed with increasing levels of difficulty and therefore increasing levels of deterrence to theft). To be more secure, a kill switch should be implemented at a lower level or directly in hardware. However, the lower the level of implementation and more secure the kill switch, the more expensive it will be to design and implement for manufacturers.

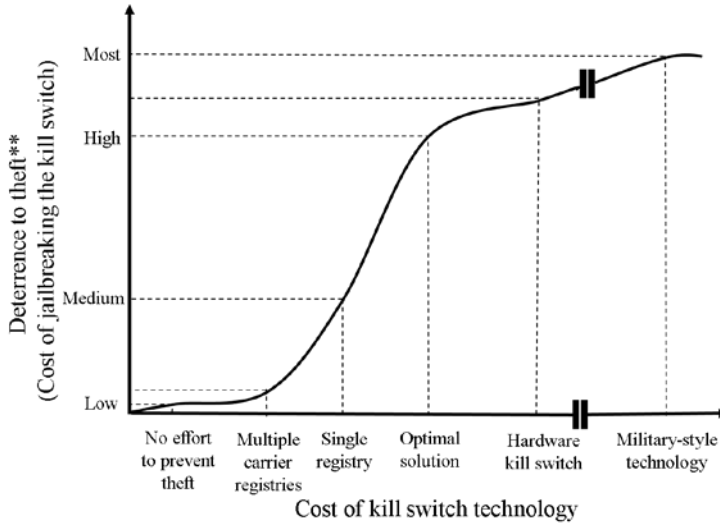
### 1. IN SEARCH OF AN OPTIMAL KILL SWITCH SOLUTION

Designing the best kill switch is an optimization problem: what is the minimum level of kill switch technology needed that will prove enough of a deterrence to a thief? The most expensive military-style solutions may not be needed as long as there is a sufficient deterrence to reduce theft by a desired amount. As with most optimization problems, an optimal solution would depend on the value of the inputs and ensuring the correct inputs have been chosen. It is hard to predict what factors of a kill switch would be optimal. In Figure

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<sup>80</sup> Heath, *supra* note 39.

1, we illustrate an example graphical representation of theft deterrence versus kill switch technology, showing how the cost of a kill switch and the cost of cracking it could lead to an optimal solution.



\*\*Assuming all assumptions in Part VII

*Figure 1.* Illustration of the potential relationship between kill switch technology and levels of theft deterrence.

Making no special effort has little to no theft deterrence. Multiple carrier registries for different carriers and different wireless standards (CDMA, GSM, and LTE) that carriers must only voluntarily consult provides a slightly higher level of deterrence. Using a single, shared carrier registry that carriers may be required to use to block stolen IMEI numbers by law, as in the case of Australia's EMTA, provides an even higher level of theft deterrence. Mandating the most secure (and expensive) military-style solution, such as the Boeing black phone, may provide the maximum possible level of theft deterrence. However, the expense of implementing it may not be commercially feasible: a cheaper hardware implementation alternative may provide nearly as much deterrence at a far-reduced cost. The optimal solution may be a mixed software/hardware implementation at the knee of the curve that provides a high level amount of theft deterrence at a cheaper cost.

## 2. A SIMPLISTIC MODEL OF THEFT BEHAVIOR

An empirical study on theft deterrence versus kill switch technologies that takes into account factors such as the notice of a kill switch to thieves, the amount of implementation cost that industry is willing to absorb if mandated by law, and the cost of jailbreaking each level of kill switch technology would be useful to flesh out what an optimal solution may look like. Finally, a study on whether smartphone thieves are rational actors would be useful. This is because models such as the one illustrated above operate on a number of assumptions that may be incorrect. The following simplified model of thieving behavior demonstrates that—assuming thieves are rational actors—much is unknown about why thefts occur. If a kill switch solution misunderstands the reason for theft, it may prove costly and ineffective. For example, a thief's decision in deciding to steal a smartphone can be represented by the following equation.

$$\text{Steal if: } U[E(\textit{phone})] > U[|E(\textit{caught})|],$$

where  $U$  represents utility,  $E(\textit{phone})$  represents the expected value of the stolen smartphone, and  $E(\textit{caught})$  represents the expected value of getting caught.  $U[E(\textit{phone})]$  may be calculated as follows.

$$\begin{aligned} U[E(\textit{phone})] = & \{[1 - p(\textit{no catch, kill switch}) - p(\textit{caught})] \\ & * E[\textit{profit}(\textit{fence phone})]\} \\ & + \{[p(\textit{no catch, kill switch}) - p(\textit{caught})] \\ & * E[\textit{profit}(\textit{sell parts})]\} + \beta, \end{aligned}$$

where  $\beta$  represents any extraneous positive or negative utility (over the sale value) that a thief gets from successfully stealing and selling a phone. Further,  $U[|E(\textit{caught})|]$  may be calculated as follows.

$$U[|E(\textit{caught})|] = EU(\textit{caught}) = p(\textit{caught}) * |E(\textit{caught})|$$

If we assume a 15% catch rate of thieves and a 75% probability of a thief evading capture and encountering an unbreakable kill switch, we have the following incentive structure:

$$U[E(\text{phone})] = (.1) * E[\text{profit}(\text{fence phone})] + (.6) * E[\text{profit}(\text{sell parts})] + \beta.$$

To continue working through the simplified model, assume a thief can net \$200 profit on average for fencing a jailbroken phone and a \$100 profit on average from either selling the parts on a kill-switch-enabled phone or (if available) paying a hacker to bypass the kill switch. A thief can expect:

$$U[E(\text{phone})] = 80 + \beta;$$

$$\text{Steal if: } 80 + \beta > EU(\text{caught})$$

A rational thief will therefore steal the phone so long as the expected value of stealing a phone (here,  $80 + \beta$ ) exceeds the expected value loss from being caught. Assuming that  $\beta$  is nominal and the probability of being caught remains 15%, a rational thief will steal a phone unless his expected value loss from being caught is greater than roughly \$533:

$$(.15) * E(\text{caught}) \geq 80,$$

$$\text{or Steal unless: } |E(\text{caught})| \geq \approx 533$$

To take it a step further, even assuming that a thief has a 100% chance of either being caught or encountering a kill switch (say,  $p(\text{caught}) = .15$  and  $p(\text{no catch, kill switch}) = .85$ ), the thief may still gain utility from selling the parts or awaiting a hack to bypass the switch:

$$U[E(\text{phone})] = (0) * 200 + (.7) * 100 + \beta = 70 + \beta;$$

$$\text{Steal if: } 70 + \beta > EU(\text{caught});$$

$$(.15) * E(\text{caught}) \geq 70,$$

$$\text{or Steal unless: } |E(\text{caught})| \geq \approx 467$$

Thus, a rational thief who fully comprehends the existence and effect of a kill switch ubiquitous on all phones could still decide to steal a phone, if only to make a profit off of selling hardware or data on the black market.

Clearly, this exercise does not purport to represent the reality of thieving behavior, but rather to show how difficult it is to understand the rationale behind stealing a phone. An endless number of additional assumptions can be introduced to the model (such as a negative effect on utility when encountering a kill-switch-enabled phone to represent confusion), and the model still remains a gross oversimplification of reality. The core assumption that thieves are rational actors is also incredibly dubious. Most phone thieves probably won't bother to calculate a detailed incentives equation like the one above, and thus they may not respond well to changing incentives (like the introduction of kill switches).

### C. COULD VIGILANTISM HURT THE KILL SWITCH'S SAFETY OBJECTIVE?

The stated objective of both the SOS initiative and the various kill switch bills in state legislatures is to increase consumer safety by preventing (violent) theft. However, only 11% of smartphone theft involves a robber taking a smartphone from a person.<sup>81</sup> Moreover, 68% of theft victims reported a willingness to resort to vigilantism to recover their smartphones.<sup>82</sup> New apps such as Find My iPhone offer GPS tracking capabilities for those desperate to recover their smartphones, stirring worries among law enforcement officials that people are putting themselves and others in danger.<sup>83</sup> "Some have been successful," said George Gascón, the San Francisco district attorney and a former police chief, "others have gotten hurt."<sup>84</sup>

Pursuing a thief can lead to violence, especially when people arm themselves – hammers are popular – while hunting for stolen smartphones. A New Jersey man was arrested after

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<sup>81</sup> LOOKOUT, *supra* note 5.

<sup>82</sup> *Id.*

<sup>83</sup> Ian Lovett, *When Hitting 'Find My iPhone' Takes You to a Thief's Doorstep*, N.Y. TIMES (May 3, 2014), available at <http://www.nytimes.com/2014/05/04/us/when-hitting-find-my-iphone-takes-you-to-a-thiefs-doorstep.html>.

<sup>84</sup> *Id.*

he tracked his stolen smartphone and ended up attacking the wrong man, mistaking him for the thief.<sup>85</sup>

A kill switch could lead to increased violence in three ways. First, the way in which it is implemented could make it easier to track a stolen smartphone and take the law into one's own hands. Second, a thief who knows that an owner can brick a stolen smartphone may violently attack the owner during the robbery to prevent the owner from recovering and "bricking" the stolen smartphone too soon. Third, if the "bricked" smartphone displays the owner's address, as some security apps and MDM solutions do, that could invite retribution from a frustrated thief.<sup>86</sup> Further investigation of whether a kill switch implementation would increase vigilantism and violence above the level already occurring with apps such as Find My iPhone is critical before defining a kill switch standard and settling on a particular implementation.

However, vigilantism is also fueled by the dismissive responses that victims of theft receive from manufacturers and service carriers. For example, a victim who tracked his stolen smartphone to a particular house and called AT&T was given two options by the carrier: either deactivate the phone and buy a new one, or find a cop willing to subpoena AT&T for information, file a lengthy police report, and go through a long bureaucratic process.<sup>87</sup> Manufacturers and carriers have little incentive to help a victim recover a device because the manufacturer profits by hawking a replacement phone; and the carrier profits by locking the crime victim into a new contract, then opening an account with whomever ends up with the stolen phone.<sup>88</sup> Carriers even profit from the specter of phone theft, by selling expensive insurance policies to protect their users. A mandatory kill switch could reverse this trend and potentially reverse the need for vigilantism by turning stolen smartphones worthless or promoting their recovery.

#### D. EXEMPT DEVICES COULD REDUCE THEFT DETERRENCE

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<sup>85</sup> *Id.*

<sup>86</sup> MORLEY, *supra* note 68.

<sup>87</sup> Swan, *supra* note 17.

<sup>88</sup> *Id.*

As we describe in Part V, the millions of older versions of smartphones still in use by the deployment deadline would defeat the theft deterrence objective of the kill switch legislation by around two years. In addition, the presence of other exempt devices would also drag the level of deterrence downward. For example, the California Senate Energy, Utilities, and Communication Committee listed the following exempt devices that would not be required to have a kill switch.

All devices that fall within the exception for resale and pawnbrokers; All devices sold out of state and brought into California; All devices currently in the market, which customers typically replace every 18 to 24 months; All devices provided “free” as part of a promotion or a wireless lifeline plan; and All devices that, even if rendered inoperable by a kill switch, may have value for parts.<sup>89</sup>

Such devices would continue to have value for resale on the black market. Moreover, the potentially large number of such devices in use would incentivize thieves to take their chances with a kill switch and continue with smartphone theft.

#### E. The Power of Default

The various pieces of legislation mandating a kill switch for smartphones have provisions stating that each smartphone sold must have the kill switch enabled but that consumers should have the ability to disable the kill switch upon purchase. On the other hand, the CTIA and third-party security app vendors such as Absolute would prefer that any kill switch be deployed on an opt-in basis, with consumers choosing whether to opt in to the program. While an opt-in program puts consumer choice front and center in deciding how a kill switch

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<sup>89</sup> California Senate, Energy, Utilities and Communications Committee, March 24, 2014, [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB962&search\\_keywords](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB962&search_keywords) (click Bill Analysis tab, then click the link titled “03/28/14 – Senate, Utilities And Communications”).

would be deployed, the choice of whether a kill switch program is opt-in or opt-out will have a significant impact of whether kill switches will be adopted by the majority of smartphone owners.

The choice of the default position is based on three assumptions from behavioral economics. First, more consumers stay with the default than would choose to do so if forced to choose.<sup>90</sup> Second, only consumers who prefer the opt-out choice will opt out. And third, where carriers oppose the default position, they will be forced to explain it to smartphone owners, resulting in well-informed decisions by consumers. However, Professor Willis asserts, in the privacy context, that these assumptions are unlikely to hold.

The default position, such as an opt-in kill switch, favored by companies is often surrounded by a powerful campaign to keep consumers there, but a default position set contrary to company interests can be met with an equally powerful campaign to drive consumers out.<sup>91</sup> Therefore, companies can either bolster the mechanisms behind the inertia that leads consumers to stick with defaults or they can weaken them to induce consumers to opt out. Rather than forcing companies to facilitate consumer exercise of informed choice, many defaults leave companies with opportunities to play on consumer biases or confuse consumers into sticking with or opting out of the default.<sup>92</sup> However, to really deter theft, smartphones will require near-100 % adoption, such that thieves stop taking the chance that a given smartphone will have the kill switch disabled.

#### F. TRACKING LOCAL SMARTPHONE SALES AND INCREASED PENALTIES FOR IMEI WIPING

In 2013, New York State Senate Co-Leader Jeffrey Klein and Assemblyman Jeff Dinowitz, Chair of the Assembly's Consumer Affairs and Protection Committee, introduced new legislation to require smartphone sellers to prove that they are

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<sup>90</sup> Lauren E. Willis, *Why Not Privacy By Default?*, 29 BERKELEY TECH. L.J. 61 (forthcoming 2014).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*



the rightful owners of the phones they sell.<sup>93</sup> The objective of the legislation is to curtail the local black market for stolen smartphones. Non-compliant sellers face the possibility of steep fines or jail time.<sup>94</sup> The state lawmakers hope that this legislation would stop stolen smartphones being sold at neighborhood stores, laundromats, and flea market stands.

The legislation would require smartphone sellers to provide detailed receipts for every phone sold, including the IMEI number. It is hoped that these records could provide additional information on how and where stolen phones move in the marketplace. However, Arianna Schweber of Absolute Software claims that although the bill could make the sale of stolen mobile phones locally more difficult, it will not diminish the demand for stolen devices.<sup>95</sup> This is because the majority of stolen smartphones are now being shipped abroad. Therefore, local legislation will likely be inadequate to address the global issue.

Also in 2013, U.S. Senator Charles E. Schumer reintroduced legislation that would make it a federal crime to wipe an IMEI number by imposing a five-year criminal penalty.<sup>96</sup> Senator Schumer noted that without a criminal penalty for tampering with IMEI numbers, thieves could simply alter the IMEI number to evade carrier registries and reactivate a smartphone phone. Because the bill has the full support of the CTIA and the FCC, it could prevent reactivation of stolen smartphones. However, it may have little deterrence value if smartphones are primarily being stolen for an international black market.

## VII. ADDITIONAL CONCERNS AND PRACTICAL DIFFICULTIES OF A MANDATORY KILL SWITCH

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<sup>93</sup> S. 5976, 2013 Leg., Reg. Sess. (N.Y. 2013).

<sup>94</sup> See, e.g., CAL. BUS. & PROF. CODE § 22761(c) (West 2014) (“The knowing retail sale of a smartphone in California . . . may be subject to a civil penalty”).

<sup>95</sup> Arianna Schweber, *New York Legislators Propose Law to Reduce Black Market for Mobile Devices*, INTELLIGENCE (Oct. 21, 2013), <http://theft319.rssing.com/browser.php?indx=16105444&item=24>.

<sup>96</sup> S. 1070, 112th Cong. (2013).

A government-mandated kill switch, as opposed to allowing individuals to make their own security choices, raises several additional concerns and risks of misuse and surveillance.

#### A. GOVERNMENT SURVEILLANCE AND CONTROL

Although Internet companies and government agencies already track bulk and targeted data on the Internet, individuals today have the ability to erase and block tracking cookies, prevent the transmission of specified local data, and even use encryption technology, given enough technical savvy.<sup>97</sup> However, mandatory phone kill switches have the potential to significantly increase government surveillance and control over speech and political behavior. On August 11, 2011, the Bay Area Rapid Transit system (BART) shut down cellphone service to four stations in San Francisco in response to a planned protest, because in July 2011 protesters disrupted BART service in response to the fatal shooting of a passenger by BART police.<sup>98</sup> BART first approached carriers directly and asked them to turn off service. Later, a BART officer asserted that “BART staff or contractors shut down power to the nodes and alerted the cell carriers” after the fact.<sup>99</sup> A smartphone kill switch that the government can control by exerting authority over carriers could even more greatly empower the government to squelch political protests by disrupting smartphone service and making organization and coordination of citizen movements or protests difficult.

The Electronic Frontier Foundation (EFF) compared BART’s actions with those of former President Hosni Mubarak of Egypt who ordered the shutdown of cellphone service in

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<sup>97</sup> Thomas Claburn, *Kill Switches: Phones Just the Start*, INFORMATIONWEEK (Feb. 19, 2014, 9:06 AM), <http://www.informationweek.com/mobile/mobile-devices/kill-switches-phones-just-the-start/d/d-id/1113887>.

<sup>98</sup> Eva Galperin, *BART Pulls a Mubarak in San Francisco*, ELECTRONIC FRONTIER FOUNDATION (Aug. 12, 2011), <https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco>.

<sup>99</sup> *Id.* (quoting James Allison, deputy chief communications officer for BART).

Tahrir Square in response to peaceful, democratic protests in 2011.<sup>100</sup> Moreover, British Prime Minister David Cameron is considering new, broad censorship powers over social networks, such as Facebook and Twitter and mobile communication in the UK.<sup>101</sup> The ability to peremptorily control smartphone kill switches could have grave concerns for free speech and democracy. However, BART was able to shut down cellphones without a kill switch. Therefore, whether kill switches really represent a broad enlargement of the government's power requires information on how much a kill switch would add to the government's current ability to turn off smartphone communications. The advantage of a kill switch that the government has the ability to control is that it could prevent theft of trade secrets and national secrets from stolen smartphones. Further study would be welcome on how this would work with or without the consent of the smartphone's owner.

## B. INSECURE NON-OWNER CONTROL

As the CTIA points out, even if a kill switch is technologically feasible, it could have serious risks. If a mandatory kill switch is created, every smartphone would have the capability. Depending on the implementation, the "kill" message could be known to every operator and could not be kept secret.<sup>102</sup> A private party with malicious intent could therefore replicate the "kill" message, such as a text or other message sent to the smartphone to disable it. In another scenario, if "killing" a smartphone requires a call to the carrier, that call could be placed by an identity theft who does not possess the smartphone or an abusive spouse who actually owns the family account to which his wife's smartphone is tied. Where a smartphone is disabled by the malicious use of a "kill switch," the safety of the user may be jeopardized, as in the

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<sup>100</sup> *Id.*

<sup>101</sup> James Kirkup, *UK Riots: Tougher Powers Could Curb Twitter*, THE TELEGRAPH (Aug. 12, 2011, 8:20 AM), <http://www.telegraph.co.uk/news/uknews/crime/8697142/UK-riots-tougher-powers-could-curb-Twitter.html>.

<sup>102</sup> CTIA, *Why a "Kill Switch" Isn't the Answer*, [http://files.ctia.org/pdf/Why\\_a\\_Kill\\_Switch\\_Isn\\_t\\_the\\_Answer.pdf](http://files.ctia.org/pdf/Why_a_Kill_Switch_Isn_t_the_Answer.pdf)

abusive spouse scenario, because the wife will be unable to make emergency calls.

By sending multiple messages, such as by incrementing the telephone number or IMEI number, groups of smartphones could be disabled. This could be used to disable entire groups of customers, such as the Department of Defense, the Department of Homeland Security or emergency services and law enforcement.<sup>103</sup> If the kill switch is a permanent switch, a smartphone could be disabled forever. The risk of denial of service could be far too large. Therefore, the carrier community maintains that control of operation (and denial of service) be embedded in the network and not at the smartphone-level.<sup>104</sup>

### C. FARADAY BAG WORKAROUNDS

Driven by high prices for non-contract smartphones overseas, the underground trade of stolen smartphones has now become a global enterprise that connects violent street thieves in American cities with buyers as far away as Hong Kong, according to law enforcement and the wireless industry. Jerry Deaven, an agent with the Department of Homeland Security, which is tasked with preventing the trafficking of stolen goods, told The Huffington Post that traffickers are responsible for “a tremendous amount of phones being shipped out of the country,” adding that “some organizations are shipping a couple million dollars worth of phones per month.”<sup>105</sup> Some stolen smartphones are placed into Faraday Bags immediately after being stolen to block GPS tracking. Further study is required on whether a Faraday Bag could be used to circumvent a kill switch, and, if so, whether a smartphone stolen in the U.S. could then be activated abroad. How about a stolen smartphone with a “kill switch” taken from

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Gerry Smith, *Inside the Massive Global Black Market for Smartphones*, HUFFINGTON POST (July 13, 2013, 2:56 PM), [http://www.huffingtonpost.com/2013/07/13/smartphone-black-market\\_n\\_3510341.html?utm\\_hp\\_ref=iphone-theft](http://www.huffingtonpost.com/2013/07/13/smartphone-black-market_n_3510341.html?utm_hp_ref=iphone-theft).

California in a Faraday Bag to Arizona or Nevada, states without corresponding kill switch legislation. Ultimately the answers to these questions will help determine whether a kill switch would be a better solution than carrier registries, and, if so, help drive the design of an optimal kill switch.

#### D. MINIMIZING THE BURDEN ON SMARTPHONE OWNERS

Finally, the amount of user effort needed to deal with kill switch systems, including notifying carriers in the event of theft or loss, reversing the data wipe and "un-bricking" a smartphone after recovery, or heading off the kill command in the event a misplaced smartphone is found, should not burden smartphone owners in the same way passwords do. For example, computer users today are required or strongly encouraged to employ different, long, and complicated passwords on each of multiple devices: laptops, tablets, desktops; and multiple accounts: financial websites, health websites, company logins, Google, etc.<sup>106</sup>

The Office of California Attorney General Kamala Harris advises users and businesses on computer security, including using firewalls, anti-virus software, and complex passwords.<sup>107</sup> However, passwords have done little to prevent hacking of sensitive information and cyber-attacks. California businesses and the government have experienced 300 separate data breaches exposing the personal information of more than 20 million customer accounts during the past two years.<sup>108</sup> Complex password requirements therefore simply burden users without actually preventing hacking. Any proposed kill switch technology and carrier response protocols should be

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<sup>106</sup> Chenda Ngak, *The 25 Most Common Passwords of 2013*, CBS NEWS (Jan. 21, 2014, 11:14 AM), <http://www.cbsnews.com/news/the-25-most-common-passwords-of-2013> ("[T]he top three passwords of [2013] are '123456,' 'password' and '12345678'.").

<sup>107</sup> State of California, Office of the Attorney General, *Is Your Computer Secure?*, <http://oag.ca.gov/privacy/facts/online-privacy/computer-secure>.

<sup>108</sup> Don Thompson, *California to Step Up Cybersecurity Efforts After Hundreds of Data Breaches*, SAN JOSE MERCURY NEWS (Feb. 27, 2014, 10:26 AM), [http://www.mercurynews.com/business/ci\\_25240431/california-step-up-cybersecurity-efforts-after-hundreds-data](http://www.mercurynews.com/business/ci_25240431/california-step-up-cybersecurity-efforts-after-hundreds-data).

designed to minimize the burden on users while burdening smartphone thieves instead. A study on the lessons the industry or analysts have learned from the failed decades-long password experiment would be useful to prevent repeating this costly mistake on smartphone kill switches.

VIII. EFFECTIVENESS OF STATE LEGISLATIVE APPROACHES:  
PATCHWORK REGULATION IN A NATIONAL /  
INTERNATIONAL MARKETPLACE

The decentralized nature of the mandatory kill switch movement presents a host of concerns for proper implementation of an effective and democratic solution. The practical reality of state-by-state piecemeal legislation is that the bigger, more influential states tend to drive policy. Thus, while Minnesota has passed its kill switch legislation and gained a first mover's advantage, pragmatically the bill only applies to phones sold or purchased new in Minnesota. This is not to say that threats of foreclosing a state market will have no effect on phone providers—risking infringement of the Minnesota bill may encourage all phone manufacturers and carriers to comply with the kill switch mandate. However, patchwork state mandates of kill switches may do little to deter thieves, particularly where there is doubt over where the phone was bought.

The real test of the legislation's viability (and the site of potential legal challenges) however arises in the larger states where more phones are sold. Hence, California and New York are the likely battlegrounds for policy development and industry regulation. Because roughly one-eighth of all Americans live in California, and Apple and Google are based there, the California law may very well produce an immediate national default.<sup>109</sup>

This potential California effect risks legislating national policy at the state level and may very well overstep the ability of other democratically elected leaders to have a say in how kill

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<sup>109</sup> Wagenseil, *supra* note 16. See also Elizabeth Weise, *Google, Microsoft to add "kill switches" to phones*, USA Today (June 20, 2014, 3:11 PM), <http://www.usatoday.com/story/tech/2014/06/20/google-microsoft-kill-switches/11083511/>.

switches should be adopted, if they should at all. The CTIA claims, for instance, that the Minnesota bill creates interstate commerce concerns “because it heavily burdens the national wireless device and service market by dictating operational and technical specifications of mobile devices.”<sup>110</sup> At the same time, coordinating state legislation is potentially challenging, unnecessary, and time-consuming. According to the Secure Our Smartphones initiative, twenty-three state Attorneys General support the proposal, among many other district attorneys and other state political figures.<sup>111</sup> Many of these states whose attorneys general support a mandatory kill switch may simply prefer to conserve political resources and allow other states, like California, to drive the policy. Kill switch opponents, however, will then likely argue that such a proposal has no opportunity to be debated by democratically elected state representatives, who may have valuable input on the matter. In truth, kill switch bills are not passing legislatures easily. There are only five state bills and one federal bill passed or pending, and California’s version was rejected once in the state senate before narrowly passing recently.<sup>112</sup> The federal kill switch bill, which would pose fewer of the risks that accompany state piecemeal legislation, has experienced little movement since being announced in February 2014.

Technological mandates in general are difficult to accomplish successfully by government legislation, much less state-by-state legislation. As the CTIA explains, there is little reason to “limit consumer choice by mandating the use of any solution . . . [because] [a]ny mandated technology standard will quickly become outdated in the fast-moving world of wireless

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<sup>110</sup> Jamie Hastings, Vice President of External & State Affairs, CTIA – The Wireless Association, Testimony in Opposition to Minnesota House File 1952, Minnesota House Commerce and Consumer Protection Finance and Policy Committee, March 19, 2014, <http://www.ctia.org/docs/default-source/Legislative-Activity/ctia-testimony-in-opposition-to-minnesota-house-file-1952-requiring-kill-switches-on-mobile-devices.pdf?sfvrsn=0>.

<sup>111</sup> Secure Our Smartphone Initiative Members, Office of New York Attorney General Eric T. Schneiderman, <http://www.ag.ny.gov/sos/initiative-members>.

<sup>112</sup> Chloe Albanesius, *California State Senate Rejects Smartphone Kill-Switch Bill*, PC MAGAZINE (April 25, 2014, 10:35 AM), <http://www.pcmag.com/article2/0,2817,2457117,00.asp>.

applications and technology.”<sup>113</sup> The private sector’s hesitance to accept government technology mandates is not unreasonable, particularly in a sector of rapid innovation like mobile phones. Politicians, many of whom have little technical comprehension of the issue, are likely not the ideal decision-makers on how technology must be used.

Nonetheless, there is a fitting example of an effective technological mandate on a similar issue as the smartphone kill switch. Car theft laws, passed in the 1980s and 1990s, successfully decreased auto theft by increasing penalties for thieves and mandating implementation of anti-theft vehicle identification numbers on the engine, transmission, and other main body parts (which became illegal to remove).<sup>114</sup> This movement, however, was aided in large part by federal legislation, namely the 1984 Motor Vehicle Theft Law Enforcement Act, which federally implemented the above, and the 1994 Motor Vehicle Theft Prevention Act, which mandated federal cooperation with states to create an opt-in program whereby volunteers would consent to law enforcement stopping the car if it were operated in certain conditions (such as late at night).<sup>115</sup> Further, the anti-auto-theft movement had federal oversight of exported cars to check for owner vehicle identification numbers.<sup>116</sup>

Clearly, no such solution is viable for smartphones, which are smaller and harder to track. While no authoritative data exists on this point, the international black market certainly provides an integral boon to smartphone theft. Especially in countries where smartphones are not widely imported, stolen phones can sell for incredibly high amounts that only reinforce the motive to internationally traffic stolen phones. In March 2013, California charged two men with operating a stolen phone trafficking ring to Hong Kong from which they made over \$4 million in a year.<sup>117</sup> Another man

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<sup>113</sup> Jamie Hastings, *supra* note 110.

<sup>114</sup> National Auto Auction Association, *History of Auto Theft Legislation: Federal Legislation*, (accessed June 5, 2014),

[http://www.naaa.com/NAAA\\_Legislative/history\\_auto-theft.html](http://www.naaa.com/NAAA_Legislative/history_auto-theft.html).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (under the 1984 Motor Vehicle Theft Law Enforcement Act).

<sup>117</sup> Gerry Smith, *Inside the Massive Global Black Market for Smartphones*, Huffington Post (July 13, 2013, 2:56 PM),



being charged reportedly bought iPhones from people at coffee shops for \$250 to \$350 and trafficked them on his person to Vietnam, eleven at a time, making trips as often as he could, apparently making enough profit to justify the trips.<sup>118</sup> Anecdotes such as these highlight the limits with even a comprehensive federal regulation aimed at deterring smartphone theft. A patchwork approach of kill switch mandates risks exploitation by both inter-state limitations and international black market workarounds. Mandatory kill switches, regardless of how effective they may seem, face many roadblocks to attaining their stated goal of deterring theft.

## IX. CONCLUSIONS AND A CONCISE LIST OF OPEN QUESTIONS

As we have shown in this paper, the stakeholders in the kill switch debate, including legislators, smartphone manufacturers, and carriers are each operating on the basis of a large number of assumptions and unknowns, including the following:

- What an optimal technical implementation of a kill switch at no additional cost to the consumer would be, including whether it should be implemented in software, hardware, or an automated form of the present manual IMEI blocking registries;
- What role MDM solutions and carrier registries will play in or out of an environment in which kill switches are deployed;
- Whether the large increase in smartphone theft is because thieves are specially targeting smartphones or whether smartphone theft is only incidental or unrelated to typical robberies;
- Whether an effective kill switch will actually deter theft or only incentivize them to ship more stolen smartphones to the international black market; and
- Whether a kill switch presents concerns, such as government surveillance and malicious activation or circumvention.

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[http://www.huffingtonpost.com/2013/07/13/smartphone-black-market\\_n\\_3510341.html](http://www.huffingtonpost.com/2013/07/13/smartphone-black-market_n_3510341.html).

<sup>118</sup> *Id.*

In addition to the assumptions and unknowns above, there are significant practical concerns about actually implementing a kill switch at no cost to the consumer across varying industry smartphone platforms and operating systems by the legislation's deadline of July 1, 2015. A necessary first step to such an implementation would be for the wireless industry to properly define kill switch standards so each manufacturer could conform their hardware, operating systems, and design platform accordingly. The short runway presented by the state bills allows very little time for such standard-setting activity. Requiring a solution too soon may not consider the balance between (1) the nature, urgency and magnitude of the problem, and (2) the cost, harm to innovation, and burden on the wireless industry of any mandated change. For example, in discussing the possibility of adding a theft-resistant "kill switch" to future iPhone models, Apple noted that the next two generations of the iPhone have already been developed, and were designed before Steve Jobs's death in late 2011.<sup>119</sup> Therefore, the challenges of effectively implementing a technological mandate too quickly could be a significant burden on smartphone manufacturers to modify their planned pipeline of designs.

Developing sound policy to deter smartphone theft would therefore benefit from more in-depth investigation of smartphone theft psychology, the mechanics of the black market for smartphones, the merits of technological solutions, and how to most effectively implement an overall solution. The time for such investigation is now, as the landmark California legislation's mandate goes into effect on July 1, 2015.

#### APPENDIX: SELECTED TEXT OF LEGISLATIVE PROPOSALS

There are four state bills and one federal bill demanding mandatory kill switches: California S.B. 962; Minnesota H.B. 1952; Illinois S.B. 3539; New York A.B. 8984; and the federal Smartphone Theft Prevention Act, H.R. 4065. Minnesota's bill was signed into law on May 14, 2014, while California's bill

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<sup>119</sup> Daniel E. Dilger, *Apple Gov't Rep Says Next Two iPhones Were Designed Under Steve Jobs*, APPLEINSIDER (Apr. 1, 2013, 12:03 PM), <http://appleinsider.com/articles/13/04/01/apple-govt-rep-says-next-two-iphones-were-designed-under-steve-jobs>.

passed the state senate on May 8, 2014 and became law on August 25, 2014. What follows is a brief description of key text from the bills.

California legislation S.B. 962 applies to smartphones manufactured and sold in California on or after July 1, 2015. It requires these smartphones to “[i]nclude a technological solution . . . [that] can render the essential features of the smartphone inoperable to an unauthorized user” (emphasis added). This technological solution “may consist of software, hardware, or a combination of both software and hardware.” Here are some selected quotes from the bill, with underlines of key phrases:

- “The technological solution should be able to withstand a hard reset or operating system downgrade, come preequipped, and the default setting of the solution shall be to prompt the consumer to enable the solution during the initial device setup.”
- “‘Essential features’ of a smartphone are the ability to use the device for voice communications, text messaging, and browse the Internet, including the ability to access and use mobile software applications.”
- “The technological solution shall be reversible, so that if the rightful owner obtains possession of the device after the essential features of the smartphone have been rendered inoperable, the operation of those essential features can be restored by an authorized user.”
- “An authorized user of a smartphone may affirmatively elect to disable or opt-out of enabling the technological solution at any time.”
- “In order to be effective, antitheft technological solutions need to be ubiquitous, as thieves cannot distinguish between those smartphones that have the solutions enabled and those that do not.”
- “The Legislature finds and declares that the enactment of a uniform policy to deter thefts of smartphones and to protect the privacy of smartphone users if their smartphones are

involuntarily acquired by others is a matter of statewide concern."

Minnesota H.B. 1952, now passed as law, becomes effective on July 1, 2015 on all smartphones sold or purchased new in Minnesota. It provides that these smartphones "must be equipped with technology designed to render the device inoperable in the event of theft or loss." Here are some selected quotes from the bill:

- "Smart phone does not include an electronic reader, tablet, or other similar device not primarily intended for two-way voice communication."
- "[Must] be reversible in the event of the smart phone's recovery by its owner"
- "Lock all of the smart phone's user data, and ensure that it is only accessible to the user or a law enforcement officer subject to a valid search warrant"
- "Render the smart phone core functionality inoperable on any wireless telecommunications service provider's network globally"
- "Prevent the smart phone from being reactivated without a passcode or other similar authorization, even if the device is reprogrammed, is turned off and subsequently turned back on, has its network connectivity disabled and subsequently re-enabled, or has its SIM card removed"

New York's proposed A.B. 8984 (which did not make it out of the legislative committee) would be applicable to any advanced mobile communications device sold in New York on or after July 1, 2015, with "advanced mobile communications device" defined very similarly to California's definition with the exception of including tablets. A.B. 8984's description of the kill switch functionality is also highly similar to California's, and its legislative intent tracks the rationale of California as well. The following two quotes are also of note:

- "It is the further intent of the legislature to prohibit any term or condition in a service contract between a customer and a commercial mobile radio service provider that requires or encourages the customer to

disable the technological solution that renders the customer's smartphone or other advanced communications device useless if stolen."

- "The rightful owner of an advanced mobile communications device may affirmatively elect to disable the technological solution after sale. However, the physical acts necessary to disable the technological solution may only be performed by the end-use consumer or a person specifically selected by the end-use consumer to disable the technological solution and shall not be physically performed by any retail seller of the advanced mobile communications device."

Illinois proposed S.B. 3539 (which did not make it out of the legislative committee) would apply immediately upon passage to any smartphones manufactured and sold in Illinois. S.B. 3539 is similar to the other legislation, but uniquely would require all violating providers to insure the phones at no cost to the consumer, rather than levying a per-phone monetary penalty. The following quotes are of note:

- "'Smartphone' means a cellular phone that is built on a mobile operating system and possesses advanced computing capability. Features a smart phone may possess include, but are not limited to, built-in applications, Internet access, digital voice service, text messaging, e-mail, and Internet browsing."
- "[P]ermanently remove all saved data on the device"
- "[R]ender the smart phone completely inoperable on any wireless telephone service provider's network, including a wireless telephone service provider's global network"
- "[P]revent the smart phone from being reactivated or reprogrammed without a password or other similar authorization"
- "[D]isable the device even if it is turned off or the SIM card or other data storage medium is removed"
- "[B]e reversible if the device is recovered by its owner."

The federal proposed Smartphone Theft Prevention Act, H.R. 4065, would have applied beginning January 1, 2015 on any mobile device manufactured in the U.S. or imported for sale to the public in the U.S. (it did not make it out of legislative committee). It would have covered any “mobile device” [which] means a personal electronic device on which commercial mobile service or commercial mobile data service is provided” and included an exemption for any technology that “accomplishes the functional equivalent of the function” defined in the bill as being able to remotely and costlessly:

- “Delete or render inaccessible from the device all information relating to the account holder that has been placed on the device”
- “Render the device inoperable on the network of any provider of commercial mobile service or commercial mobile data service globally, even if the device is turned off or has the data storage medium removed”
- “Prevent the device from being reactivated or reprogrammed without a passcode or similar authorization after the device has been rendered inoperable or subject to an unauthorized factory reset”
- “[R]everse any action . . . if the device is recovered by the account holder.”

In response to these pieces of legislation, the CTIA has produced its own voluntary opt-in commitment for carriers and manufacturers. The main provisions are as follows:

- Remote wipe the authorized user’s data that is on the smartphone in the event it is lost or stolen.
- Render the smartphone inoperable to an unauthorized user (e.g., locking the smartphone so it cannot be used without a password or PIN), except in accordance with FCC rules for 911 emergency communications, and if available, emergency numbers programmed by the authorized user (e.g., “phone home”).

- Prevent reactivation without authorized user's permission (including unauthorized factory reset attempts) to the extent technologically feasible
- Reverse the inoperability if the smartphone is recovered by the authorized user and restore user data on the smartphone to the extent feasible (e.g., restored from the cloud).

# BITCOIN: THE CONFLICTING CURRENCY

*SEAN GREENWALT, B.A.*

## INTRODUCTION

Bitcoins are a new and successful form of virtual currency or digital money. A bitcoin is an electronic item of value that can be used as a medium for exchange of goods and services and even conversion to real currency backed by recognized national governments. Like all new conceptions that break traditional boundaries, bitcoins or virtual currencies are still misunderstood from a legal perspective. Currently, no federal legislation has been created with respect to virtual currencies, and regulatory bodies such as the Internal Revenue Service (“IRS”), the U.S. Department of Treasury and Financial Crime Enforcement Network (“FinCEN”), and the U.S. Securities and Exchange Commission (“SEC”) have all been left to interpret existing law against the new monetary medium. Meanwhile, federal courts have only occasionally ruled on the legal status of bitcoins themselves, but at all times found that the virtual currency should be treated as a form of online money. While the federal court rulings are still in infancy, they may pose complications for certain federal regulatory bodies that wish for the bitcoin currency to be legally treated as property such as the IRS.

## PROSPECTUS

This note will break down what bitcoins are and how the federal government is currently classifying and treating them, before moving towards analyzing how bitcoins will be classified in the future once full harmony is reached between all the branches of government. The note will: analyze the main federal court cases (there are only three); explain how the federal government has reached the



classification of bitcoin as money before applying its significance to IRS, Treasury and SEC publications; and look at the inconsistent treatment of bitcoins throughout the government. The note will go on to analyze the IRS and other regulatory bodies and their treatment of bitcoins as either property or at least “not currency,” and whether or not it matters that the federal courts, and regulatory bodies are inconsistently treating bitcoins for criminal and tax purposes. Finally, the note will touch on the legislative opinion (or lack thereof) on bitcoins and how current laws are meant to apply to them.

Part I of this note will give the history and origin of bitcoins, and explain where the concept of virtual currency came from. Parts II and III will discuss the inner workings of the bitcoin system and how it survives as a viable currency without a third party facilitator to back its value. Part IV explains the current U.S. government treatment of bitcoins by breaking the topic down into subparts for each government branch: subpart A is the judicial branch, subpart B is the executive branch, subpart C is the legislative branch, and subpart D will showcase state sovereign bitcoin treatment. Part V and VI will analyze the current state of affairs and determine a likely path for the legal future of bitcoins and whether or not the different apparatus’s of the U.S. government have to be in harmony in their respective bitcoin treatment. Finally, the conclusion will consider all the relevant factors discussed within the note in determining the correct current legal standard for bitcoins.

## BITCOINS AND THE AMERICAN DREAM

### I. IN THE BEGINNING THERE WAS BITCOIN

Bitcoins are the first open source digital currency to operate over a peer to peer payment network.<sup>1</sup> Bitcoin is the world’s first decentralized digital payment system.<sup>2</sup> It does

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<sup>1</sup> Bitcoin Project, *Frequently Asked Questions*, <https://bitcoin.org/en/faq> (last visited Oct. 17, 2004).

<sup>2</sup> Jerry Brito & Andrea Castillo, *Bitcoin: A Primer for Policymakers*, Mercatus Center, George Mason University, 3 (2013),

not require a bank or a middleman.<sup>3</sup> Bitcoins have been described as “cash for the internet” by some of the software’s core developers.<sup>4</sup>

Bitcoins stemmed from the idea of “crypto-currency” as coined by one Wei Dai in 1998.<sup>5</sup> The idea was a new form of currency that used encryption to control inflation and transactions, instead of a centralized authority.<sup>6</sup> The bitcoin concept itself and supporting software specifications were first published in 2009 by one Satoshi Nakamoto to a cryptography mailing list.<sup>7</sup> Nakamoto left bitcoin development in 2010, and details of his past and whether or not he was a real person or just a pseudonym have been speculative ever since.<sup>8</sup> However, the bitcoin concept continued to grow and has since been fostered by a group of “core developers.”<sup>9</sup> Bitcoin itself is simply openly shared software that any developer could review or even make their own version of.<sup>10</sup>

Bitcoins are not technically controlled by anyone. While a group of core developers improve and manage the software, the core developers have no power to force bitcoin users to use a completely changed bitcoin software.<sup>11</sup> Bitcoins will only work when there is a consensus of users using the same software version, and therefore all users and developers have a strong motivation to keep the bitcoin system constant.<sup>12</sup>

## II. BITCOIN 101

For the average bitcoin user, the digital currency is simply a computer application that provides a digital

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[http://mercatus.org/sites/default/files/Brito\\_BitcoinPrimer.pdf](http://mercatus.org/sites/default/files/Brito_BitcoinPrimer.pdf)

<sup>3</sup> *Id.*

<sup>4</sup> Bitcoin Project, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Benjamin Wallace, *The Rise and Fall of Bitcoin*, *Wired* (Nov. 23, 2011), [http://www.wired.com/2011/11/mf\\_bitcoin/all/](http://www.wired.com/2011/11/mf_bitcoin/all/).

<sup>9</sup> Bitcoin Project, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

“wallet” and allows for bitcoins (the form and denomination of the digital currency) to be sent and received in an effort to create consideration.<sup>13</sup> The value of bitcoins are not derived from any precious metal or government, but only what people believe they are worth.<sup>14</sup> However, what makes bitcoins special is that they created a solution to a fundamental problem that plagued all past incarnations of virtual currency.

The issue with past decentralized digital currency is that it lacked a trusted third party intermediary.<sup>15</sup> For the majority of transactions over the internet, a service such as PayPal or Visa records the transaction and keeps a record or a “ledger” of the user’s account balance.<sup>16</sup> Without such third-parties to act as ledgers, decentralized digital currencies could easily fall prey to “double-spending”.<sup>17</sup> This means the digital currency could possibly be spent multiple times.<sup>18</sup> The double-spending problem arises from the format of digital currency: if the currency is truly just a digital computer file, what is to stop its circulators from simply copying the file and sending it to multiple destinations?

Bitcoins are the first format of digital currency to solve the problem of double spending.<sup>19</sup> Bitcoins accomplish this feat by creating a public ledger called the “block chain” that records every user’s transaction.<sup>20</sup> All new transactions are checked against the block chain to ensure that previous bitcoins are not being used again by the same user.<sup>21</sup> Each bitcoin transaction is verified by requiring the parties to “sign” their transaction with a key code.<sup>22</sup> Every signature includes two types of key codes: a public key and a private key.<sup>23</sup> The two types of keys are

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<sup>13</sup> Bitcoin Project, *supra* note 1.

<sup>14</sup> Brito & Castillo, *supra* note 2, at 4.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup>*Id.* at 4.

<sup>20</sup> Bitcoin Project, *supra* note 1.

<sup>21</sup> Brito & Castillo, *supra* note 2, at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

used in every signature help prevent fraud and double spending.<sup>24</sup>

Although each user has a public and private key to use as a signature for each transaction, the public keys are not linked to anyone's identity.<sup>25</sup> This helps bitcoin transactions stay anonymous, but also raises concerns of criminal activity. However, the anonymity of bitcoins is only half-fold. Each bitcoin transaction and public key records the user's IP address which can be tracked to them in case of illegal activity, but there is nothing to stop a user from using a proxy server for each transaction to hide their real IP address either.<sup>26</sup> In this regard, bitcoin transactions can be analogized to cash and a form of public receipt. Finally, it is speculated, as the bitcoin currency becomes more adopted, it will become more and more regulated in line with banking and financial regulations, and total anonymity will become much more difficult.<sup>27</sup>

### III. DO STORKS DELIVER BITCOINS?

Since there is no central bank or authority in control of the bitcoin supply, the bitcoin software application creates new bitcoins based off of users who voluntarily verify the "block chain" transactions as discussed earlier.<sup>28</sup> These users that verify the block chain are called "miners" and in exchange for their work they receive new bitcoins or an actual transaction fee.<sup>29</sup>

However, the bitcoin mining process is more complicated than just verifying a signature; transactions can only be verified by using computing power to solve complex math problems.<sup>30</sup> The equations are designed to become more complicated as more bitcoins are mined, and as more bitcoins are mined, transaction fees will replace

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> Bitcoin Project, *supra* note 1.

<sup>30</sup> Brito & Castillo, *supra* note 2, at 7.

bitcoins as compensation for mining.<sup>31</sup> The bitcoin system is designed like a traditional money system based off precious metals or items of value because the number of bitcoins that can ever be mined has been limited to 21 million as part of the software's parameters.<sup>32</sup> This is in opposition to most government monetary structures that operate under fiat conditions where the amount of money in circulation can be continuously created. However, similar to the fiat system is the fact that bitcoin value is only as much as the public ascribes to it.

#### IV. DOES UNCLE SAM KNOW ABOUT THIS?

Unfortunately, there is a dark side to bitcoin use, and things are not as homologous as they could be within the United States Government branches. For the purpose of judicial proceedings, the U.S. District Courts and executive regulatory bodies are split on whether bitcoins qualify as money or property.

##### A. TELL IT TO THE JUDGE

On August 6, 2013, the Eastern District of Texas, in *SEC v. Shavers*, decided whether or not Investments in a Bitcoin Trust were considered securities under federal securities law.<sup>33</sup> It was the first bitcoin definition case heard around the world.

The Defendant was charged by the SEC with operating a Ponzi scheme, where investors invested into his Bitcoin Trust.<sup>34</sup> The Defendant argued that the Bitcoin Trust investments were not securities by simple virtue, that bitcoins are not money.<sup>35</sup> The SEC countered that investments in bitcoins and the Bitcoin Trust are investment contracts, and therefore, qualify as securities.<sup>36</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *SEC v. Shavers*, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, at \*3-4 (E.D. TX. Aug. 6, 2013).

<sup>34</sup> *Id.* at 2-3.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

A “security” is “any note, stock, treasury stock, security future, security-based swap, bond... [or] **investment contract**” (Emphasis added).<sup>37</sup> In pertinent part, an “investment contract” is any contract, scheme, or transaction involving an investment of money.<sup>38</sup>

The Court held that the Bitcoin Trust investment did amount to an investment of money.<sup>39</sup> However, even more importantly, the Court specifically identified bitcoins as a “currency or form of money.”<sup>40</sup> In fashioning its determination of whether or not the Bitcoin Trust investments constituted an investment of money, the Court first notes that “it is clear that bitcoin[s] can be used as money.”<sup>41</sup> Bitcoins can be “used to purchase goods or services, and as [the Defendant] stated, used to pay for living expenses.”<sup>42</sup> While the Court did note that bitcoins are limited to “those places that accept it as currency,” the Court also reasoned that this was not a hindrance because bitcoins can also be exchanged for many strong currencies such as the U.S. Dollar, Euro, and Yen. For these reasons, the Court felt that bitcoins do qualify as a “form of money.”<sup>43</sup>

United States Magistrate Judge Amos Mazzant wrote not only the first opinion by a United States District Court on the issue of whether bitcoins constitute money, but he likely also wrote the strongest opinion to this day in terms of diction on the issue. Judge Mazzant comes right out and calls bitcoins a “currency or a form of money”<sup>44</sup> It is important to note that this opinion was written before an applicable IRS Notice which states bitcoins should be treated as property (at least for tax purpose, but including tax crimes).<sup>45</sup> However, the ruling was decided after the

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<sup>37</sup> 15 U.S.C.S. § 77b (LexisNexis 2016).

<sup>38</sup> *Shavers*, 2013 U.S. Dist. LEXIS 110018, at \*4 (citing *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946)).

<sup>39</sup> *Id.* at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 4-5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 5.

<sup>45</sup> Internal Revenue Service, *I.R.S. Notice 2014-21*, 2 (Mar. 25, 2014), <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

U.S. Department of Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued an official Guidance on March 18, 2013, that stated bitcoins are not a form of currency or legal tender.<sup>46</sup> It’s unclear whether the Defendant in *Shavers* relied upon the FinCEN Guidance or his own logic for his argument. Regardless, Judge Amos makes no reference to persuasive or binding authority on either side of the issue.

What stands out about the *Shavers* ruling is the fact that it rests on practicality and common knowledge. Since there is limited federal precedent on the issue, instead of looking to outside sources and persuasive authority, Judge Mazzant simply states the attributes of bitcoins in a very *Res Ipsa Loquiter* fashion and comes to the conclusion that bitcoins are indeed money. In later federal cases, a common theme will be using common sense and common definitions of money, while ignoring technical definitions of electronic software or property.

Summary judgment was ruled in favor of the SEC and against *Shavers* on September 18, 2014.<sup>47</sup> No appeal had been filed against the determination of bitcoins as money ruling, which was a central jurisdiction issue to the case, as of March 3, 2015.

On July 9, 2014, the Southern District of New York, in *United States v. Ulbricht*, involved a Defendant charged with money laundering conspiracies that involved the operation of a website known as the Silk Road, which acted as an online marketplace for illicit goods and services.<sup>48</sup>

The Defendant was charged under 18 U.S.C § 1956(h) with participation in a money laundering conspiracy.<sup>49</sup> The contested element of money laundering conspiracy by the Defendant involved:

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<sup>46</sup> *FinCEN Guid.* FIN-2013-G001, 1 (Mar. 18, 2013), [http://fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

<sup>47</sup> *SEC v. Shavers*, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 130781, at \*38. (E.D. Tex. Sep. 18, 2014).

<sup>48</sup> *United States v. Ulbricht*, 2014 U.S. Dist. LEXIS 93093, at \*1-2. (S.D.N.Y. July 9, 2014).

<sup>49</sup> *Id.* at 66.

“It was part and an object of the conspiracy that ... the defendant, and others ... knowing that the property involved in certain *financial transactions* represented proceeds of some form of unlawful activity, would and did conduct and attempt to conduct such *financial transactions*, which in fact involved the proceeds of specified unlawful activity[.]” (*emphasis added*).<sup>50</sup>

Under the above money laundering statute, a financial transaction is “the movement of funds by wire or other means, ... or involving one or more monetary instruments[.]”<sup>51</sup> The term “monetary instrument” includes: bank checks, personal checks, the currency or coin of a country, money orders, or negotiable instruments or investment securities.<sup>52</sup>

The Defendant challenged the money laundering charge by claiming it was impossible for him to launder money because bitcoins are not “monetary instruments” that can form the basis of financial transactions. The Defendant, for his defense, cleverly relied on a very recent IRS Notice that confirmed the IRS would treat virtual currency as property and not currency for tax purposes.<sup>53</sup> The Defendant also referenced FinCEN’s recent Guidance that declared virtual currencies are not “legal tender,” nor do they have the attributes of real currency which need to be issued by a country.<sup>54</sup>

The Court disagreed, and found the Defendant’s contention and cited support unpersuasive. The Court stated that “neither the IRS, nor FinCEN ha[ve] addressed the question of whether a ‘financial transaction’ can occur with bitcoins[.]” nor do they have any power to amend and interpret the money laundering statute for the Courts.<sup>55</sup> The Court concluded that “financial transaction” is broadly

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<sup>50</sup> *Id.* at 67.

<sup>51</sup> 18 U.S.C. § 1956(c)(4) (2016).

<sup>52</sup> 18 U.S.C. § 1956(c)(5) (2016).

<sup>53</sup> See *Ullbright*, 2014 U.S. Dist. LEXIS 93093 at 69-70 (citing *I.R.S. Note*. 2014-21).

<sup>54</sup> *Id.* (citing *FinCEN Guid.* FIN-2013-G001).

<sup>55</sup> *Id.* at 69.



defined, and it includes all movements of “funds” by any monetary instrument or other means.<sup>56</sup> The Court applied the ordinary meaning to the term “funds” because the definition was not included in the money laundering statute.<sup>57</sup> Citing to the dictionary definition, “funds” are defined as “money” and “money” is defined as “an object used to buy things.”<sup>58</sup>

The Court held from these definitions that bitcoins are indeed encompassed under the term “financial transaction.”<sup>59</sup> The District Court Judge was either very careful not to explicitly state that bitcoins are funds or money or simply pressed for time, but the deduction is self-evident by the Court’s conclusion that bitcoins are encompassed under “financial transactions,” which include all movement of funds.<sup>60</sup> The Court held that “[p]ut simply, ‘funds’ can be used to pay for things in the colloquial sense. Bitcoins can either be used directly to pay for certain things or can act as a medium of exchange [and] ... the value of bitcoins lie in their ability to pay for things[.]”<sup>61</sup>

The *Ulbirt* Case was the second in a line of three District Court cases that have shown resistance to any persuasive authority in regards to the monetary status of bitcoins, including the previous *SEC v. Shavers* case. Judge Forrest, of the Southern District of New York, at times even appeared hostile to the contention that bitcoins were anything but money. From an objective point of view, the interpretation the Court took towards bitcoin was very practical, opting for a common sense breakdown of *what bitcoins are meant to do*, while avoiding technical semantics of currency and bartering.

A little over a month later, on August 18, 2014, the Southern District of New York was faced again with the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 69-70.

<sup>58</sup> *Id.* at 70 (citing *Cambridge Dictionaries Online*, <http://dictionary.cambridge.org/us/dictionary/american-english/funds?q=funds> (last visited July 3, 2014)).

<sup>59</sup> *Id.* at 71.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 70.

issue of whether or not bitcoins qualify as money.<sup>62</sup> This time with one District Court Judge Jed Rakoff presiding. The Defendant was charged with operating an unlicensed money transmitting business under 18 U.S.C. § 1960.<sup>63</sup>

18 U.S.C. § 1960 includes references to the words “money” and “funds.” Under Section 1960, “money transmitting” is the “transferring funds on behalf of the public by any and all means.”<sup>64</sup> The Defendant argued that bitcoins do not qualify as money under Section 1960, and used the FinCEN Guidance ruling that states bitcoins are not a currency.<sup>65</sup>

The Court disagreed, and like previous cases, looked to the plain meaning of the words “money” and “funds.”<sup>66</sup> In this case the court took the time to explain (via footnote) that words like “funds” or “money” deserve an ordinary dictionary definition, contrary to any Black Letter Law definition because the statute 1960 does not even “remotely” suggest that the words are legal “terms of art,” thus ordinary meanings are intended, although under most Black Letter definitions, the result would be the same.<sup>67</sup> The court found that “money” in ordinary context means “something generally accepted as a medium of exchange, measure of value, or a means of payment.”<sup>68</sup> Prominently, an example of money includes “money of account” which is “a denominator of value or basis of exchange which is used in keeping accounts and for which there may or may not be an equivalent coin or denomination of paper money.”<sup>69</sup> “Funds” were also defined as “available money

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<sup>62</sup> *United States v. Faiella*, No. 14-cr-243, 2014 U.S. Dist. LEXIS 116114 (S.D.N.Y. Aug. 18, 2014).

<sup>63</sup> *Id.* at 2.

<sup>64</sup> 18 U.S.C. § 1960(b)(2).

<sup>65</sup> *Faiella*, 2014 U.S. Dist. LEXIS 116114 at 6.

<sup>66</sup> *Id.* at 2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary/money> (last visited Aug. 18, 2014)).

<sup>69</sup> *Id.* at 2 (quoting *Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary/money> (last visited Aug. 18, 2014)).

[or] an amount of something that is available for use: a supply of something.”<sup>70</sup>

The Court held that it was obvious bitcoins qualify as money or funds under their ordinary meanings.<sup>71</sup> Reasoning that “bitcoin[s] can be easily purchased in exchange for ordinary currency, acts as denominator of value, and is used to conduct financial transactions.”<sup>72</sup> For the first time, we see a Court cite to persuasive judicial authority too, quoting *SEC v. Shavers*, “[i]t is clear that bitcoin[s] can be used as money ... to purchase goods or services.”<sup>73</sup> The Court also found that Section 1960, although legislated in 1990, was written to combat “evolving threats” such as “nonbanking financial institutions” that “convert street currency into monetary instruments” for the purpose of drug sales.<sup>74</sup>

Judge Rakoff in the Southern District of New York writes a very broad opinion, but leaves no question as to what bitcoins are; they are money. In a way, his opinion seems much more well-rounded than his counterpart Judge Forrest in *Ulbricht*. Judge Rakoff made sure to specifically state that bitcoins are money, and actually cited to persuasive authority for the first time (albeit he bypasses the previous Southern District case in favor of *SEC v. Shavers*).

However, what makes the *Faiella* opinion unique, compared to *Shavers* and *Ulbricht*, is that the “ordinary” definition used is much more inclusive than either of the previous cases. Where *Shavers* simply stated a practical common knowledge view that bitcoins are money because they act like money, *Ulbricht*, while not citing to *Shavers*, seemed to solidify the notion that bitcoins are money by using a dictionary definition.<sup>75</sup> It appears not all dictionary definitions are created equal though. *Ulbricht* used the

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<sup>70</sup> *Id.* at 2-3 (quoting *Merriam-Webster Online*, <http://www.merriam-webster.com/dictionary/money> (last visited Aug. 18, 2014)).

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.*

<sup>73</sup> *SEC v. Shavers*, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 130781, at \*38, 4 (E.D. Tex. Sep. 18, 2014).

<sup>74</sup> *Id.* at 4 (quoting S. Rep. 1010-460, 1990 WL 201710 (1990)).

<sup>75</sup> See *SEC v. Shavers*, 2014 U.S. Dist. at 4-5, *Contra United States v. Ulbricht*, 2014 U.S. Dist. at 70

Cambridge dictionary to determine that “funds” are defined as “money” and “money” is defined as “an object used to buy things”<sup>76</sup> *Faiella* (most likely intentionally) used a much broader definition from Merriam dictionary:

“[M]oney” in ordinary context means “something generally accepted as a medium of exchange, measure of value, or a means of payment. Prominently, an example of money include “money of account” which is “a denominator of value or basis of exchange which is used in keeping accounts and for which there may or may not be an equivalent coin or denomination of paper money.” “Funds” were also defined as “available money [or] an amount of something that is available for use: a supply of something.”<sup>77</sup>

The difference is immediately apparent between both definitions. While the Cambridge definition (money is an object used to buy things) seems very broad, the Merriam version (something accepted as a medium of exchange or payment means) goes even further, even implying that if bitcoins were simple bartering chips that they would be classified as money.

*Faiella* also attempts to use legislative intent to bolster its conclusion. It is a creative effort to use a Senate Report from 1990 that references “evolving threats,” but it’s very likely this would not hold water in a Court of Appeals because of the large time span since it was authored and the creation of bitcoin in 2008, especially with how fast digital progress occurs year to year.<sup>78</sup> *Faiella*, was the final of three U.S. District Court cases to address the classification of bitcoins, and it was the first to start using persuasive judicial and legislative authority. It is likely that the case will be

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<sup>76</sup> *United States v. Ulbricht*, 2014 U.S. Dist. LEXIS 93093, at \*1-2, 70 (S.D.N.Y. July 9, 2014) (citing *Cambridge Dictionaries Online*).

<sup>77</sup> *United States v. Faiella*, No. 14-cr-243, 2014 U.S. Dist. LEXIS 116114, at 2-3 (S.D.N.Y. Aug. 18, 2014) (quoting *Merriam Online Dictionary*).

<sup>78</sup> See S. Rep. 1010-460, 1990 WL 201710 (1990).

used as reference point for future cases whether they be in a District or Court of Appeals.

## B. THE EXECUTION

The United States Department of Treasury Financial Crimes Enforcement Network or FinCEN was the first regulatory body to issue a statement regarding bitcoins. FinCEN issued a Guidance on March 18, 2013, concerning FinCEN's regulations involving exchanging or using virtual currencies.<sup>79</sup> The Guidance makes no reference to bitcoins, but discusses in depth virtual currencies, which includes bitcoins.<sup>80</sup> The Guidance's purpose was to clarify the applicability of the regulations that implement the Bank Secrecy Act ("BSA") to persons "creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies."<sup>81</sup> The guidance does not go as far to quantify virtual currency as property, but it does state that virtual currency is not "real" currency or legal tender.<sup>82</sup>

Under FinCEN regulations, currency (also described as "real currency") is defined as "coin and paper money of the United States or of any other country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in [its] country of issuance."<sup>83</sup> FinCEN contrasts currency to "virtual currency" by defining virtual currency, for the first time, as "a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency."<sup>84</sup> The Guidance continues to note that "virtual currency does not have legal tender status in any jurisdiction." Further, virtual currencies that have "an equivalent value in real currency, or act[] as a substitute

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<sup>79</sup> *FinCEN Guid.* FIN-2013-G001, 1 (Mar. 18, 2013), [http://fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

for real currency” are referred to as “convertible virtual currency.”<sup>85</sup>

The FinCEN Guidance has been used as support in several United States District Court cases to help argue that bitcoins do not qualify as money, but as property. While the Guidance holds only persuasive authority because it only concerns the implementation of the BSA (more on the BSA later), a main distinction in the judicial definitions of currency versus the FinCEN definition is the element of a country of issuance.<sup>86</sup> However, even though the FinCEN does not wish for bitcoins to be an official currency, they may still wish to have them treated as money for crime enforcement, thus, making the distinction between currency and money null. Courts have looked to the plain ordinary or dictionary meanings of money, which for the most part only requires an item to be a medium of exchange, where under FinCEN a real currency must be backed by the trust of a sovereign nation. Further, the FinCEN Guidance makes no reference to what virtual currencies are classified as, and nowhere in the Guidance can the word “property” be found.<sup>87</sup>

Ironically enough, the FinCEN Guidance requires those who exchange bitcoins to register as Money Services Businesses, which is a type of financial institution that deals with cash, checks or currency exchanges.<sup>88</sup> Although the FinCEN Guidance gives bitcoins a sub-currency like designation, it is clear that the department wishes bitcoins to be treated much closer to money or cash than as property as the IRS and others may hope, as well as why Courts have not been persuaded to consider bitcoins as property.

Bitcoins currently do not have status as legal tender in any one jurisdiction, but they are being used as a form of money in many.<sup>89</sup> In March 2014, the IRS ruled that virtual currency, including bitcoins, should be treated as a form of

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 3.

<sup>89</sup> Internal Revenue Service, *I.R.S. Note*, 2014-21, 1 (Mar. 25, 2014), <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

property instead of actual money.<sup>90</sup> This means that bitcoins could begin acting more as stock and less than an item that immediately trades for goods and services.<sup>91</sup> This unfortunately raises undesirable tax issues such as appreciation, and much more record keeping for legal transactions.<sup>92</sup> For Example, if a person bought \$10 worth of bitcoins, and the bitcoins appreciate in value to \$500, and then are used to buy a deluxe easy bake oven. The \$490 realized is now a taxable profit as far as the IRS is concerned. It is likely many may try to ignore the tax consequences because bitcoins are not in heavy circulation at the moment, but such a scenario could be a huge stumbling block to the success of virtual currency in the mainstream. The IRS's Notice by far is the most direct regulatory opinion classifying bitcoins as property and not money. This has made it a favorite of defendants in court arguing against money laundering charges, but the persuasive authority of the IRS's ruling on criminal law seems to be limited at best.

The Federal Elections Commission ("FEC") also released a recent advisory opinion on bitcoins after a federal Political Action Committee submitted the question of whether federal political committees and candidates may accept bitcoin donations.<sup>93</sup> The FEC decided to allow bitcoin donations, but avoided classifying them as money or non-money directly stating they concluded bitcoins are "money or anything of value" under the Federal Election Campaign Act.<sup>94</sup> However, the advisory opinion also stated that for reporting purposes, bitcoins should be reported as in-kind donations and not cash.<sup>95</sup> However, this is likely meant to solve the problem of fluctuating bitcoin value and the "cash on hand" reporting requirement of PACs. Interestingly

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<sup>90</sup> *Id.* at 2.

<sup>91</sup> Alex Hern, *Bitcoin is legally property, says US IRS. Does that kill it as a currency?*, *The Guardian* (Mar. 31, 2014), <http://www.theguardian.com/technology/2014/mar/31/bitcoin-legally-property-irs-currency>.

<sup>92</sup> *Id.*

<sup>93</sup> Len E. Goodman, F.E.C. Op. 2014-02 (May, 8, 2014), <http://saos.fec.gov/aodocs/2014-02.pdf>.

<sup>94</sup> *Id.* at 2. See 2 U.S.C. § 431(8)(A)(i); see also 11 C.F.R. § 100.52(d)(1).

<sup>95</sup> *Id.* at 8.

enough, a bitcoin worth \$50 donated to a PAC, would be allowed to appreciate to \$5000 and be converted to cash without issue despite the \$2600 cash limit on contributions.<sup>96</sup>

The Security Exchange Commission (“SEC”) is primarily responsible for enforcing federal securities law and regulating the securities industry and stock and options exchanges, including electronic security markets.<sup>97</sup> The SEC has used the Securities Act of 1933, 15 U.S.C. § 77a, and Securities Exchange Act of 1934, 15 U.S.C. § 78a, as a basis to prosecute at least one offender who created a Ponzi scheme that involved investing in bitcoins.<sup>98</sup> As seen above, the Court found these laws to have authority over bitcoins and other virtual currency. In order to do this, the *Shavers* Court had to declare that bitcoins were indeed money, and therefore under the jurisdiction of these laws. The SEC seems more in line with the FinCEN in their desired treatment of bitcoins as both would prefer the currency to be treated more like cash money, in contrast to the IRS’s newfound position which advocates for bitcoins to be treated as property.

### C. POWER TO THE PEOPLE

The United States legislative branch has not passed any definitive law concerning bitcoins whatsoever at this time.<sup>99</sup> Congressional action on bitcoin has been limited to only two occasions where the Senate Committee on Finance, in May 2013, and the Homeland Security and Governmental Affairs committee, in August 2013, sent letters to various federal agencies to survey their treatment of virtual currencies.<sup>100</sup> Both of these actions took place before the IRS

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<sup>96</sup> *Id.*

<sup>97</sup> *About the SEC: What We Do*, U.S. Securities and Exchange Commission, <http://www.sec.gov/about/whatwedo.shtml> (last visited Jan. 10, 2015).

<sup>98</sup> *See* Securities Act of 1933, 15 U.S.C. § 77a, *see also* Securities Exchange Act of 1934, 15 U.S.C. § 78a. *SEC v. Shavers*, 2014 U.S. Dist.

<sup>99</sup> Craig Elwell, Cong. Research Serv., R43339, *Bitcoin: Questions, Answers, and Analysis of Legal Issues*, 9 (2014).

<sup>100</sup> *Id.* at 9.



issued their 2014 Notice and their results lacked a clear consensus and answer as to how virtual currencies were to be treated for tax reporting purposes and national security threats.<sup>101</sup>

The Congressional Research Service prepared a report specifically on bitcoins (not virtual currency in general) on July 15, 2014.<sup>102</sup> While the report is not in any fashion binding law, it will likely be the first resource used by lawmakers as it is prepared specifically for members of congress, assuming congress can pass a law before the information becomes outdated in the fast moving digital world. While the report did not make any definitive statement as to whether bitcoins should be classified as money instead of property, the report at times simply referred to bitcoins as “digital money” as well as “currency.”<sup>103</sup> However, the report omits any reference to the recent IRS Notice 2014-21 even though it was published after the notice. The Congressional Service Report also recognized that the status of bitcoins is still up to determination when it referenced the above *Shavers* decision stating “[the SEC] successfully convinced a federal district court that bitcoins are money.”<sup>104</sup> The report also quickly notes that bitcoins are not legal tender, and no merchant is required to accept them as a form of payment, unlike the actual U.S. dollar.<sup>105</sup>

A central power of the congress, granted by the U.S. Constitution, is its authority to “coin money [and] regulate the value thereof.”<sup>106</sup> Although no specific law has been passed to regulate bitcoins or other virtual currencies, bitcoins are finding treatment under two main areas of law: Federal Anti-Money Laundering laws and Federal Taxation law.

Federal Anti-Money Laundering laws such as 18 U.S.C. § 1956 and 1957 prohibit engaging in financial transactions that are designed to finance illegal activities or

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at ii.

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.* at 11.

<sup>105</sup> *Id.* at 6.

<sup>106</sup> U.S. CONST. art. I, § 8, cl. 5.

involve proceeds of such activities.<sup>107</sup> Most money laundering crimes involve financial institutions, which triggers transaction reporting requirements under the Bank Secrecy Act (“BSA”).<sup>108</sup> The Currency and Foreign Transactions Reporting Act complements the BSA by requiring these financial institutions, designated as “money services businesses” (“MSBs”), to file suspicious activity reports when cash transactions break certain monetary thresholds set by the Secretary of Treasury office.<sup>109</sup> MSBs may include check cashers, foreign currency exchangers, traveler’s and cashier’s check issuers, prepaid cards, and money wire transmitters.<sup>110</sup> MSBs are all required to register with the Department of Treasury.

At first glance, it may not appear that the BSA concerns bitcoins at all. However, as previously referenced, FinCEN has used the BSA as their legal authority to require bitcoin exchanges that convert U.S. or foreign currency into bitcoins or vice versa to be registered as an MSB.<sup>111</sup> This was memorialized in the FinCEN Guidance issued on March 18, 2013 concerning virtual currency.<sup>112</sup> Such an action does not appear to stretch the law either because the purpose of the BSA is to deter under the table, cash or cash-like, financial transactions. Bitcoins can readily be exchanged for US currency, and therefore, would need to be treated as a form of cash under the law to avoid easy exploitation of anti-money laundering laws. Whether or not this cash-like treatment of bitcoins under the BSA can be used to bolster an argument against the IRS’s recent declaration that bitcoins are to be considered property is yet to be seen.

As discussed above, the Securities Act of 1933 and the Securities Exchange Act of 1934 have been successfully

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<sup>107</sup> 18 U.S.C. § 1956–1957 (2016).

<sup>108</sup> Craig Elwell, Cong. Research Serv., R43339, Bitcoin: Questions, Answers, and Analysis of Legal Issues, 9, 14 (2014).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *FinCEN Guid.* FIN-2013-G001, 1 (Mar. 18, 2013), [http://fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

<sup>112</sup> *Id.*

proven in court to apply to bitcoins and virtual currencies of the like.<sup>113</sup>

The tax law applicable to bitcoins is limited to the IRS's recent Notice 2014-21. Congress has passed no statute or federal taxation code regulation specifically addressing virtual currencies. Currently the federal taxation law regarding bitcoins is solely vested in the IRS's treatment of the currency, which leaves the bitcoin designation as property for tax reporting purposes as discussed in the previous section. Unlike the FinCEN that uses anti-money laundering laws as the basis of its virtual currency treatment, the IRS did not include in its Notice the general tax law it used as authority to couple bitcoins into the property designation.<sup>114</sup> Calls to the IRS Notice Author Keith AQUI for further comment have not been returned as of Mar. 4, 2015.<sup>115</sup>

International law is also a concern for bitcoin's future because virtual currency has no geo-political bounds. A recent study by the European Central Bank (similar to the United States' Federal Reserve) speculated that based on the growth of virtual currency, international regulation will be inevitable.<sup>116</sup> The International Monetary Fund ("IMF") currently is not permitted to acquire currency not issued by one of its members. Some concern has been raised over the IMF's ability to combat a speculative attack via virtual currency such as bitcoin against the traditional currency on one of its member countries.<sup>117</sup>

#### D. CO-EQUAL SOVEREIGNS AT-LARGE

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<sup>113</sup> SEC, 2014 U.S. Dist. LEXIS 130781, at \*3-4.

<sup>114</sup> Internal Revenue Service, *I.R.S. Note*, 2014-21, 1 (Mar. 25, 2014), <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> European Central Bank, "*Virtual Currency Schemes*," (October 2012), <http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf>.

<sup>117</sup> Craig Elwell, Cong. Research Serv., R43339, Bitcoin: Questions, Answers, and Analysis of Legal Issues, 9, 16 (2014).

Several states have begun regulating bitcoins, with even more following suit every year.<sup>118</sup> The typical issue state regulators face is whether bitcoins fall under current money transmission statutes or whether new regulations are required to monitor bitcoin use and prevent possible money laundering and fraud.<sup>119</sup> Some states, like Texas, have simply issued Guidance's suggesting that bitcoins do not qualify as money and therefore businesses dealing in bitcoins do not need money transmitter licenses.<sup>120</sup> However, other states, such as Washington, have decided that bitcoins (and all virtual currencies) do fall within their money transmitting statutes and therefore businesses that deal in bitcoin exchange have been required to apply for money transmitter licenses.<sup>121</sup>

Two states that have particularly led the charge in bitcoin state monetary policy are New York and California.<sup>122</sup> New York, one of the major financial hubs of the world, is currently gearing up for a massive bitcoin licensing regime.<sup>123</sup> Meanwhile, California has recently become the first state enacting law that gives virtual currency legal money status as opposed to mere legal tender or currency status.<sup>124</sup> Similar paths may follow or

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<sup>118</sup> Peter Luce, *State Virtual Currency Regulatory Heat Map*, Payment Law Advisor (Dec. 19, 2014), <http://www.paymentlawadvisor.com/2014/12/19/state-virtual-currency-regulatory-heat-map/>.

<sup>119</sup> *Id.*

<sup>120</sup> However, businesses that deal in converting virtual currency to another country's currency do need to obtain a money transmitter license. Jerry Wang, *State of Texas Issues Memorandum on Virtual Currencies*, Payment Law Advisor (April 14, 2014), <http://www.paymentlawadvisor.com/2014/04/14/state-of-texas-issues-memorandum-on-virtual-currencies/>.

<sup>121</sup> Luce, *supra* note 115.

<sup>122</sup> Craig Elwell, Cong. Research Serv., R43339, *Bitcoin: Questions, Answers, and Analysis of Legal Issues*, 9, 11 (2014).

<sup>123</sup> Stan Higgins, *New York Reveals BitLicense Framework for bitcoin Businesses*, Coindesk (July 17, 2014), <http://www.coindesk.com/new-york-reveals-bitlicense-framework-bitcoin-businesses/>.

<sup>124</sup> Pete Rizzo, *California Governor Grants bitcoin 'Legal Money' Status*, Coindesk (June 29, 2014),

are already paving the way like California and New York. Furthermore, Texas' designation of virtual currency as non-money could cause unintended consequences in their state courts.

### I. EMPIRE STATE OF MIND

New York proposed its first major bitcoin or virtual currency regulations on July 17, 2014 and then, after comment period, released proposed updates on February 4, 2015.<sup>125</sup> The proposed regulations were issued by the New York Department of Financial Services ("NYDFS").<sup>126</sup>

The main thrust of the proposed rules is that businesses "that receive, transmit, store or convert virtual currency for customers; buy and sell virtual currency as a customer business; control, administer or issue a virtual currency; or perform conversions between bitcoin and fiat or any value exchange will need to be licensed to operate in New York."<sup>127</sup> The revised version made an exception for virtual currency software developers, persons using bitcoin for "non-financial means," and possible conditional licenses for virtual currency startup companies.<sup>128</sup> Further, Merchants that merely accept bitcoins as a form of payment are not subject to the proposed licensing requirements nor are merchants that use bitcoins for investment purposes only.<sup>129</sup> For the most part, the proposed regulations appear aimed at entities solely involved in making money (outside

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<http://www.coindesk.com/california-governor-grants-bitcoin-legal-money-status/>.

<sup>125</sup> Higgins, *supra* note 120; see Pete Rizzo, *Breaking Down New York's Latest BitLicense Revision*, Coindesk (Feb. 4, 2015), <http://www.coindesk.com/breaking-down-new-york-bitlicense-revision/>.

<sup>126</sup> New York State Department of Financial Services, *Regulations of the Superintendent of Financial Services: Virtual Currencies*, Title 23, Ch. 1, Pt. 200 (Proposed Feb 4, 2015).

<sup>127</sup> Luce, *supra* note 115.

<sup>128</sup> Rizzo, *supra* note 122.

<sup>129</sup> Luce, *supra* note 115; see Rizzo, *supra* note 122.

of long-term investment) from virtual currencies themselves.

Record keeping methods to prevent fraud and money laundering are the main tools of the NYFDS regulations. Accounts and transaction records with verified party identities, capital and balance statements, as well as quarterly financial reports are all expected to help bring virtual currency into the monetary mainstream.<sup>130</sup> Further, all transactions involving value over \$10,000 are expected to be reported the day of their request.<sup>131</sup> The NYFDS' revised regulations are only subject to comment for only 30 days, and will likely go into effect without much change from this point.<sup>132</sup> NYFDS' rules and regulations are important because many states that have not undertaken virtual currency guidance will likely be influenced by such a large state with a booming financial sector. While the proposed rules in regulations do not specify that bitcoins are money, from the treatment they are receiving from the NYFDS, it's all but implied that bitcoins and bitcoin related business' are being considered in the same manner as businesses that deal in cash money exchange.

## II. THE GOLDEN STATE

California has become the first state to legally recognize bitcoins and other virtual currencies as legal money.<sup>133</sup> Assembly bill 129 was signed into law on June 28, 2014, which recognized nontraditional mediums of value as actual money such as rewards points and digital currencies, which were technically illegal under previous unenforced law.<sup>134</sup> However, the measure was largely symbolic because the law does nothing to regulate bitcoins further, besides slapping a monetary label on them.<sup>135</sup> Still, in terms of the

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Rizzo, *supra* note 122.

<sup>133</sup> A.B 129, Ch. 74 Gen. Assmb. (Ca. 2014).

<sup>134</sup> Pete Rizzo, *California Governor Grants bitcoin Legal Money' Status*, Coindesk (June 29, 2014),

<http://www.coindesk.com/california-governor-grants-bitcoin-legal-money-status>.

<sup>135</sup> *Id.*

classification of bitcoins as money, it certainly sets a precedent for other states and even the federal government.

The actual regulation of virtual currency in California will come from the California Department of Business Oversight (“DBO”), which has yet to formally rule on virtual currency regulations, but has given some hints as to the direction it’s taking.<sup>136</sup> The DBO has indicated that it is currently exploring options for how it would license bitcoin operators and how virtual currencies fit into *current* California money transmitter regulations.<sup>137</sup> However, in response to rumors that Coinbase, a prominent bitcoin exchanger, received regulatory approval to operate a bitcoin exchange in California, the DBO affirmed that while bitcoin exchanges are permissible as of January 2015, the DBO has still not decided whether or not to regulate such exchanges under California’s money transmission statutes.<sup>138</sup>

## V. THE GOOD, THE BAD, AND THE BITCOIN

Bitcoins are the first viable form of virtual or digital currency that does not have a third party regulator. This allows for greater anonymity (but not total) as well as greater uncertainty in the value of bitcoins. It is likely the use of bitcoins will continue to grow, but the prospect of over-regulation by the IRS and other regulatory bodies could be a threat to their use in large quantities or mainstream commercial transactions. Alternatively, the continuing classification of bitcoins as money or currency by the Courts could make its use unattractive to criminals as well. All of this is not even tied to the extreme volatility of bitcoins as an item of value either.

It is clear that the IRS is resisting the classification of bitcoins as actual money or currency. Contrast this to the SEC and FinCEN that for the purpose of crime enforcement

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<sup>136</sup> *Id.*

<sup>137</sup> Stan Higgins, *California Regulator: Coinbase Exchange 'Not Regulated or Licensed'*, Coindesk (Jan. 27, 2015), <http://www.coindesk.com/california-regulator-coinbase-exchange-regulated-licensed/>.

<sup>138</sup> *Id.*

are much more apt to have bitcoins treated like cash or securities involving money. SEC went as far as suing an individual in court to prove bitcoins are money under the law. Perhaps this does not matter for the purpose of taxation, but at some point the IRS will likely find itself in court over a tax crime involving bitcoins, even if it is just a failure to pay property tax. When this day comes, supposing congress has not yet acted, it will be highly probable that there will be a majority of case law and other treatment by regulatory bodies designating bitcoin as cash-money type asset and not capital.

On the other hand, Federal Courts see no reason to dive into the technicalities of virtual currency. The reasoning of all three main District Court opinions concerning bitcoin can be summed up as: if it looks like a duck, walks like a duck, and quacks like a duck... it is a duck. The no nonsense, practical approach of the District Courts is likely to continue, especially with the *Faiella* opinion using the most persuasive authority in its analysis; look for the *Faiella* opinion to pop up in most future bitcoin classification cases because it used the most authority and most encompassing definition for "money" (as well as rebutting any claim that money should be construed as a technical legal term of art).<sup>139</sup>

It appears a technical refusal of bitcoin as property (involving the details of software engineering and reasoning of regulatory bodies) may be reserved for the Appellate Courts or a very overzealous District Court judge. However, it appears that bitcoins will likely stay as money for the purpose of criminal charges because it would be a heavy toll on public policy to allow drug traffickers and conspirators to get away with money laundering because in the semantic technical sense they are not dealing with *real* money. This leads to the speculation that bitcoins will almost certainly stay classified as money in the Federal Courts. How this may affect future tax law if and when bitcoins become mainstream is up to dispute.

While it may not be something that matters initially, eventually there will be a legal action that intertwines

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<sup>139</sup> *United States v. Faiella*, No. 14-cr-243, 2014 U.S. Dist. LEXIS 116114 (S.D.N.Y. Aug. 18, 2014).



criminal and tax law that will require the issue of whether bitcoins are classified as money or property to be addressed. This note predicts it will occur in the federal courts within the next 20 years if the issue is not congressionally settled. When a court finally hears the bitcoin classification issue, the IRS's property definition will likely be outbalanced by the forming precedent.

The legislative branch is in a unique position because they will ultimately be the last ones to act on bitcoin law, but will also have the final authority on the subject as well. It would be naïve to believe that no regulation will occur from bitcoin legislation. Bitcoins and virtual currency of the like will be regulated, as is every new legal entity or conception. The question is how, and will it be constitutional? Certain state legislatures have already taken the lead to classify bitcoins as legal money, but real treatment of the currency is being left up to state regulators anyway, so the gesture may merely be symbolic.

There will also be a number of unseen interests involved when creating the first bitcoin legislation. These will include the governmental interests that favor bitcoin regulation such as the SEC, IRS, FinCEN, FEC, and even state governments could be affected. Based off of the actions and publications from the various regulatory bodies, the IRS will likely be the only one to favor a property designation. However, there is no downside for the SEC or FinCEN if bitcoin can constitutionally maintain its tax status as property and still be considered as money for criminal prosecutions and civil recoveries. In a perfect world, the government would get more tax revenue, and prosecute citizens as they find most convenient. Other balancing interests include U.S. citizens that use bitcoins, especially U.S. businesses that accept bitcoins and may face adverse tax consequences. North America's major bitcoin exchanger, Coindesk, as well as other bitcoin arbitrators such as Bitpay, will all have high stakes in future bitcoin regulations. Most nongovernmental entities will likely favor a monetary treatment of bitcoins for all legal occasions.

## VI. THE FUTURE IS NOW

The federal courts seem unlikely to budge in their classification of bitcoins as money. The logical follow up question is: why should they? Most cases that find themselves debating the legal status of bitcoin involve drug trafficking money launderers or Ponzi scheme operators; all of which come charging into court with the IRS notice or FinCEN guidance claiming bitcoins cannot be money. However, bitcoins are a new creation, and it is the judge's job to "discover" the law through a multitude of factors, including public policy, until lawmakers say contrary.

Bitcoins are a situation where blind reading of regulatory directions would lead to absurd results. Bitcoins are already a magnet for controversial and illegal purchases because of their difficulty to track. To allow a legal cloud for online criminal activities would create a situation that the bitcoin creator and core developers never intended. Money launderers and scammers could walk free on a mere technicality of diction and aging statutes under a strict interpretation of money. From the District Court opinions, this notion has not been lost on the judiciary either. There is simply no way drug traffickers, money launderers and investment con-artists are going to avoid justice so contritely. If an Appellate Court ever heard the issue, an affirmation of bitcoins as money would be a mere formality to set a higher precedent. The attorneys of these defendants must obviously feel that there is enough conflict in the IRS Notice and other regulatory publications to mean something. However, according to the decisions of the federal courts, what they likely mean is that the current tax treatment of bitcoins is in danger. If bitcoins are ever to be universally classified as property and not money, the decision is not going to come from the federal courts.

Regulatory publications are not all encompassing nor fully consistent either. While the FinCEN Guidance does not go as far as stating bitcoins are money, it does require those business dealing in bitcoin currency exchange be registered as money service businesses in order to be regulated under the Bank Secrecy Act.<sup>140</sup> FinCEN can refuse

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<sup>140</sup> *FinCEN Guid.* FIN-2013-G001, 1 (Mar. 18, 2013), [http://fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

to label bitcoins as money until the cows come home, but the purpose of the BSA is to regulate the flow of cash money, and by including bitcoins, they are effectively labeling it as *de facto* cash money. The FEC opinion allowing political campaigns to accept bitcoins as donations left the question of their money status up to interpretation. The opinion itself described, bitcoins as “money or anything of value,” but for FEC reporting purposes, the donations should be reported as “in-kind” or property donations.<sup>141</sup> While this may lean in favor of treating bitcoins as property, it was likely not intended to be a definitive answer, but a solution to fluctuating bitcoin value and the “cash on hand” reporting requirement of political campaigns.

Finally, there is the IRS Notice proclaiming that bitcoins should be treated as property for tax purposes.<sup>142</sup> Treating bitcoins as property and subjecting them to capital gains treatment is not likely to spur their growth, especially as more businesses look to accept bitcoins for payment of normal goods and services. While the criminal law determinations on bitcoin’s money status may seem like a separate realm to some, they will not remain separate forever. At a certain point, a company is likely to sue the IRS for a refund for the difference in tax revenue between capital gains and cash transaction. When this occurs, the appeals court (after the tax court inevitably agrees with the IRS) will look to a multitude of factors for its decision, including public policy and similar court decisions. Does this mean the federal courts will unilaterally strike down the IRS’s tax designation of bitcoins? Perhaps not, but likely so. Like the previous federal judicial opinions that look beyond the strict interpretation of text, the odds do not look great for the IRS. Tax evasion, money laundering, investment fraud, and the like; all go hand in hand. The momentum of the federal judiciary is swinging in favor of classifying bitcoins as money, and public policy supports this. A decision to the contrary (affirming bitcoins as property) is only sure to bring more criminals out of the

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<sup>141</sup> Len E. Goodman, F.E.C. Op. 2012-02 (May, 8, 2014), <http://saos.fec.gov/aodocs/2014-02.pdf>.

<sup>142</sup> Internal Revenue Service, *I.R.S. Note*. 2014-21, 1 (Mar. 25, 2014), <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

woodwork claiming precedent against their bitcoin related crimes under money statutes.

### THE FINAL VERDICT

The future of bitcoins is still uncertain. At certain times, its future looks stable, where bitcoin companies are even sponsoring college football bowl games.<sup>143</sup> On the opposite end of the spectrum, there is a major bitcoin exchange marketplace declaring bankruptcy after hackers infiltrated its security network.<sup>144</sup> However, what is certain is the fact that a revolution in monetary exchange has begun. There are many roadblocks to virtual currencies mainstream acceptance, but it is no longer a hypothetical venture of a pseudonymous man in his mother's basement. The law will have to play catch up or different agencies will lose synergy in the new challenges that face them when it comes to tax shelters, money service businesses, and money laundering. These early days of bitcoin use will one day be compared to the early days of internet use.

More legal clarity is needed for bitcoins to become a mainstream success. Congress must pass a law verifying the tax regulations, and giving designated authority to regulatory bodies for crime enforcement concerning bitcoins. Without such an action, bitcoins and virtual currency will continue to be used as money in the "wild wild west" of the internet. Bitcoins already operate in the gray lines of regulation and criminality. Tax shelters will become much more frequent if the duties of each regulatory body and tax law is not reformed. Further, the IRS will likely be challenged in court down the road for its

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<sup>143</sup> Michael Casey, *BitPay to Sponsor St. Petersburg Bowl in First Major Bitcoin Sports Deal*, Wall Street Journal, <http://www.wsj.com/articles/bitpay-to-sponsor-st-petersburg-bowl-in-first-major-bitcoin-sports-deal-1403098202>.

<sup>144</sup> Rachel Abrams and Nathaniel Popper, *Trading Site Failure Stirs Ire and Hope for Bitcoin*, New York Times (Feb. 25, 2014), [dealbook.nytimes.com/2014/02/25/trading-site-failure-stirs-ire-and-hope-for-bitcoin/](http://dealbook.nytimes.com/2014/02/25/trading-site-failure-stirs-ire-and-hope-for-bitcoin/).

inconsistent treatment of bitcoin, whether or not it is actually constitutional.<sup>145</sup>

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<sup>145</sup> This note is dedicated to my wonderful fiancée Angela Swagler, and in memory of Sterling Earhart.



# FEDERAL PROGRAM BRIBERY, NEW FEDERALISM, AND THE MISSING FEDERAL INTEREST

*Jacob Baggett*<sup>1</sup>

## I. INTRODUCTION

In October of 1983, Donald V. Morano stood before the United States Supreme Court and argued his position in *Dixson v. United States*.<sup>2</sup> In his thick New England accent, he argued that his clients, city officers responsible for the management and expenditure of federal funds, were not “public officials” within the definition of a federal bribery statute, 18 U.S.C. § 201, which prohibits offering something of value to a public official with the illicit intent of influencing an official act. If his clients were not public officials within the meaning of the statute, then they could not be convicted under the statute.

At a superficial glance, a question of this nature would appear immaterial. The defendants were criminals who misappropriated funds for an amount of personal gain. Why care whether federal or state law pursued them? They

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<sup>1</sup> Jacob Baggett, Juris Doctor (2015) and former Editor-in-Chief of the Lincoln Memorial University Law Review. The author would like to thank Assistant Professors Akram Faizer and Melanie Reid for their substantive knowledge, valuable criticism, and unwavering encouragement.

<sup>2</sup> 465 U.S. 482 (1984) (holding that executives of private, nonprofit corporation having operational responsibility for administration of federal housing grant program within city under terms of subgrant from city were “public officials” within meaning of federal bribery statute, and thus were subject to prosecution under statute).

were malefactors; they deserved punishment; (seemingly) end of story. However, a second, more careful look reveals the issue was not only material, but foundational--foundational in that the prosecutorial authority and role of the federal government was arguably beyond the federal scope, i.e., beyond the role of the federal government.

Fearing the Court would rule unfavorably in *Dixson*, Congress quickly augmented § 201 by passing 18 U.S.C. § 666, which detailed federal program bribery. Section 666 serves as a statutory mechanism for the federal prosecution of bribery and corruption of persons who are not federal employees or "public officials" under § 201. It is § 666 which draws similar, arguably more complicated, foundational issues.

The role in and authority of the federal government to prosecute federal corruption charges levied against state and local officials has historically been a relatively uncontentious issue. However, the development of so-called New Federalism principles articulated by the United States Supreme Court in, most notably, *United States v. Lopez*<sup>3</sup> and *United States v. Morrison*,<sup>4</sup> caused far-reaching stir. The stir's effect raised the question of whether § 666, the bribery statute applicable to state and local officials, was legislated with proper congressional authority.

Part One of this note will discuss the elements and jurisprudential evolution of § 201, which criminalizes the bribery of federal officials and the payment or receipt of official gratuities. Part Two will detail federal program

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<sup>3</sup> 514 U.S. 549 (1995) (holding the Gun Free School Zone Act exceeded Congress' Commerce Clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce).

<sup>4</sup> 529 U.S. 598 (2000) (holding the Commerce Clause did not provide Congress with authority to enact civil remedy provision of the Violence Against Women Act (VAWA), inasmuch as the relevant provision was not regulation of activity that substantially affected interstate commerce).



bribery under § 666, which criminalizes the bribery and corruption of non-federal employees, including state and local officials. Part Three will dissect New Federalism and its impact on the discussion surrounding the federal interest on which congressional authority to pass § 666 rests. Finally, Part Three, set against the backdrop of one of Tennessee's infamous corruption investigations, Operation Rocky Top, will attempt to provide a solution to the illusive, missing federal interest in the prosecution of corrupt state and local officials by adding a requirement to § 666's jurisdictional hook. Such a solution potentially satisfies federalism principles while keeping the federal anti-corruption statutes intact.

## II. THE EVOLUTION OF § 201

Due to the supplementary nature of § 666, it is nearly impossible to meaningfully discuss § 666 without addressing the statutory section which it supplements, § 201. Section 201 covers two branches of corruption: bribery<sup>5</sup> and illegal gratuities.<sup>6</sup> Both bribery and illegal gratuities require proof that (1) with illicit intent, (2) something of value was requested, offered, or given to a (3) public official, with the goal of (4) influencing an official act.<sup>7</sup>

An act of bribery differs from an illegal gratuity in a crucial respect, the intent element. Bribery<sup>8</sup> requires *quid pro quo*—an official act in exchange for something of value.<sup>9</sup> An illegal gratuity, on the other hand, requires that the thing of value be offered or solicited “otherwise than as provided for the proper discharge of [the federal official's] official duty[.]”<sup>10</sup> In *United States v. Sun-Diamond Growers of*

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<sup>5</sup> 18 U.S.C. § 201(b) (2014).

<sup>6</sup> 18 U.S.C. § 201(c) (2014).

<sup>7</sup> 18 U.S.C. § 201 (2014).

<sup>8</sup> 18 U.S.C. § 201(b)(1) (2014) (applicable to the offeror/payor); 18 U.S.C. § 201(b)(2) (2014) (applicable to the offeree/payee).

<sup>9</sup> 18 U.S.C. § 201(b) (2014).

<sup>10</sup> 18 U.S.C. § 201(c) (2014).

*California*,<sup>11</sup> the Court elaborated on this distinction. The Court stated that the illegal gratuities prohibition,<sup>12</sup> unlike the bribery statute did not require a connection between the offeror's intent and the specific official act. Thus, for the purposes of illegal gratuities, the intent requirement is satisfied if the offeror sought merely "to build a reservoir of goodwill" which may be connected to a future or past unspecified act.<sup>13</sup>

#### A. QUID PRO QUO AND CORRUPT INTENT

Under § 201's bribery prohibition, the corrupt intent element is intertwined with the concept of *quid pro quo*. Foundationally, in *United States v. Johnson*, the Tenth Circuit held that "[section 201's intent element required that] the government must show the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced."<sup>14</sup> The money must be given with more than "some generalized hope or expectation of ultimate benefit on the part of the donor."<sup>15</sup>

An adjacent issue is what if the illegal *quid pro quo* bargain goes unfulfilled? Under § 201, the offense is complete when a bribe or gratuity is either offered or solicited.<sup>16</sup> The bargained for act need not be done to give rise to criminal act. Additionally, if the offeree never performs the requested action or has no authority to perform, a criminally briberous act has nonetheless been committed.<sup>17</sup>

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<sup>11</sup> 526 U.S. 398 (1999).

<sup>12</sup> 18 U.S.C. § 201(c)(1)(A) (2014) (applicable to the offeror/payor); 18 U.S.C. § 201(c)(1)(B) (2014) (applicable to the offeree/payee).

<sup>13</sup> *Sun-Diamond Growers*, 526 U.S. at 405.

<sup>14</sup> *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980).

<sup>15</sup> *Id.* (citing *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976)).

<sup>16</sup> *See* 18 U.S.C. § 201(b) (2014).

<sup>17</sup> *United States v. Valle*, 538 F.3d 341, 347 (5th Cir. 2008).

As an illustration, in *United States v. Valle*, the defendant, an Immigration and Customs Enforcement agent, solicited a \$20,000 bribe from an immigrant in return for removing “criminal charges” from the immigrant’s file.<sup>18</sup> The defendant knew the file contained no criminal charges, and as a result, he argued that he never intend to follow through. Thus, he argued, he could not be convicted.<sup>19</sup> The court rejected this argument, citing the Second Circuit case of *United States v. Meyers*.<sup>20</sup> In *Meyers*,<sup>21</sup> a defendant unsuccessfully asserted the defense that he was “playacting,” i.e., never intended to commit the act for which the bribe was exchanged.<sup>22</sup>

In response to such reasoning, Judge Weiner offered an intriguing dissent in *Valle*.<sup>23</sup> He reasoned that if the offeree has no legal authority or actual ability to do the official act, then the offeree could “never have specifically intended to deliver the *quid pro quo* required by *Sun-Diamond*. . . .”<sup>24</sup> *Valle* is significant because it is an ideal example of the statutory interpretative lengths to which courts have gone to expand the conduct covered under § 201’s umbrella, as evidenced by Judge Weiner’s well-reasoned specific-intent objection to the majority’s holding.

Moreover, if § 201 had been ruled inapplicable to the facts of *Valle*, it is not as if the defendant would have walked out the courthouse doors. Under the same facts, the defendant was convicted of extortion under 18 U.S.C. § 872.<sup>25</sup> The extortion statute, unlike § 201, required no interpretational gamesmanship to fit the crime.

## B. BRIBERY AND GRATUITIES- “OFFICIAL ACT”

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<sup>18</sup> *Id.* at 343.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 347.

<sup>21</sup> *United States v. Meyers*, 692 F.2d 823 (2nd Cir. 1982).

<sup>22</sup> *Id.* at 831.

<sup>23</sup> *Valle*, 538 F.3d at 350 (5th Cir. 2008) (Weiner, J., dissenting).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 352.

Another element of § 201 requires that the briborous actor seek to influence an “official act.”<sup>26</sup> Generally, courts have also read the “official act” language broadly to force the statute fit the crime.<sup>27</sup> In *United States v. Biaggi*, the court held that the statute “refers to ‘any’ action taken on a matter brought before the public official in [the official’s] capacity.”<sup>28</sup>

However, the D.C. Circuit had a different perspective on the interpretation of “official act.” In *Valdes v. United States*,<sup>29</sup> the D.C. Circuit read the “official act” requirement narrowly. In that case, an officer searched a law enforcement data base to obtain vehicle registration information in exchange for cash from an undercover informant. The D.C. Circuit reasoned that the “officer’s actions” lacked a sufficiently “formal” relationship to his official duties, and thus, an official act was not influenced.<sup>30</sup> The court provided a helpful example:

[A]sking questions (of people, databases, and real evidence) is certainly a part of investigating. . . . But it would constitute an enormous expansion of the gratuities provision to define “action” on a “matter” as encompassing every question asked and answered, or even every question that somehow parallels those an official might ask as part of his official duty and whose answer might entail a use of government resources. It would bring under the clause a broad range of moonlighting activities that in any way paralleled an official’s regular work (and perhaps that of a broad spectrum of fellow workers, as well). Thus, a Department of Justice lawyer who used a government Westlaw account to look up a legal question for a friend would be, in the

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<sup>26</sup> 18 U.S.C. § 201(b)(1)(a).

<sup>27</sup> See, e.g., *United States v. Biaggi*, 853 F.2d 89, 97-99 (2nd Cir. 1988).

<sup>28</sup> *Id.* at 98.

<sup>29</sup> *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

<sup>30</sup> *Id.* at 1342-3.

dissenters' view, "deci[ding]" a "question" that might "be brought before [him]." <sup>31</sup>

This D.C. Circuit rationale signaled that the seemingly ever-expanding, nearly-boundless scope of federal corruption statutes must have limits.

### C. BRIBERY AND GRATUITIES - "THING OF VALUE"

Section 201 also requires that the offeror offer, or the offeree accept, something of value for an official act. The "thing of value" has been understood to comprise anything that has a subjective value to the accepting party, the offeree.<sup>32</sup> The Second Circuit, in *United States v. Williams*,<sup>33</sup> held that "corruption of office occurs when the officeholder agrees to the misuse of his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe."<sup>34</sup>

### D. BRIBERY AND GRATUITIES- "PUBLIC OFFICIAL" AND *DIXSON V. UNITED STATES*

As the final, heavily litigated element, § 201 requires that the bribe or gratuity be offered, requested, or received by a "public official" or a "person who has been selected to be a public official."<sup>35</sup> This element brings us squarely back to the Supreme Court chamber in October of 1983 with Donald Morano. Following opening pleasantries and rehearsed opening points, the degree to which most Justices were unconvinced by Morano's defensive argument was evident

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<sup>31</sup> *Id.* at 1326.

<sup>32</sup> See generally 1 SARAH N. WELLING ET AL, FEDERAL CRIMINAL LAW AND RELATED CIVIL ACTIONS § 7.3 (1988).

<sup>33</sup> *United States v. Williams*, 705 F.2d 603 (2nd Cir. 1983).

<sup>34</sup> *Id.* at 623.

<sup>35</sup> 18 U.S.C. § 201(a)(1) & (2) (2014).

from the tone of their questions and responses to Morano's less-than-helpful answers.<sup>36</sup>

In the midst of oral argument, Morano's sympathizers showed their cards as well. For instance, during the government's segment, Justice O'Connor stated, "It is somewhat of a concern to think that any potential recipient of federal money might be subject to [§ 201]."<sup>37</sup> The government's advocate, Richard G. Wilkins, responded by stating, "Certainly, it is a matter of some concern, but . . . [§ 201] applies only to a person acting for or on behalf of the United States in an official function, so it isn't just anyone who receives some sort of federal fund or some sort of federal subsidy."<sup>38</sup>

The Court found the government's answer persuasive because it echoed similar sentiments in its majority opinion. The majority held that § 201 was a comprehensive statute applicable to all persons performing activities for or on behalf of the United States.<sup>39</sup> Articulating in more detail, the Court pronounced "the proper inquiry [when determining whether an individual is a public official] is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with federal responsibilities." Thus, in *Dixson*, despite Congress's fear it would rule otherwise, the Court concluded that "[t]he government has a strong and legitimate interest in prosecuting [local officials in charge of distributing federal funds] for their misuse of government

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<sup>36</sup> *Dixson v. United States*- Oral Argument, Oyez: U.S. Supreme Court Media, IIT Chicago-Kent College of Law, [http://www.oyez.org/cases/1980-1989/1983/1983\\_82\\_5279#sort=vote](http://www.oyez.org/cases/1980-1989/1983/1983_82_5279#sort=vote).

<sup>37</sup> *Dixson v. United States*- Oral Argument, Oyez, at 34:15 (Justice O'Connor speaking).

<sup>38</sup> *Dixson v. United States*- Oral Argument, at 34:23 (Richard G. Wilkins speaking).

<sup>39</sup> *Dixson v. United States*, 465 U.S. 482, 496 (1984).

funds,” due to the fact that these officials had the sort of national, public trust Congress intended to encompass.<sup>40</sup>

#### E. JUSTICE O’CONNOR’S DISSENT IN *DIXSON*

In *Dixson*, Justice O’Connor found the majority’s “public officer or employee with federal responsibilities” answer to be overly inclusive and vague, and she sought to provide legal ammunition to those who might challenge the majority’s broad interpretation of “public official” in the future. Her dissent, in which an unlikely cast of Justices Brennan, Rehnquist, and Stevens joined, maintained the position that *grantee autonomy*, i.e., the independence and relatively high level of discretion of a state or local grantee with regard to how federally granted funds are used, should be determinative.<sup>41</sup> “The main defining characteristic of the category is the principle of grantee autonomy: although grants impose conditions on the use of grant funds, grantees are left considerable discretion to design and execute the federally assisted programs without federal intrusion.”<sup>42</sup> As a result, grants-in-aid to state or local governments, managed and dispersed by their state and local employees or contractors, should be treated as categorically different from other types of federal activities.<sup>43</sup> Thus, Justice O’Connor reasoned, § 201 was not applicable to facts of *Dixson*.<sup>44</sup>

Justice O’Connor expounded on this concept of *grantee autonomy* by explaining the principle has particular importance in two circumstances. First, grantee autonomy

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<sup>40</sup> *Id.* at 482.

<sup>41</sup> *Id.* at 508 (O’Connor, J., dissenting).

<sup>42</sup> *Id.* (citing 41 U.S.C. § 504 (definition of “grant” requires that “no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity”)).

<sup>43</sup> *Dixson*, 465 U.S. at 508 (O’Connor, J., dissenting).

<sup>44</sup> *Id.* at 510-11.

is strongest in “block grant” programs, such as the program at issue in *Dixson*. “In such programs, federal control over the spending of the distributed funds is minimized, and the grant recipient cannot plausibly be said to be acting for anyone but itself.”<sup>45</sup> Second, due to longstanding federalism principles, “the principle of grantee autonomy applies with special force when federal grant recipients are state or local governments.”<sup>46</sup> She stated:

Such principles must shape the construction of the statutory language . . . [And] demand a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States, even when their programs are being funded by the United States.<sup>47</sup>

In the years that followed *Dixson*, circuit courts embraced the “public officer or employee with federal responsibilities” rationale of the majority and were reluctant to seize and act on the grantee-autonomy distinction articulated in Justice O’Connor’s dissent.<sup>48</sup>

As a final note, the expansion of § 201’s applicability widened further in 2001 when a *private* citizen, who performed some delegated government function, was held to be a “public official.” In *United States v. Thomas*,<sup>49</sup> the Fifth Circuit held that a prison guard who was employed by a private company, which contracted with the Immigration

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<sup>45</sup> *Id.* at 509.

<sup>46</sup> *Id.* (citing See Shapek, MANAGING FEDERALISM: EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM (1981)).

<sup>47</sup> *Dixson*, 465 U.S. 509-10 (O’Connor, J., dissenting).

<sup>48</sup> See, e.g., *United States v. Strissel*, 920 F.2d 1162 (4th Cir. 1990) (executive director of city housing authority who distributed HUD funds); *United States v. Velazquez*, 847 F.2d 140 (4th Cir. 1988) (county deputy who worked in local jail with contract to house federal prisoners).

<sup>49</sup> 240 F.3d 445 (5th Cir. 2001).



and Naturalization Service to run a prison, and who performed the same duties, had the same responsibilities and potential criminal culpability as a federal prison guard.<sup>50</sup>

### III. 18 U.S.C. § 666 - FEDERAL PROGRAM BRIBERY

Congress feared the Supreme Court would rule the opposite way it did in *Dixson*, i.e., that the defendants, city employees in charge of dispersing and managing federal funds, were not public officials under § 201, so as an uncharacteristically preemptive measure, Congress augmented § 201 with § 666 while *Dixson* was being litigated.<sup>51</sup> This federal program bribery statute is a mechanism by which the federal prosecution of bribery may be undertaken against persons who are not federal employees or “public officials.” Rather than predicate the statutes applicability on federal employment or public official status, § 666 predicates its applicability on the receipt of federal “benefits.”<sup>52</sup>

The statute makes it a federal criminal offense if (1) an agent of a state, local government or agency (2) corruptly solicits or accepts anything of value of \$5,000 dollars or more (3) intending to be influenced in connection with *any* transaction the state or local organization for whom the agent works, and (4) such organization receives \$10,000 in federal benefits within a year’s time.<sup>53</sup>

The statute met its first major challenge in 1997 when the Supreme Court granted certiorari to answer whether government must prove the bribe at issue, in some way, affected federal funds before the bribe violated §

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<sup>50</sup> *Thomas*, 240 F.3d at 448.

<sup>51</sup> *Salinas v. United States*, 522 U.S. 52, 58 (1997).

<sup>52</sup> 18 U.S.C. § 666(b) (2014).

<sup>53</sup> 18 U.S.C. § 666(b) & (d)(5) (2014). The statute provides the applicable punishment, a fine and imprisonment of “not more than ten years, or both.” 18 U.S.C. § 666(a)(2) (2014).

666(a)(1)(B). The case, *Salinas v. United States*, involved the chief deputy of a state prison facility.<sup>54</sup> The facility housed several federal prisoners, and in exchange for housing them, the state facility received considerable federal funds, and these funds easily constituted \$10,000 in benefits required by § 666.<sup>55</sup> The chief deputy at the facility received two designer watches and a truck, which had a value greater than \$5,000, in exchange for allowing a federal prisoner conjugal visits.<sup>56</sup>

The defense made a nexus argument which would require the federal government to prove that the bribery affected federal funds in order to convict a state or local actor under § 666. Focusing on the word “any” in § 666(a)(1)(B), the Court stated the statute broadly encompassed an agent of a state or local government which receives \$10,000 in federal benefits be influenced or rewarded in connection with *any* business, transaction, or series of transactions of the defined organization, government or agency.<sup>57</sup> As a result, the Court held that the “expansive and unqualified [language], both as to the bribes forbidden and the entities covered” does not support the argument that federal funds must be affected before the acts could be criminal in nature.<sup>58</sup>

#### A. 18 U.S.C. § 666 - CONGRESSIONAL AUTHORITY CHALLENGE TONED IN FEDERALISM

The *Salinas* opinion was equivocal, and as an aftereffect, a circuit split developed on the issue of whether the criminal acts prohibited by § 666 required any type of nexus between the corrupt act and a risk to federal funds. To address this split, the Court heard the case of *Sabri v. United States*.<sup>59</sup> As a ramification of the presented nexus issue, congressional

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<sup>54</sup> *Salinas*, 522 U.S. at 52.

<sup>55</sup> *Id.* at 54.

<sup>56</sup> *Id.* at 55.

<sup>57</sup> *Id.* at 57.

<sup>58</sup> *Id.* at 52.

<sup>59</sup> *Sabri v. United States*, 541 U.S. 600 (2004).

authority to enact § 666 became integral to the proceedings and decision.

*Sabri* concerned a member of the Minneapolis Community Development Agency (“MCDA”) and a real estate developer.<sup>60</sup> Both were accused of violating § 666(a)(2) when each was involved in bribes and kickbacks, which exceeded \$5,000, relating to various regulatory approvals and eminent domain proceedings.<sup>61</sup> Minneapolis received approximately \$29,000,000 per year in federal funds, and the MCDA received \$23,000,000 per year, which easily satisfies the statute’s other jurisdictional requirement.<sup>62</sup>

*Sabri* raised a facial challenge to the statute when he argued, “the law can never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money.”<sup>63</sup> The Court replied that it “do[es] not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook[,]”<sup>64</sup> the nexus between the corrupt act and federal funds. Further, the Court expressed, “there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I, § 8.”<sup>65</sup> The Court further stated:

Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not

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<sup>60</sup> *Id.* at 602.

<sup>61</sup> *Id.* 602-3.

<sup>62</sup> *Id.* at 602.

<sup>63</sup> *Id.* at 604.

<sup>64</sup> *Id.* at 605.

<sup>65</sup> *Id.*

frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.<sup>66</sup>

After losing the first portion of the Spending Clause round, the petitioner went into the remainder of the round wielding *Morrison*<sup>67</sup> and *Lopez*.<sup>68</sup> In those cases of similar rationale, the Court reasoned, it would be necessary “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>69</sup> Thus, the congressional authority to enact such statutes was not present. In *Sabri*, however, the Court found that no pile of inference upon inference was needed. The federal government was within its “power to keep a watchful eye on expenditures and on the reliability of those who use public money[.]”<sup>70</sup>

In a final effort, the petitioner asserted that the condition attached to such funds, i.e., that their misuse would result in criminal culpability, was unduly coercive under the Tenth Amendment-related test established in *South Dakota v. Dole*.<sup>71</sup> If such were held true, then § 666 would be unconstitutional. However, the Court quickly distinguished *Dole* from the facts of *Sabri* by aptly stating that § 666 brings “federal power directly to bear on individuals who convert public spending into unearned private gain,” not on a State’s public policy decision-making ability, as in *Dole*.<sup>72</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>68</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>69</sup> *Id.* at 608 (citing *Lopez*, 514 U.S. at 567).

<sup>70</sup> *Sabri*, 541 U.S. at 608.

<sup>71</sup> *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>72</sup> *Sabri*, 541 U.S. at 601.

Concurring,<sup>73</sup> Justice Thomas expressed his doubt about the federal government's interest his colleagues used to justify the congressional authority to enact § 666 under the Spending Clause. He reasoned that merely noting the fungible nature of money does not explain how the federal government could gain an interest in all instances of local bribery. Justice Thomas provided an example: "noting that '[m]oney is fungible,' . . . for instance, does not explain how there could be any federal interest in 'prosecut[ing] a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of \$10,000[.]'"<sup>74</sup> Justice Thomas concluded the federal interest in the bribe at issue in *Sabri* was comparably attenuated, "yet the bribe is covered by the expansive language of § 666(a)(2)."<sup>75</sup>

#### B. THE ACADEMIC DISCOURSE SURROUNDING § 666

*Sabri* was announced in 2003, the same term as *McConnell v. FEC*.<sup>76</sup> *McConnell* held that the federal government's interest in combatting corruption outweighs the ever-important First Amendment rights involved in the political process.<sup>77</sup> This decision coupled with *Sabri*, "confirm[ed] the high priority that the Court places on the National Government's authority to fight corruption at any level in order to protect the democratic process and public confidence in it."<sup>78</sup>

<sup>73</sup> *Id.* at 610 (Justices Kennedy and Scalia also concurred, but only for the purpose of revoking their indorsement of Part III of the opinion, which the authoring justices deemed an "afterword").

<sup>74</sup> *Id.* at 623 (Thomas, J., concurring) (citing *United States v. Santopietro*, 166 F.3d 88, 93 (2nd Cir. 1999)).

<sup>75</sup> *Sabri*, 541 U.S. at 601 (Thomas, J., concurring).

<sup>76</sup> *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), *overruled by Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

<sup>77</sup> *McConnell*, 540 U.S. at 143-44, *overruled by Citizens United*, 558 U.S. 310 (2010).

<sup>78</sup> George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 404 (2005).

Accordingly, George D. Brown, Professor of Law at Boston College Law School, labeled the Court's 2003 term the "Anti-Corruption Term."<sup>79</sup>

Further, Brown predicted these two cases could be seen as "two important steps down the road toward more vigorous anti-corruption efforts."<sup>80</sup> On a federal level, the federal government's concern with the efficiency of its operations is clear.<sup>81</sup> However, the federal government's interest in "sub-national" corruption is significantly more attenuated.<sup>82</sup> Brown posed, "What concern is to Washington if Smallville is inefficient, lax on ethical standards, and even allows their salaries through liberal use of municipal property and funds?"<sup>83</sup>

First, "the conduct of all government officials is something the public views in unitary terms, regardless of the level at which it occurs. Thus, corruption at any level can undermine confidence in the system as a whole."<sup>84</sup> This argument is "short on empirical justification"<sup>85</sup> but has an "intuitive appeal."<sup>86</sup> In other words, at the time this article was written, no studies had been conducted much less conclusively proven that members of the general public were unable to distinguish between federal, state, and local officials. Even if such a distinction could not be made in the minds of average citizens, it is unlikely that such a lack of understanding or misconception provided a solid basis for establishing the federal government's interest necessary for § 666's legislation.

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<sup>79</sup> *Id.* at 405.

<sup>80</sup> *Id.* at 407.

<sup>81</sup> *Id.* at 409.

<sup>82</sup> *Id.* at 409-10.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 410.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

Second, Brown stated that “interstate externalities” may be offered as a federal government’s interest.<sup>87</sup> Essentially, corruption in State A may affect State B. This inference-based justification is “the familiar race to the bottom argument for national intervention.”<sup>88</sup> Brown dismissed both of these potential federal interests as “hardly overwhelming.”<sup>89</sup> Moreover, conceivable federal interests used to justify federal prosecution of state and local actors under federal bribery programs “run directly counter to . . . New Federalism.”<sup>90</sup>

#### IV. NEW FEDERALISM AND FEDERAL ANTI-CORRUPTION STATUTES

The late 1990’s and early 2000’s saw, perhaps, the main thrust of the resurgence of federalism principles.<sup>91</sup> “New Federalism,” as it was dubbed, is essentially two principles: an emphasis on the Constitution’s enumeration of federal powers as limiting the powers of the federal government,<sup>92</sup> and the concept of states as quasi-sovereign, largely autonomous entities owed great respect by the co-equal national government.<sup>93</sup> New Federalism principles are likely the most controversial Rehnquist Court legacies.<sup>94</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 411.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) (“[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.”); Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001).

<sup>92</sup> See, e.g., *Pritz v. United States*, 521 U.S. 898, 929-30 (1997).

<sup>93</sup> See, e.g., *Lopez*, 514 U.S. at 552; *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 54, 72, 76 (1996).

<sup>94</sup> Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 12 (2003).

One prevailing theme of the Rehnquist Court's New Federalism "insiste[d] that it is the task of the Justices to enforce both textual and structural limitations on federal power - i.e., that 'political safeguards are not enough[.]'"<sup>95</sup>

Structural federalism is sometimes said by the Justices not only to facilitate optimal outcomes through competition and choice, or diversity and experimentation; the Court's decisions and reasoning are animated as well by claims that decisionmakers and regulators ought to be "accountable" to those they serve, and that this accountability is enhanced by the dual sovereignty and decentralization preserved by our Constitution.<sup>96</sup>

It is from this view of the Constitution's "text, history, and structure"<sup>97</sup> that produces the congressional authority battle played out in the context of federal corruption statutes. Particularly at issue is the federal government's power or authority to enact legislation which reaches state and local officials.

#### A. POTENTIAL SOURCES OF CONGRESSIONAL AUTHORITY TO ENACT § 666: HENNING'S CORRUPTION LEGACY

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<sup>95</sup> *Id.* at 15 (citing *See, e.g.,* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001)).

<sup>96</sup> Garnett, 89 CORNELL L. REV. at 20 (citing *See, e.g.,* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies.")).

<sup>97</sup> Garnett, 89 CORNELL L. REV. at 22.



Peter J. Henning, Professor of Law at Wayne State University, offered a potential source of congressional authority to enact § 666 by offering a novel argument that the Constitution has an “Anti-Corruption Legacy.”<sup>98</sup> Henning argued that congressional involvement in the prosecution of state and local official is not a threat to federalism.<sup>99</sup> In fact, Henning believed federalism is strengthened by federal prosecution of such crimes because corruption at state and local levels undermines the balance federalism creates.<sup>100</sup>

In support of congressional authority to combat corruption at the federal level, Henning cited:

“Bribery” as one of the grounds for impeachment; the prohibition of both change in the President's compensation during his term of office and of his receipt of “any other Emolument from the United States, or any of them”; the prohibition on federal officeholders' receipt of emoluments from foreign sources; the prohibition on members of Congress being appointed “to any federal office ‘which shall have been created, or the Emoluments whereof shall have been increased during such time’ that the member was in office[; and,] [t]he Appropriations Clause requir[ing] congressional authorization before [the executive] can disburse funds.”<sup>101</sup>

Taken in conjunction with one another, Henning asserted these Constitutional provisions are “structural standards

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<sup>98</sup> Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 80-2 (2003).

<sup>99</sup> *Id.* at 81-2.

<sup>100</sup> *Id.*

<sup>101</sup> George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 415-416 (2005) (citing Henning, 92 KY. L.J. at 86-7).

designed to limit the possibility of corruption in the Federal government.”<sup>102</sup>

Regarding Constitutional provisions creating structural standards applicable to the federal government combatting corruption at the state level, Henning cites two constitutional provisions: the Seventh Amendment guarantee of a jury trial and the Article III provision for diversity jurisdiction of federal courts.<sup>103</sup> Both, in his view, provide a certain level of protection against corrupt state and local government bias in judicial proceedings.<sup>104</sup>

Henning’s “Anti-Corruption Legacy” argument regarding the federal government’s authority to criminalize acts of its own employees is unnecessary. The federal government has a clear interest in and authority to regulate the acts of its employees which are likely to undermine the employee’s duties. Thus, Henning likely made those points for purposes of boosting his Anti-Corruption Legacy argument relating to the criminalization of acts of state and local officials.

After close examination, the inferences and logical backflips needed to find congressional authority to criminalize and prosecute various acts of state and local officials under this Anti-Corruption Legacy argument are hardly persuasive due to their less-than-concrete nature. Such inferences may frighten a jurist or academician wishing to build a congressional authority argument on such a basis. George D. Brown agreed that Henning’s argument is “hardly dispositive”<sup>105</sup> and he, along with Adam H. Kurland, discussed another potential source of congressional power to regulate the conduct at issue, the Guarantee Clause.

## B. KURLAND AND THE GUARANTEE CLAUSE

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<sup>102</sup> Henning, 92 KY. L.J. at 87.

<sup>103</sup> *Id.* at 89.

<sup>104</sup> *Id.* at 91.

<sup>105</sup> Brown, 54 CATH. U. L. REV. at 417.

Kurland, Professor of Law at Howard University, a strong advocate for prosecution on a federal level, wrote that federal prosecution of state and local officials on the basis of congressional authority such as the Commerce Clause was dubious.<sup>106</sup> Thus, Kurland looked elsewhere in the Constitution for congressional authority. His search led him to examine the Guarantee Clause. The Guarantee Clause states, “[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]”<sup>107</sup> Kurland believes:

[T]he primary federal interest in combating local corruption . . . is based on the principle that the public is entitled to honest government at all levels. The faith that the citizenry places in all levels of government is the foundation of the republic. Thus, anything that erodes that foundation is of substantial federal interest. The citizens of the United States are therefore entitled to federal protection from abuses of power by those who govern.<sup>108</sup>

Further, Kurland saw the Guarantee Clause as akin to the Fourteenth Amendment in that he views it as “a constitutional provision that necessarily intrudes on state sovereignty and alters the normal federal state balance.”<sup>109</sup> Additionally, Kurland believed the Guarantee Clause could

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<sup>106</sup> Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 486 (1989).

<sup>107</sup> U.S. CONST. art. IV, § 4.

<sup>108</sup> Brown, 54 CATH. U. L. REV. at 418 (citing Kurland, 62 S. CAL. L. REV. at 376-77).

<sup>109</sup> Brown, 54 CATH. U. L. REV. at 419 (citing Kurland, 62 S. CAL. L. REV. at 459).

be a source of congressional power to enact a generally applicable anti-corruption statute.<sup>110</sup>

The immediate benefit of his thesis is that it is a plausible basis for “dealing directly with the problem of the prosecutions: validation under a general statute, of those prosecutions.”<sup>111</sup> However, Congress has never taken such a broad view of its power.<sup>112</sup> More importantly, recent Supreme Court discussion of the Guarantee Clause seems to view the clause more “as a source of state autonomy than a font of federal power.”<sup>113</sup> Thus, New Federalism, discussed previously, blocks the Guarantee Clause from being a source a federal power, at least as it is currently viewed.

## V. OPERATION ROCKY TOP - AN ILLUSTRATIVE CASE STUDY & RESTRICTING § 666’S SCOPE BY ADDING A JURISDICTIONAL ELEMENT

### A. OPERATION ROCKY TOP

By 1985, fearing circumvention of Tennessee’s strict gambling prohibitions, the Tennessee General Assembly began to heavily regulate charitable bingo operations, which were generating an estimated \$31 million a year.<sup>114</sup>

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<sup>110</sup> Brown, 54 CATH. U. L. REV. at 420 (citing Kurland, 62 S. CAL. L. REV. at 452-53).

<sup>111</sup> Brown, 54 CATH. U. L. REV. at 420.

<sup>112</sup> *Id.* (citing Kurland, 62 S. CAL. L. REV. at 493).

<sup>113</sup> Brown, 54 CATH. U. L. REV. at 420 (citing *Printz*, 521 U.S. at 918-9 (listing the Guarantee Clause among provisions that reflect the Constitution's commitment to state sovereignty)).

<sup>114</sup> Interview with Tennessee State Senator Randy McNally, Chairman of the Finance, Ways, & Means Committee, in Oak Ridge, TN. (Mar. 21, 2015); Ronald Smothers, *Tennessee Republicans See an Election Weapon in State’s Bingo Scandal*, N.Y. TIMES, January 28, 1990, available at <http://www.nytimes.com/1990/01/28/us/tennessee-republicans-see-an-election-weapon-in-state-s-bingo-scandal.html>.

For instance, the legislature began limiting the times a person could play within a specified time period and the types of prizes which could be won.<sup>115</sup> During this time, the Secretary of State's office oversaw compliance with the relevant bingo law and regulations.<sup>116</sup>

In the fall of 1985, then-state Representative James R. "Randy" McNally ("McNally"), who represented a portion of East Tennessee, received a call from a member of the local chapter of the Fraternal Order of Eagles ("Eagles"), an organization geared toward health-related charitable efforts,<sup>117</sup> and the member told McNally of concerns he had with the bingo practices of a local branch of the Army & Navy Union ("Army-Navy"),<sup>118</sup> an armed services veteran's social organization. The Eagles member explained that Army-Navy was not adhering to Tennessee law in various ways.<sup>119</sup> Consequentially, McNally began to investigate the law and Army-Navy.<sup>120</sup>

Simultaneous to investigating the matter, McNally contacted Secretary of State's office, and expressed his concerns about the practices of the Army-Navy branch, and he asked the office to look into Army-Navy's practices.<sup>121</sup> By February of 1986, McNally said he was frustrated because his efforts to prompt the Secretary of State to investigate

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<sup>115</sup> Interview with Tennessee State Senator McNally (Mar. 21, 2015) (on file with author).

<sup>116</sup> *Gentry Crowell*, 57; *Top Tennessee Aide*, N.Y. TIMES, December 22, 1989, available at <http://www.nytimes.com/1989/12/22/obituaries/gentry-crowell-57-top-tennessee-aide.html>.

<sup>117</sup> Fraternal Order of Eagles, *About*, <http://www.foe.com/About.aspx> (last visited Mar. 22, 2015).

<sup>118</sup> Army and Navy Union, *Home*, <http://www.armyandnavyunion.org/home/> (last visited Mar. 22, 2015).

<sup>119</sup> Interview with Tennessee State Senator McNally, *supra* note 115.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

“were going nowhere.”<sup>122</sup> At approximately the same time, McNally received a call from three fellow House members, and one in particular asked McNally to meet with a Bingo Association lobbyist. Initially, McNally was reluctant; however, as a courtesy, he consented.<sup>123</sup>

At the end of the same legislative work week, McNally met with the lobbyist at the Hermitage for a luncheon to discuss bingo practices.<sup>124</sup> McNally explained that “the meeting went normally until the [lobbyist] said some of the legislators that [the lobbyist] dealt with liked to get their money during campaign season, and others liked the money to be spread out over the year.”<sup>125</sup> McNally found the statement deeply unsettling.<sup>126</sup> What type of money was the lobbyist talking about-- campaign contributions or something else? Even if he were only referencing legal campaign contributions, why would the legislators prefer the funds be “spread out” over the year?

He considered the statement over the weekend, and returned to Nashville the proceeding Monday but was unsure how to proceed.<sup>127</sup> He worried about being framed as an “alarmist.”<sup>128</sup> As a Rotary Club member, McNally attended a Rotary meeting that Monday, and the civic-driven message conveyed by the meeting, pushed him to delve deeper into the lobbyist’s statement, regardless of the potential political and social ramifications.<sup>129</sup> He called the Federal Bureau of Investigation (“F.B.I.”).<sup>130</sup>

A call screener at the F.B.I.’s Nashville office answered the phone, obtained the necessary information, and told

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

McNally he would be contacted soon.<sup>131</sup> Within five minutes, they called back.<sup>132</sup> F.B.I. agent, Richard Knudsen, expressed that the F.B.I. was interested in McNally's information.<sup>133</sup> Additionally, McNally learned that Knudsen had been working in conjunction with an agent of the Tennessee Bureau of Investigation ("T.B.I."), Roger Farley, on this matter.<sup>134</sup>

McNally was instructed not to initiate conversations with the Bingo Association's lobbyist.<sup>135</sup> McNally said, "if [he] called, I was supposed to tell them, 'I was ok; I was satisfied' with the legality of their operation."<sup>136</sup> Approximately two weeks after the Hermitage luncheon, another player revealed himself.<sup>137</sup>

W.D. "Donnie" Walker ("Walker"), head of the Charitable Solicitations division of the Secretary of State's office, contacted McNally, and ominously asked, "everything ok?"<sup>138</sup> McNally gave an affirmative response, but the interested parties must not have been convinced because a week later, while McNally was on his way to a committee meeting in the General Assembly's main office building, the War Memorial Building, the Bingo Association's lobbyist handed McNally a white envelope, and said, "we appreciate you."<sup>139</sup>

As a result, he was immediately faced with a crucial decision: whether to risk raising alarm by skipping the committee meeting and reporting the event, or go to the meeting with an envelope filled with unknown content in his coat jacket's side pocket.<sup>140</sup> After a brief moment of

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

consideration, McNally called Agents Knudsen and Farley.<sup>141</sup> The agents told McNally to leave the immense, yet crowded, office building without being seen, and they would pick him up immediately.<sup>142</sup>

After stopping at nearby fast-food restaurant, the agents took the envelope from McNally, examined it, and preserved it as evidence.<sup>143</sup> Upon opening the envelope, McNally found three hundred dollars.<sup>144</sup> At the direction of the agents, McNally made a recorded phone call to the lobbyist.<sup>145</sup> McNally thanked him for the money and expressly asked whether it should be reported as a campaign contribution.<sup>146</sup> The lobbyist said they did not intend to report it, and neither should he.<sup>147</sup>

A lull in the relevant events occurred until June of 1986 when the “drop dead” contribution reporting date approached.<sup>148</sup> McNally was concerned about whether to report the three-hundred dollars because the Secretary of State oversaw the reporting and recording of contributions.<sup>149</sup> The F.B.I. was proceeding with a particular degree of caution because Abscam, a corruption investigation ending with the overturning of several charges due to entrapment issues, was a not-so-distant memory.<sup>150</sup> The F.B.I. and T.B.I. wanted more evidence, so when the lobbyist in question came calling, they sent McNally to meet with him in July of 1986.<sup>151</sup>

Prior to the meeting, set to take place at the Regas in Knoxville, McNally was fitted with a wire and transmitting

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*



device. He was “sweating bullets” during the dinner.<sup>152</sup> The conversation centered around lobbying and the Army-Navy matter.<sup>153</sup> The lobbyist explained that he knew “how the [legislative] game was played.”<sup>154</sup> With McNally (and investigating officials) listening, he proceeded to tell McNally that the game is best played when a lobbyist can get close to a legislator, obtain money for the legislator to vote a certain way on a hotly-contested bill, and the legislator and lobbyist split the corresponding illegal funds.<sup>155</sup> To the investigators’ and McNally’s deeper surprise, the lobbyist cited specific votes and members the lobbyist had helped influence.<sup>156</sup>

The dinner had gone on quite some time when suddenly McNally heard the previously set codeword over the Regas’s intercom system.<sup>157</sup> He quickly excused himself, and met with agents in the men’s bathroom.<sup>158</sup> Apparently, the tape recorder he was wearing was nearly out of recording capacity, and McNally was forced to end the dinner quickly without raising suspicion.<sup>159</sup> McNally returned to the table, and the dinner ended anti-climatically with no further material facts developing, and to much disappointment, no money was exchanged.<sup>160</sup>

Tapes in hand, the F.B.I. brought the case before Washington officials.<sup>161</sup> After reviewing the tapes, the investigation received high priority, i.e., reinforcements

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

were deployed.<sup>162</sup> Most notably, the F.B.I. sent an undercover agent to pose as a lobbyist.<sup>163</sup>

In September of 1986, another major effort to gather evidence occurred.<sup>164</sup> The lobbyist, Walker, and McNally met in the parking lot of an East Tennessee hospital.<sup>165</sup> With the F.B.I. and T.B.I. watching, McNally received one-thousand dollars after feigning dissatisfaction with the prior bribe.<sup>166</sup> Serendipitously, reports of a peeping Tom had been made to the local police, and the entire surveillance of the event was almost exposed when a local police unit rolled by and saw the surveillance van.<sup>167</sup>

Thinking the van may be connected to the peeping Tom reports, the local police officer got out, and began asking questions of the T.B.I. and F.B.I. agents within.<sup>168</sup> Quickly, the agents identified themselves, and asked the officer to leave.<sup>169</sup> Meanwhile, McNally calmed the lobbyist and Walker, who had seen the local police unit, by telling them to “just be cool.”<sup>170</sup> When the officer left, the parties went their separate ways.<sup>171</sup>

In November of 1986, McNally was elected to the Tennessee Senate.<sup>172</sup> Nearly three years later, the investigation was publicly announced by the F.B.I. and T.B.I.<sup>173</sup> Many and varying federal indictments were issued as result of the information gathered as a result of the information collected by F.B.I, the T.B.I., and McNally.<sup>174</sup> Particularly, the lobbyist

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

and Walker were offered plea deals in return for cooperation.<sup>175</sup> Both initially rejected.<sup>176</sup> However, the “big break” in the case occurred when Walker became a witness for the prosecution.<sup>177</sup> “Mr. Walker . . . pleaded guilty in a plea agreement and provided details of how he helped operators obtain fraudulent charters as charities so that they could legally organize bingo games.”<sup>178</sup>

Walker detailed that he arranged “secret partnerships” in the operations for some current and former elected officials, and he helped organize the bingo operators into a group called “the Association,” whose goal was funneling money to legislators willing to become a part of a secret partnership.<sup>179</sup> “Armed with Mr. Walker’s testimony, grand juries began their indictments. Among those indicted were a former member of the Alcoholic Beverage Commission, a labor leader, a former legislator, and State Election Commissioner and an incumbent legislator[.]”<sup>180</sup> as well as the previously discussed defendants.

Operation Rocky Top reached its highest political actor with Secretary of State. After testifying before the federal grand jury, the Secretary was called another time.<sup>181</sup> Knowing that the recall was likely to end in his indictment, he committed

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Ronald Smothers, *Tennessee Republicans See an Election Weapon in State’s Bingo Scandal*, N.Y. TIMES, January 28, 1990, available at <http://www.nytimes.com/1990/01/28/us/tennessee-republicans-see-an-election-weapon-in-state-s-bingo-scandal.html>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Tennessee Secretary of State Dies after Suicide Attempt*, DAILY NEWS, Bowling Green, Kentucky, Page 4-A, December 21, 1989, available at <https://news.google.com/newspapers?nid=1696&dat=19891221&id=9PMaAAAAIABJ&sjid=kkcEAAAAIABJ&pg=7052,6125595&hl=en>.

suicide.<sup>182</sup> In response to the revelations of the investigation, the Tennessee General Assembly established new, more rigid ethical boundaries: limits on campaign contributions and new lobbying restrictions.<sup>183</sup> However, perhaps federal intervention was unnecessary.

#### B. AN ADDITIONAL JURISDICTIONAL ELEMENT

The rationale used by the Court to support congressional authority to pass § 666 is arguably unconvincing. The highly policed Commerce Clause provided no basis; the Taxing and Spending rationale of *Salinas* and *Sabri* is wanting; Henning's "Anti-Corruption Legacy" begged for serious inferences, and the Guarantee Clause provided no help in the face of the resurgence of Federalism principles, i.e., New Federalism.

If, as a counterfactual, § 666 were found to have been without congressional authority and Senator McNally had accepted the bribes offered, the F.B.I.'s lack of power to investigate the matter would not cause the sky to fall on the heads of the people of the State of Tennessee. The State, a quasi-sovereign federalism partner, would address the matter from an investigatory, prosecutorial, and adjudicative role. Specifically, the T.B.I.'s white collar division would investigate, seek to prosecute, and have the matter of public corruption adjudicated.

At the heart of federal corruption statutes is the lack of trust the federal government has in states to discover, investigate, and fairly adjudicate a matter of corruption which involves the state's local and/or state-level officials. The federal assumption essentially is that a state from which corruption spawns is thereby ill-equipped to help itself, to address the

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<sup>182</sup> *Id.*

<sup>183</sup> Interview with Tennessee State Senator McNally, *supra* note 115.

matter. This assumption is a fallacy of the worst order. It is a generalization.

All states in which corruption exists are not necessarily unable to address the matter merely because a corrupt act germinated within its boundaries. A determination as to whether the state is capable of addressing the matter must be made with regard to the nature and extent of the corrupt activities at issue. If the corrupt activities are so pervasive as to call reasonable doubt as to whether the state agency or branch of government in charge of investigating, prosecuting, or adjudicating the matter can fairly handle the matter then, perhaps, federal intervention is needed. Otherwise, the state should be allowed to address the matter with its agents and under its criminal law.

To effectuate this policy, § 666's jurisdictional hook need only be amended. The jurisdictional hook currently requires, an agent of a State, local government or agency to corruptly solicit or accept anything of value of \$5,000 or more, and such organization of which that agent is a part receive \$10,000 in federal benefits within a year's time.<sup>184</sup> It should be amended to additionally require that "there be reasonable belief that the state agency or agencies with jurisdiction to investigate, prosecute, or adjudicate the alleged corrupt matter will be unable to fairly decide whether to proceed with the matter due to potential bias, political or otherwise, created by the pervasive nature of the corruption scheme at issue."

This additional requirement would, in effect, remedy the generalization fallacy at the heart of § 666 as well as curb the nearly boundless scope of the statute. The concern regarding the lack of significant, traceable federal interest articulated by Justice Thomas's concurrence in *Sabri* would also be quieted because the federal government could articulate reasonable doubt as to the ability of the state to

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<sup>184</sup> 18 U.S.C. § 666(b) & (d)(5) (2014).

handle the state or local matter, and thereby gain an interest in legislating and enforcing § 666.

Take Justice Thomas's city meat inspector example. Recalling his concurrence in *Sabri*, Justice Thomas was unpersuaded by the argument that the fungible nature of money gave rise to a federal interest in prosecuting a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of \$10,000.<sup>185</sup> The additional jurisdictional requirement as to the ability of the state to handle the matter of the unsavory meat inspector would add significant weight to the federal government's interest that Justice Thomas felt unconvincingly light (or non-existent).

To have palpable impact, the suggested additional jurisdictional requirement would necessarily have to be one which is proven to the jury at the time of trial. From an evidentiary perspective, for the federal government to be able to proceed with the prosecution of the meat inspector, they would be required to produce evidence showing that the state would be unable to fairly decide whether to further investigate and potentially prosecute because, to extend facts of the example, the meat inspector's unscrupulous behavior was merely a small tributary of a much larger, pervasive corruption scheme—a scheme which reasonably could leave a state-led investigation without the ability to fairly decide whether to proceed.

Specifically, the federal government would be required to produce evidence showing that the local or state regulatory agency in charge of the meat inspector's compliance with applicable law was tainted by the corruption scheme. Ideally, the federal government would produce evidence, such as video recordings, financial statements, or collaborative testimony, which demonstrates further bribes or a portion of the briberous scheme reached the highest

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<sup>185</sup> *Sabri*, 541 U.S. at 614 (Thomas, J., concurring).

overseeing local and state actors as to render those actors without the ability, due to their involvement, to execute their investigative duties.

In the context of Operation Rocky Top, if McNally had taken a \$5000 bribe, § 666 would be applicable because the State of Tennessee receives far more than \$10,000 in federal benefits in a year's time, and the bribe would have been in connection with his capacity as a legislator. Should the additional jurisdictional element suggested have existed then, the federal prosecutor would have had to demonstrate to the jury that the T.B.I., the state prosecutorial authority, or state adjudicating body was unable to fairly decide whether to proceed with the matter due its bias, political or otherwise, created by the pervasive nature of the corruption scheme.

Ideally, the prosecutor would present lawfully obtained testimony, recordings, or official or business records which would show that the bingo-related illegal funds or political influence spread from the legislature and into the relevant investigatory department of the T.B.I., the prosecuting official, or adjudicative body as to taint a link in the state's criminal justice process.

Specifically, the new element could have been satisfied by a prosecutorial showing of the scheme's taint reaching the relevant, white-collar arm of the T.B.I. or the local judicial official who would likely hear the case if filed. Such a showing would demonstrate a reasonable belief that the pervasive nature of the corruption scheme at issue destroyed the objective stance of state agency tasked with the investigation, prosecution, or adjudication of the Association's bingo-related practices. A taint of this nature would, in effect, render the state's justice process unable to properly address the corruption matter. Upon that evidentiary showing, then federal interdiction into a state or local corruption matter would be proper.

However, the facts of investigation fell short of this jurisdictional requirement due to the fact that no evidence was presented that the corruption scheme reached into the T.B.I. or the state court system which would have adjudicated the matter. Had these been contemporary events and had the additional jurisdictional hook been in place, the State of Tennessee's semi-autonomous nature would have been respected and left undisturbed by federal intervention.

## VI. CONCLUSION

Since *Dixon*, courts have seen the scope of § 201 become nearly boundless, and cases limiting its scope have had a nominal effect.<sup>186</sup> By preemptively passing § 666, Congress further augmented the scope federal corruption crimes. After discussing various potential sources of congressional authority, the unconvincing Spending Clause rationale was revealed. Startlingly, the Court stated that the federal interest required for congressional authority to pass § 666 stemmed from the fact that \$10,000 in federal funds were merely in the vicinity of corruption. In the face of New Federalism, such logic, such a tenuous articulation of federal interest cannot stand. However, a solution was presented.

The additional requirement to § 666's jurisdictional hook, i.e., the federal government would be required to forbear intervention into what could largely be qualified as an intra-state matter unless the federal government could demonstrate the state's inability to help itself, would significantly lessen the tenuous nature of the federal interest as well as satisfy New Federalism principles, at least from a theoretical perspective.

To demonstrate the jurisdictional requirement's pragmatic efficacy, Operation Rocky Top, a Tennessee corruption

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<sup>186</sup> See, e.g., *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).



investigation, served as case study in which examples of how such a requirement could be met with a sufficient evidentiary showing. In short, the requirement would place a duly heavy burden on a federal prosecutor pursuing a § 666 action against a state actor, but that is precisely the point. Such a heavy burden is necessary to give the federal government its required interest in the criminal matter and comport with New Federalism principles. The additional jurisdictional requirement reins federal authority, and by predicating federal authority on a respect for a state's semi-autonomous nature, the federal government is placed in an on-deck posture.



# A RESPONSE TO THE LIBERTARIAN CRITICS OF OPEN-BORDERS LIBERTARIANISM

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## I. INTRODUCTION

Libertarians may be unique in many regards, but their views on immigration do not qualify. They are as divided as is the rest of the population on this issue. Some favor open borders, and others oppose such a legal milieu. The present paper may be placed in the former category. It will outline both sides of this debate in sections II and III. Section IV is devoted to some additional arrows in the quiver of the closed border libertarians, and to a refutation of them. We conclude in section V.

## II. ANTI OPEN BORDERS

The libertarian opposition to free immigration is straightforward and even elegant.<sup>1</sup> It notes, first, a curious

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<sup>1</sup> Peter Brimelow, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); Jesús Huerta De Soto, *A Libertarian Theory of Free Immigration*, 13 *J. OF LIBERTARIAN STUD.* 187, 187-97 (1998); Hans-Hermann Hoppe, *DEMOCRACY, THE GOD THAT FAILED: THE ECONOMICS AND POLITICS OF*

bifurcation in international economic relations. In the case of both trade and investment, there must necessarily be two<sup>2</sup> parties who agree to the commercial interaction. In the former case, there must be an importer and an exporter; both are necessary. Without the consent of both parties, the transaction cannot take place. A similar situation arises concerning foreign investment. The entrepreneur who wishes to set up shop abroad must obtain the willing acquiescence of the domestic partner for the purchase of land and raw materials. And the same occurs with financial transactions that take place across national borders. Both lender and borrower must approve; otherwise, this interaction cannot possibly occur.

Matters are entirely different regarding labor mobility. Here, in the absence of any immigration restrictions, the migrant, without anyone's by-your-leave except his own, simply shows up on the territory of the receiving country. Nor is this only a mere failure to attain

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MONARCHY, DEMOCRACY AND NATURAL ORDER (2001); John Hospers, *A Libertarian Argument Against Opening Borders*, 13:2 J. OF LIBERTARIAN STUD. 153 (1998); Stephan Kinsella, *A Simple Libertarian Argument Against Unrestricted Immigration and Open Borders*, LRC BLOG (Sept. 1, 2005), <http://archive.lewrockwell.com/kinsella/kinsella18.html>; Bionic Mosquito, *Open Borders: Case Study*, BIONIC MOSQUITO (Nov. 5, 2015), <http://bionicosquito.blogspot.ca/2015/11/open-borders-case-study.html>; Matthew Reece, *The Pragmatic Libertarian Case Against Open Borders*, THE ZEROth POSITION (Nov. 24, 2015), <https://reece.liberty.me/the-pragmatic-libertarian-case-against-open-borders>; Llewellyn Rockwell, *Open Borders Are an Assault on Private Property*, MISES DAILY ARTICLES (Nov. 16, 2015), <https://mises.org/library/open-borders-are-assault-private-property>; Murray Rothbard, *Nations by Consent: Decomposing the Nation-State*, 11 J. OF LIBERTARIAN STUD. 1 (1994); Eric Ruark, *The (Il)logic of Open Border Libertarians*, FEDERATION FOR AMERICAN IMMIGRATION, (May 21, 2014); Jared Taylor, *THE REAL AMERICAN DILEMMA: RACE, IMMIGRATION, AND THE FUTURE OF AMERICA* (American Renaissance 1998).

<sup>2</sup> Or more

symmetry. Something far more important, at least for this version of libertarianism, is involved. Without mutual consent, it is charged, such movement constitutes trespass. Or, in some versions of this argument, it is in effect forced integration. Thus, from this quarter it is not at all clear that open immigration is the libertarian position. Indeed, the very opposite is true. Without limitations, restrictions, this is antithetical to libertarianism. In other words, private property rights are one of the two very bedrocks of this philosophy.<sup>3</sup> Free and open immigration violates private property rights, and this is incompatible with freedom. Free immigration is an open sesame for trespass.<sup>4</sup>

### III. THE CASE FOR OPEN BORDERS

Those libertarians in favor of free immigration<sup>5</sup> are not without a defense of their position, even in the face of

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<sup>3</sup> Along with the non-aggression principle (NAP). See Hans-Hermann Hoppe, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY*, 318-23 (1993); Jacob Huebert, *LIBERTARIANISM TODAY*, 27-39 (2010); Stephan N. Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 *J. OF LIBERTARIAN STUD.* 132 (1995); Stephan N. Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12:2 *J. OF LIBERTARIAN STUD.* 313 (1996), [http://www.mises.org/journals/jls/12\\_2/12\\_2\\_5.pdf](http://www.mises.org/journals/jls/12_2/12_2_5.pdf); Murray N. Rothbard, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO*, 2-53 (1973).

<sup>4</sup> Others have vigorously pursued their critiques of the open border libertarians. See Bionic Mosquito, *Open Borders: Case Study*, BIONIC MOSQUITO (Nov. 5, 2015), <http://bionicmosquito.blogspot.ca/2015/11/open-borders-case-study.html>; Hans-Hermann Hoppe, *On Free Immigration and Forced Immigration*, LRC BLOG (Jan. 1970), <https://www.lewrockwell.com/1970/01/hans-hermann-hoppe/on-free-immigration-and-forced-integration/>.

<sup>5</sup> Chris Berg, *Open the Borders*, 26 *POL'Y* 3, (2010); Walter Block, *A Libertarian Case for Free Immigration*, 13 *J. OF LIBERTARIAN STUD.* 167, (1998) [hereinafter Block, *Libertarian Case*]; Walter Block,

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*The State Was a Mistake*, MISES INSTITUTE (2004), <https://mises.org/library/state-was-mistake> (last visited Sept. 4, 2016); Walter Block, *Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part I*, 27 REASON PAPERS 117, (2004); Walter Block, Hoppe, Kinsella and Rothbard II, *Immigration: A Critique*, 22 J. OF LIBERTARIAN STUD. 593, (2011) [hereinafter Block, *Immigration: A Critique*]; Walter Block, *Rejoinder to Hoppe on Immigration*, 22 J. OF LIBERTARIAN STUD. 771, (2011) [hereinafter Block, *Rejoinder to Hoppe*]; Walter Block, *Rejoinder to Todea on the 'Open' Contract of Immigration*, 8 SCI. J. HUMANISTIC STUD. 52, (2013) [hereinafter Block, *Rejoinder to Todea*]; Walter Block, *Contra Hoppe and Brat on Immigration*, MGMT. EDUC. SCI. TECH. J., Jan. 2016, at 1; Walter Block & Gene Callahan, *Is There a Right to Immigration? A Libertarian Perspective*, 5 HUM. RTS. REV. 46 (2003); Donald Bourdreaux, *Absorbing Immigrants: Does America Have the Space and Resources to Allow Open Borders?*, FOUNDATION FOR ECONOMIC EDUCATION (2002), <https://fee.org/articles/absorbing-immigrants> (last visited Sept. 4, 2016); Donald Bourdreaux, *Immigration: The Practice of Principle*, CAFE HAYEK (2013), <http://cafehayek.com/2013/06/immigration-the-practice-of-the-principle.html> (last visited Sept. 4, 2016); Bryan Caplan, *Why Should We Restrict Immigration?*, 32 CATO J. 5, (2012); Bryan Caplan, *My Path to Open Borders*, OPEN BORDERS: THE CASE (2013), <http://openborders.info/blog/my-path-to-open-borders/> (last visited Sept. 4, 2016); Bryan Caplan, *America Should Open Its Borders: My Opening Statement for the Reason Immigration Debate*, LIBRARY OF ECONOMICS AND LIBERTY (2014), [http://econlog.econlib.org/archives/2014/04/america\\_should.html](http://econlog.econlib.org/archives/2014/04/america_should.html) (last visited Sept. 4, 2016); Richard Ebeling, *Freedom To Move: Personal Liberty or Government Control, Part I*, EPIC TIMES (2015), <http://www.epictimes.com/07/23/2015/personal-liberty-or-government-control/> (last visited Sept. 4, 2016); Richard Ebeling, *Practicing Freedom: Markets, Marriage, and Migration*, EPIC TIMES (2015), <http://www.epictimes.com/richardebeling/2015/08/practicing-freedom-markets-marriage-and-migration/> (last visited Sept. 4, 2016); THE CASE FOR FREE TRADE AND OPEN IMMIGRATION, (Richard Ebeling & Jacob Hornberger eds., 1995); Albert Esplugas & Manuel Lora, *Immigrants: Intruders or Guests? A reply to Hoppe and Kinsella*, 22 J. OF LIBERTARIAN STUD. 185, (2010); Max Fisher, *How Ending Birthright Citizenship Would Change Immigration*, THE ATLANTIC (2010),

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ending-birthright-citizenship-would-change-immigration/344536/ (last visited Sept. 4, 2016); David Friedman, *THE MACHINERY OF FREEDOM: A GUIDE TO RADICAL CAPITALISM*, (2d ed. 1995); David Friedman, *Welfare and Immigration – The Other Half of the Argument*, DAVID D. FRIEDMAN'S HOME PAGE (2006), [http://www.daviddfriedman.com/Libertarian/Welfare\\_and\\_Immigration.html](http://www.daviddfriedman.com/Libertarian/Welfare_and_Immigration.html) (last visited Sept. 4, 2016); David Friedman, *Immigrants and Welfare*, DAVID D. FRIEDMAN'S HOME PAGE (2012), <http://daviddfriedman.blogspot.ca/2012/11/immigrants-and-welfare.html> (last visited Sept. 4, 2016); Anthony Gregory & Walter Block, *On Immigration: Reply to Hoppe*, 21 J. OF LIBERTARIAN STUD. 25, (2007); David Henderson, *Tear Down These Walls*, FOUNDATION FOR ECONOMIC EDUCATION (2012), <https://fee.org/articles/tear-down-these-walls/> (last visited Sept. 4, 2016); Jacob Hornberger, *End Immigration Socialism*, THE FUTURE OF FREEDOM FOUNDATION (2014), <http://fff.org/2014/09/22/end-immigration-socialism/> (last visited Sept. 4, 2016); Jacob Hornberger, *There Is Only One Libertarian Position on Immigration*, THE FUTURE OF FREEDOM FOUNDATION (2015), <http://fff.org/2015/08/25/one-libertarian-position-immigration/> (last visited Sept. 4, 2016); James Hudson, *The Philosophy of Immigration*, 8 J. OF LIBERTARIAN STUD. 51, (1986); Michael Huemer, *Is There a Right to Immigration?*, 36 SOC. THEORY & PRAC. 429, (2012); Jan Krepelka, *A Pure Libertarian Theory of Immigration*, 22 J. OF LIBERTARIAN STUD. 35, (2010); John Lee, *Confusing Public and Private: The Nonsensical Private Property Argument Against Open Borders*, OPEN BORDERS: THE CASE (2015), <http://openborders.info/blog/confusing-public-private-nonsensical-private-property-argument-open-borders/> (last visited Sept. 4, 2016); John Lee, *The claim that open borders inevitably leads to homogeneity is incredibly weak*, OPEN BORDERS: THE CASE (2015), <http://openborders.info/blog/claim-open-borders-inevitably-leads-homogeneity-incredibly-weak/> (last visited Sept. 4, 2016); William Niskanen, *Build a Wall around the Welfare State, Not around the Country*, CATO INSTITUTE (2006), <http://www.cato.org/blog/build-wall-around-welfare-state-not-around-country> (last visited Sept. 4, 2016); Alex Nowrasteh, *Could Our Immigration Laws Prevent the Next Google?*, THE HUFFINGTON POST (March 28, 2012), [http://www.huffingtonpost.com/alex-nowrasteh/post\\_2887\\_b\\_1232305.html](http://www.huffingtonpost.com/alex-nowrasteh/post_2887_b_1232305.html) (last visited Sept. 4, 2016); Alex Nowrasteh, *Could Our Immigration Laws Prevent the Next Google?*, THE FEDERALIST (2015),

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Society for Individual Liberty, *Why Open Immigration?* (July 29, 2002); Dalmia Shikha, *On immigration, Obama may be cynical, but he's not breaking the law*, THE WASHINGTON EXAMINER (2014), [http://www.washingtonexaminer.com/on-immigration-obama-may-be-cynical-but-hes-not-breaking-the-law/article/2551807%22%20target=%22\\_blank](http://www.washingtonexaminer.com/on-immigration-obama-may-be-cynical-but-hes-not-breaking-the-law/article/2551807%22%20target=%22_blank) (last visited Sept. 4, 2016); Julian Simon, THE ECONOMIC CONSEQUENCES OF IMMIGRATION, (Oxford: Basil Blackwell 1989); Julian Simon, *Are There Grounds for Limiting Immigration?*, 13 J. OF LIBERTARIAN STUD. 137, (1998); Ilya Somin, *Obama, immigration, and the rule of law*, THE WASHINGTON POST (2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/> (last visited Sept. 4, 2016); Diana Todea, *A libertarian account of freedom of movement and open borders*, 2 SCI. J. HUMANISTIC STUD. 99, (2010); Will Wilkinson, *Milton Friedman's Argument for Illegal Immigration*, THE FLY BOTTLE (2008), <http://www.willwilkinson.net/flybottle/2008/06/11/milton-friedmans-argument-for-illegal-immigration/> (last visited Sept. 4, 2016); Will Wilkinson, *Liberalism and Birthright Citizenship*, THE FLY BOTTLE (2010), <http://www.willwilkinson.net/flybottle/2010/08/09/liberalism-and-birthright-citizenship/> (last visited Sept. 4, 2016). In contrast, there are some libertarians who take a middle ground in this controversy assuming neither a clear position for or against open borders. See Brian Doherty, ET AL., HUMAN AND PRO-GROWTH: A REASON GUIDE TO IMMIGRATION REFORM, (Shikha Dalmia ed., 2013); J.C. Lester, *Book Reviews In Defense of the Realm: The Place of Nations in Classical Liberalism By David Conway*, 20 J. OF LIBERTARIAN STUD. 81, (2006); Patrick Lynch, *Libertarians Can Believe in Borders*, LIBRARY OF LAW AND LIBERTY (2015), <http://www.libertylawsite.org/2015/10/27/why-libertarians-can-believe-in-borders/> (last visited Sept. 4, 2016); Tibor Machan, *Immigration Into a Free Society*, 13 J. OF LIBERTARIAN STUD. 199, (1998); Ron Paul, LIBERTY DEFINED: 50 ESSENTIAL ISSUES THAT AFFECT OUR FREEDOM, 150-159 (2011); Keith Preston, *The Immigration Question: A Libertarian Middle Ground Between Rockwell and Carson*, ATTACK THE SYSTEM (2015), <https://attackthesystem.com/2015/11/13/the-immigration-question-a-libertarian-middle-ground-between-rockwell-and-carson> (last visited Sept. 4, 2016); Michael Rozeff, *Original Appropriation and Its Critics*, LRC BLOG (2005), <https://www.lewrockwell.com/2005/09/michael-rozeff/original-appropriation-and-its-critics/> (last visited Sept. 4, 2016).

this seeming overwhelming case against it. The open borders libertarian asks, is immigration necessarily a violation of property rights? When put in this way, it is clear that it is not. For example, suppose an Asian, or an African, or a Mexican, or a Martian for that matter, were to catapult<sup>6</sup> into a completely unowned parcel of land that has never before been homesteaded.<sup>7</sup> For example, consider some

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<sup>6</sup> Perhaps arriving by helicopter, or space ship in the case of the Martian.

<sup>7</sup> For the libertarian, homesteading is the sine qua non of private property rights. See Walter Block, *Earning Happiness Through Homesteading Unowned Land: a comment on 'Buying Misery with Federal Land' by Richard Stroup*, 15 J. OF SOC. POL. AND ECON. STUD. N.2, 237-254 (1990); Walter E. Block, *Homesteading City Streets; An Exercise in Managerial Theory, Planning and Markets*, Vol. 5, No. 1, 18-23, (2002), <http://www-pam.usc.edu/volume5/v5i1a2s1.html>; Walter E. Block, *On Reparations to Blacks for Slavery*, *Human Rights Review*, LRC BLOG (2002), <https://www.lewrockwell.com/lrc-blog/reparations-blacks-slavery/>; Walter E. Block and Guillermo Yeatts, *Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform*, J. NAT. RESOURCES & ENVTL. L., Vol. 15, No. 1, 37-69 (1999-2000); Water E. Block and Michael R. Edelstein, *Popsicle sticks and homesteading land for nature preserves*, ROMANIAN ECONOMIC AND BUSINESS AND BUSINESS REVIEW, Vol. 7, No. 1, pp. 7-13 (2005), <http://www.rebe.rau.ro/REBE%207%201.pdf>; Per Bylund, *Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership*, (June 2005) (master thesis on file with Lund University), <http://www.lunduniversity.lu.se/o.o.i.s?id=24965&postid=1330482>; Per Bylund, *Man and Matter: how the former gains ownership of the latter*, LIBERTARIAN PAPERS, Vol. 4, No. 1, (2012), <http://libertarianpapers.org/articles/2012/lp-4-1-5.pdf>; Hugo Grotius, *Law of War and Peace* (De Jure Belli ac Pacis, (1625); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*, (1993); Hans-Hermann Hoppe, *Of Private, Common, and Public Property and the Rationale for Total Privatization*, LIBERTARIAN PAPERS, Vol. 3, No. 1, 1-13 (2011), <http://libertarianpapers.org/2011/1-hoppe-private-common-and-public-property/>; Stephan N. Kinsella, *A libertarian theory of contract: title transfer, binding promises, and*

territory in the midst of Alaska, or in some isolated part of the Wyoming Rocky Mountains. Our immigrant starts to mix his labor with this land that has never been touched by human beings.<sup>8</sup> What law that a libertarian must respect has this Asian, African, Mexican, or Martian violated? It is not clear that he has acted unlawfully<sup>9</sup> at all. Rather, the very opposite is the case. If the statist try to remove him from these immigrant land claims, it is they, not he who is the trespasser, the NAP violator, the disrespecter of private property rights. This is a clear case, as clear as can be. Such an immigrant homesteader acts entirely within the limits of libertarian law.<sup>10</sup> A more debatable example concerns other

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*inalienability*, 17 J. OF LIBERTARIAN STUD. 11 (2003), [http://www.mises.org/journals/jls/17\\_2/17\\_2\\_2.pdf](http://www.mises.org/journals/jls/17_2/17_2_2.pdf); Stephan N. Kinsella, *How we come to own ourselves*, MISES DAILY ARTICLES (Sept. 7, 2006), <http://www.mises.org/story/2291>; Stephan N. Kinsella, *Homesteading, Abandonment, and Unowned Land in the Civil Law*, MISES DAILY ARTICLES (May 22, 2009), <http://blog.mises.org/10004/homesteading-abandonment-and-unowned-land-in-the-civil-law/>; John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, 17-19 (1948); John Locke, *Second Treatise of Civil Government*, Chap. 5, (1955); Ellen Frankel Paul, *Property Rights and Eminent Domain*, (1987); Samuel Pufendorf, *Natural Law and The Law Of Nations*, (1673); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto*, 32 (1973); Michael Rozeff, *Communities, Immigration, and Decentralization*, LRC BLOG (Dec. 14, 2005), <http://www.lewrockwell.com/rozeff/rozeff51.html>; Carl Watner, *The Proprietary Theory of Justice in the Libertarian Tradition*, JOURNAL OF LIBERTARIAN STUDIES, Vol. 6, No. 3-4, 289-316 (1982), [http://mises.org/journals/jls/6\\_3/6\\_3\\_6.pdf](http://mises.org/journals/jls/6_3/6_3_6.pdf).

<sup>8</sup> The Bureau of Land Management of the U.S. Government of course claims these parcels, but as they have not homesteaded them either, the libertarian need not support such land titles.

<sup>9</sup> At least not according to the libertarian NAP law.

<sup>10</sup> Bionic Mosquito appears to be ambivalent on this issue. On the one hand, he asserts: "I suppose, given my logic above, I could conclude that Block's immigrant squatter on the top of the Rocky Mountains now 'owns' the land under his feet - at least until the owner (taxpayer, government - it really doesn't matter at the moment) defends it and removes him. Which the state will, via the US military (or some similar agency)." Bionic

property owned by the government that has not been totally empty of human habitation: parks, roads, forests. Suppose an immigrant were to set up shop in one of those places, in the face of a population that, through inaction, in effect acquiesces in continued state ownership. My own view is that anyone, citizen or outsider, who would do so would be in the right.<sup>11</sup> However, I readily acknowledge, this is a far more complicated claim than the one concerning entirely virgin territory and one I shall not pursue in the present paper.

Another weakness in the closed border libertarian position concerns internal immigration. If movement from Argentina to the U.S. is to be stemmed by regulations

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Mosquito, *Dances With Elephants*, BIONIC MOSQUITO BLOG (Aug. 12, 2015), <http://bionicosquito.blogspot.ca/2015/08/dances-with-elephants.html>. If I read this correctly, it means that in this author's view the homesteader is not the legitimate owner of the land with which he has mixed his labor. On the other hand, this scholar also maintains: "Yet 'own' means something— eventually they come into contact. This leads me to consider the possibility: 'own' means what one can defend. I don't say that this fits neatly in libertarian theory; I don't say it is just..." *Id.* In my view, in contrast, licit ownership, at least for the libertarian perspective, has nothing whatsoever to do with whether or not the owner can successfully defend his property. When the bully exploits the 90 pound weakling, or the mugger robs a victim, or the conquistadores steal the land of the peasants, or the slave master despoils the slave of his labor, the latter is still in the right, even though he is unable to "defend" his rights, and the former is in the wrong. Might does not make right, at least not for the libertarian.

<sup>11</sup> See Joachim Hagopian, *Deep State's Draconian Measures To Criminalize Citizens*, LRC BLOG (Jan. 2016) <https://www.lewrockwell.com/2016/01/joachim-hagopian/deep-states-vicious-measures>; Ron Paul, *Oregon Standoff: Isolated Event or Sign of Things to Come?*, LRC BLOG (Jan. 2016), <https://www.lewrockwell.com/2016/01/ron-paul/beginning-civil-unrest>; Joel Skousen, *Oregon Standoff: Federal Land Grab vs. the Sagebrush Rebellion*, TEA PARTY ECONOMIST (Jan. 9 2016), <http://www.garynorth.com/public/14709.cfm>.

presumably emanating from private property rights considerations, what of a change of address from New York to Louisiana? It would appear that the same arguments that apply to the one case also do so for the other (Richman, 2010). The criticism of the migrant to the U.S. from Argentina is that without some sort of controls, there is a violation of property rights. The immigrant arrives, as it were, without any permission from anyone else. However, that same situation holds true for interstate movements; for intrastate ones too. People continually travel, for instance between New Orleans and Baton Rouge, all on their own cognizance; with no permission from anyone else. The implication of the non-open borders position is that this, too, should be looked at askance. And, yet, this consideration would appear to be a *reductio ad absurdum* of that viewpoint.

#### IV. OTHER ARGUMENTS

##### A. ACTUAL IMMIGRANT PRACTICE

It might be claimed that the typical immigrant does not hive off to the desolate woods where no man has ever trod before. Rather, he enters a city, typically where members of the donor country congregate, so that he can be amongst his own kind. Says Mosquito (2016D): “These refugees are not settling on the 3000-meter-plus peaks of the Swiss Alps, far removed from any otherwise improved land; they are not going north of the Arctic Circle. They are coming to the developed – and even most developed – parts of Europe. Even if I accept your theory, you cannot avoid this practice – today.” This cannot be denied.

However, this is hardly even relevant to our discussion. We are now attempting to explore whether free immigration is *per se* a violation of the libertarian principles of private property rights. And, if a single, solitary counter example can be furnished, this proves there is no fundamental rights violation in this practice.

## B. CANNOT HIRE?

In view of Hoppe (2004):

It is incorrect to infer from the fact that an immigrant has found someone willing to employ him that his presence on a given territory must henceforth be considered 'invited.' Strictly speaking, this conclusion is true only if the employer also assumes the full costs associated with the importation of his immigrant-employee. This is the case under the much-maligned arrangement of a 'factory town' owned and operated by a proprietor. Here, the full cost of employment, the cost of housing, healthcare, and all other amenities associated with the immigrant's presence, is paid for by the proprietor. No one else's property is involved in the immigrant-worker settlement. Less perfectly (and increasingly less so), this full-cost-principle of immigration is realized in Swiss immigration policy. In Switzerland, immigration matters are decided on the local rather than federal government level, by the local owner-resident community in which the immigrant wants to reside. These owners are interested that the immigrant's presence in their community increase rather than decrease their property values. In places as attractive as Switzerland, this typically means that the immigrant (or his employer) is expected to buy his way into a community, which often requires multimillion-dollar donations.

Unfortunately, welfare states are not operated like factory towns or even Swiss

communities. Under welfare-statist condition, the immigrant employer must pay only a small fraction of the full costs associated with the immigrant's presence. He is permitted to socialize (externalize) a substantial part of such costs onto other property owners. Equipped with a work permit, the immigrant is allowed to make free use of every public facility: roads, parks, hospitals, schools, and no landlord, businessman, or private association is permitted to discriminate against him as regards housing, employment, accommodation, and association. That is, the immigrant comes invited with a substantial fringe benefits package paid for not (or only partially) by the immigrant employer (who allegedly has extended the invitation), but by other domestic proprietors as taxpayers who had no say in the invitation whatsoever. This is not an 'invitation,' as commonly understood. This is an imposition. It is like inviting immigrant workers to renovate one's own house while feeding them from other people's refrigerators. Consequently, because the cost of importing immigrant workers is lowered, more employer-sponsored immigrants will arrive than otherwise. Moreover, the character of the immigrant changes, too. While Swiss communities choose well-heeled, highly value-productive immigrants, whose presence enhances communal property values all-around, employers under democratic welfare State conditions are permitted by state law to externalize their employment costs on others and tend to import increasingly cheap, low-skilled and low value-productive immigrants,

regardless of their effect on all-around communal property values.<sup>12</sup>

There are several difficulties in this position. First, consider the claim that the employee immigrant is to be considered invited<sup>13</sup> “only if the employer also assumes the full costs associated with the importation of his immigrant-employee.” Consider the case of “immigrants” from an entirely different country, “Storkovia.” Contrary to the views of some biologists, all babies come from that nation.<sup>14</sup> They are, not merely in effect, but, actually, immigrants. They come from a place completely outside of the recipient country, in some sense even further removed than adult or child migrants from elsewhere on the planet. Do the parents of these immigrants bear anything like the “full costs associated with the[ir] importation?” To ask this is to answer it: of course not. When these immigrants grow up and commit crimes, it is their responsibility, not that of their mothers and fathers. Why, then, impose “full costs” on employers, and not on parents? Wherein lies the justification for treating these importers of immigrants so differently?

Second, consider “the cost of housing, healthcare, and all other amenities associated with the immigrant's presence” as well as the fact that the “immigrant is allowed to make free use of every public facility: roads, parks, hospitals, schools, and no landlord, businessman, or private association is permitted to discriminate against him as

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<sup>12</sup> Hans-Hermann Hoppe, *In the Free Market, May a Businessman Hire Any Immigrant He Chooses?*, LRC BLOG (Sept. 22, 2004), <https://www.lewrockwell.com/2004/09/hans-hermann-hoppe/in-the-free-market-may-a-businessman-hire-any-immigrant-he-chooses/>.

<sup>13</sup> Block & Callahan, *Is There a Right to Immigration? A Libertarian Perspective*, *supra* note 5 (explaining that because of this, labor mobility, too, would garner agreement by two parties, as in the case of internationally traded goods or investments).

<sup>14</sup> *Id.* (explaining that the stork carries boy babies in blue cloth, and girl babies in pink).



regards housing, employment, accommodation, and association.”<sup>15</sup> But whose fault is this? Is it the immigrants? Of course not. These policies were put in place long before he arrived on the shores of the recipient country. As well, the immigrants from Storkovia will also be able to access this “substantial fringe benefits package.” The logic of this argument implies, again, that babies should either be banned and/or their creation, in migration from Storkovia, should be strictly controlled; as strictly as migrants from any other “place.” No, of course, the libertarian answer, to which Hoppe would certainly agree is to get rid of the welfare state which offers these “fringe benefits” to all and sundry.<sup>16</sup>

Third, Hoppe’s concern with declining “communal property values” is more than passing curious, given that under libertarianism, property, and only property, not its value, may properly be owned. This point is eloquently demonstrated by none other than this author himself.<sup>17</sup>

### C. COLOGNE, GERMANY; SWITZERLAND, SWEDEN, DENMARK

A very powerful argument against open borders is based on what is actually occurring in late 2015 and early 2016. Large numbers of immigrant men, mainly from Arab countries have been molesting women, raping them, in many of the European nations that have welcomed them.<sup>18</sup>

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<sup>15</sup> *Id.* (explaining how those consideration apply to voting, receiving welfare, etc., with a lag time of some 18-21 years).

<sup>16</sup> David D. Friedman, *Welfare and Immigration – The Other Half of the Argument*, DAVID D. FRIEDMAN’S HOME PAGE (April 1, 2006), [http://www.daviddfriedman.com/Libertarian/Welfare\\_and\\_Immigration.html](http://www.daviddfriedman.com/Libertarian/Welfare_and_Immigration.html) (making a valid point that immigration may well help reduce or eliminate these burdensome and illicit welfare programs).

<sup>17</sup> See Hans Hermann-Hoppe & Walter Block, *On Property and Exploitation* (2002).

<sup>18</sup> Martin Armstrong, *Germany’s Refugee Crisis is Starting to Explode*, LRC BLOG (Jan 11, 2016), <https://www.lewrockwell.com/2016/01/martin->

This has been so serious a problem, and so widespread, that there is even a new language to describe these acts of biting the hand that feeds them: “rapefugees” and “Taharrush.”<sup>19</sup> This behavior is particularly despicable in that repays benevolence with viciousness. In the view of many, this is the Achilles Heel of libertarian open borders position. It would be difficult to quarrel with this assessment, at least in the view of most exponents of this opinion. However, this

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armstrong/germanys-rapefugee-crisis/; Janosch Deckler, *'Criminal' migrants carried out Cologne assault Stolen mobile phones found at refugee centers*, POLITICO (Jan. 11, 2016 1:35 PM), <http://www.politico.eu/article/criminal-migrants-carried-out-cologne-hauptbahnhof-sex-assault-refugees-asylum-migration>; Michael B. Dougherty, *The Morally Repugnant Response To The Cologne Sexual Assault Gang*, THE WEEK (Jan.11 2016), <http://theweek.com/articles/598070/morally-repugnant-response-cologne-sexual-assault-gang>; Tyler Durden, *Massive Coverup Exposed In Sweden As Media, Cops Hid Migrant Sex Attacks*, ZERO HEDGE (Jan. 11, 2016), <http://www.zerohedge.com/news/2016-01-11/massive-coverup-exposed-sweden-media-cops-hid-migrant-sex-attacks>; Nick Hallett, *'Taharrush': Authorities Fear Repeat of Cologne as Middle East Rape Culture Imported to Europe*, BREIBART BLOG (Jan. 10, 2016), <http://www.breitbart.com/london/2016/01/10/german-authorities-fear-repeat-of-cologne-as-taharrush-comes-to-europe/>; Rex Murphy, *Every major authority in Cologne – police, officialdom, press – failed*, NATIONAL POST (Jan. 9, 2016 4:49 PM), <http://news.nationalpost.com/full-comment/rex-murphy-every-major-authority-in-cologne-police-officialdom-press-failed>; Taki Theodoracopulos, *Who Scares America More?*, TAKI'S MAG. (2016), [http://takimag.com/article/who\\_scares\\_america\\_more\\_taki/print#axzz3wwlTmKF](http://takimag.com/article/who_scares_america_more_taki/print#axzz3wwlTmKF).

<sup>19</sup> “Gang-rape,” or “collective harassment” in Arabic. See Corey Charlton, *The Arabic gang-rape 'Taharrush' phenomenon which sees women surrounded by groups of men in crowds and sexually assaulted... and has now spread to Europe*, MAILONLINE (Jan. 12, 2016), <http://www.dailymail.co.uk/news/article-3395390/The-Arabic-gang-rape-Taharrush-phenomenon-sees-women-surrounded-groups-men-crowds-sexually-assaulted-spread-Europe.html>.

is a small segment of scholars who have contributed to that literature whose perspectives are invulnerable to this critique.

Before we make this defense, let us take a small detour and discuss the distinction put forth by Kant (1785, 1930) between his categorical and hypothetical imperatives. The former is articulated in the form of a command: Do this! Don't do that! Or, regarding our present concerns: Open the border! Do not open the border! The latter takes on an if-then format: If you want this, do that. If you want that, do this. If you want to see large numbers of unskilled workers unemployed, implement the minimum wage law. If you do not want to see large numbers of unskilled workers unemployed, eliminate the minimum wage law.<sup>20</sup>

Most libertarian advocates of open borders take on the categorical imperative: Open the borders! True, advocates state that the following reasons for their position: it is the moral policy to pursue, it does not harm domestic workers, and that it promotes specialization, etc. Nevertheless at the end of the day, their bottom line is a categorical one: do not prohibit open and free immigration. However, there are some libertarian advocates of free unimpeded immigration who adopt the hypothetical stance. This small subset of the open borders libertarians<sup>21</sup> do not say: open all borders, period. They assert, rather, open all borders or homestead all land, all standing room, all territory on which people might settle.<sup>22</sup> To put this in

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<sup>20</sup> Note, a scenario in which the minimum wage increases employment and pay would be a logical contradiction; therefore, we do not ask about it.

<sup>21</sup> Block, *Libertarian Case*, *supra* note 5; Block, *Immigration: A Critique*, *supra* note 5; Block, *Rejoinder to Hoppe*, *supra* note 5; Block, *Rejoinder to Todea*, *supra* note 5; Block and Callahan, *supra* note 5; Gregory and Block, *supra* note 5.

<sup>22</sup> Walter Block & Peter Nelson, *WATER CAPITALISM: THE CASE FOR PRIVATIZING OCEANS, RIVERS, LAKES, AND AQUIFERS*, (Rowman & Littlefield eds., 2015) (including bodies of water internal to the country).

other words: all borders should be open (a categorical); if, however, you are afraid of being inundated by people who will molest women and engage in other untoward acts, then privatize all land, every square inch of it. When you follow this policy, free immigration will be converted into trespass or forced integration, something that falls completely outside of the bounds of libertarian law. With full private property over every square inch of land, then and only then would open immigration constitute trespass or forced integration.

I do not say that the open border libertarians who adopt the categorical imperative are refuted by the Cologne, Germany argument. I only maintain they are vulnerable to it. For example, they may assert that the obvious harms to allowing “rapefugees” into their country is more than offset by the positives; the humanitarian policy of rescuing innocent people in danger of their lives, etc. Whether this will suffice or not is beyond the scope of the present paper. The only point I wish to make now is that the open borders libertarians who adopt the Kantian hypothetical are invulnerable to the Cologne counterexample. They can properly defend their position by claiming that it is not their fault that the “rapefugees” were allowed into Germany. The government of Angela Merkel had a choice: either open the borders or privatize fully. Had they adopted the latter policy, there would not have been any “rapefugees” allowed into their territory. But, they chose differently. The responsibility thus lies with them, not with the open borders libertarians.<sup>23</sup>

#### D. THICK LIBERTARIANISM

In the view of some libertarian opponents of open borders, this policy will lead away from libertarianism, and/or make it more difficult to move in its direction in the

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<sup>23</sup> Not that the latter had any power to make any determination at all in these decisions.

first place. Mosquito (2016H) writes as follows on this matter:

So what does culture have to do with maintaining a libertarian order? This, to me, is quite simple: the less conflict, the less chance that some self-proclaimed and self-pitying disadvantaged group will look to a savior to deliver them from their perceived suffering. The less conflict, the less chance that people will look for someone to do something about it. The 'someone' will ultimately be the monopoly provider of fixing all things for all people. And there goes the libertarian order – or even the possibility of moving closer to one. No matter the pleasant thoughts of open-borders libertarians, in this world we have an open borders example turning into a call for more state action....Ask yourself: who is the 'opposition' in this drama? Who is the 'enemy'? Look in the mirror. This is the fruit of 'open borders' in this world. <sup>24</sup>

Note that this is a thick libertarian<sup>25</sup> perspective. As such it is incompatible with what I am trying to do in the

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<sup>24</sup> Mosquito, *supra* note 10 (doubles down on this perspective with this statement: "I am not arguing libertarian theory; I am suggesting that *Block's suggested path from here to there will move society away from, and not toward, a libertarian world.*").

<sup>25</sup> For advocates of thick libertarianism, See Nick Gillespie, ET AL., *The Declaration of Independents: How Libertarian Politics Can Fix What's Wrong With America*. (Public Affairs 2011); Charles Johnson, *Libertarianism through Thick and Thin*, RAD GEEK PEOPLE'S DAILY (OCT. 3, 2008), [http://radgeek.com/gt/2008/10/03/libertarianism\\_through/](http://radgeek.com/gt/2008/10/03/libertarianism_through/);

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Charles Johnson, *Libertarianism through Thick and Thin*, RAD GEEK PEOPLE'S DAILY (July 20, 2013), [http://radgeek.com/gt/2008/10/03/libertarianism\\_through/](http://radgeek.com/gt/2008/10/03/libertarianism_through/);

Roderick Long, *The Plot Thickens*, AUSTRO-ATHENIAN EMPIRE BLOG (Nov. 3, 2007), <http://aaeblog.com/2007/11/03/the-plot-thickens/>;

Roderick Long, *Thickness Unto Death*, AUSTRO-ATHENIAN EMPIRE BLOG (July 10, 2008), <http://aaeblog.com/2008/07/10/thickness-unto-death/>;

Roderick Long, *Monster Thickburger Libertarianism*, AUSTRO-ATHENIAN EMPIRE BLOG (July 24, 2008), <http://aaeblog.com/2008/07/24/monster-thickburger-libertarianism/>;

Bionic Mosquito, *The Real Action is in the Reaction of the Opposition*, LRC BLOG (Jan. 11, 2016), <https://www.lewrockwell.com/2016/01/bionic-mosquito/open-borders-saul-alinsky/>;

Cathy Reisenwitz, *Thick and thin libertarianism and Tom Woods*, SEX & THE ST. (Dec. 23, 2013), <http://cathyreisenwitz.com/blog/2013/12/23/thick-and-thin-libertarianism-and-tom-woods/>;

Sheldon Richman, *TGIF: In Praise of 'Thick' Libertarianism*, EXPLORE FREEDOM (Apr. 4, 2014), <http://fff.org/explore-freedom/article/tgif-in-praise-of-thick-libertarianism/>;

Sheldon Richman, *Libertarianism is more than just rejecting force: the 'thick' and 'thin' of libertarian philosophy*, HIT & RUN (Apr. 6, 2014), <http://reason.com/archives/2014/04/06/a-libertarian-opposition-to-racism>;

Sheldon Richman, *TGIF: Libertarianism Rightly Conceived*, EXPLORE FREEDOM (May 2, 2014), <http://fff.org/explore-freedom/article/tgif-libertarianism-rightly-conceived/>;

Sheldon Richman, *What Social Animals Owe Each Other*, EXPLORE FREEDOM (July 1, 2014), <http://fff.org/explore-freedom/article/what-social-animals-owe-each-other/>;

Jeffery Tucker, *Against libertarian brutality: Will libertarianism be brutalist or humanitarian? Everyone needs to decide*, THE FREEMAN (March 12, 2014), [http://www.fee.org/the\\_freeman/detail/against-libertarian-brutalism](http://www.fee.org/the_freeman/detail/against-libertarian-brutalism);

Kevin Vallier, *Political Libertarianism: Between Thick and Thin*, BLEEDING HEART LIBERTARIANS (May 7, 2014), <http://bleedingheartlibertarians.com/2014/05/political-libertarianism-between-thick-and-thin>;

Kevin Vallier, *Libertarian Social Morality: Progressive, Conservative or Liberal?*, BLEEDING HEART LIBERTARIANS (February 22, 2013), <http://bleedingheartlibertarians.com/2013/02/libertarian-social-morality-progressive-conservative-or-liberal/>;

Matt Zwolinski, *Libertarianism: Thick and Thin*, BLEEDING HEART LIBERTARIANS (December 28, 2011), <http://bleedingheartlibertarians.com/2011/12/libertarianism->

thick-and-thin/#more-1697. In contract, advocates for thin libertarianism, See Logan Albright, *What Libertarianism Is Not*, MISES INSTITUTE CANADA BLOG (Apr. 26, 2014), <http://mises.ca/posts/blog/what-libertarianism-is-not/>; Walter E. Block, *Pure libertarianism*, THE LIBERTY CRIER (May 17, 2014), [http://libertycrier.com/pure-libertarianism/?utm\\_source=The+Liberty+Crier&utm\\_campaign=8cd483dafc-The\\_Liberty\\_Crier\\_5\\_19\\_2014&utm\\_medium=email&utm\\_term=0\\_600843dec4-8cd483dafc-284768769](http://libertycrier.com/pure-libertarianism/?utm_source=The+Liberty+Crier&utm_campaign=8cd483dafc-The_Liberty_Crier_5_19_2014&utm_medium=email&utm_term=0_600843dec4-8cd483dafc-284768769); Walter Block, *Was Murray Rothbard a Thick Libertarian*, ECON POL'Y J. (May 23, 2014), [http://www.economicpolicyjournal.com/2014/05/was-murray-rothbard-thick-libertarian.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28EconomicPolicyJournal.com%29](http://www.economicpolicyjournal.com/2014/05/was-murray-rothbard-thick-libertarian.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28EconomicPolicyJournal.com%29); Walter Block, *Was Murray Rothbard a Thick Libertarian? Part II*, ECON POL'Y J. (May 23, 2014), [http://www.economicpolicyjournal.com/2014/05/was-murray-rothbard-thick-libertarian\\_23.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28EconomicPolicyJournal.com%29](http://www.economicpolicyjournal.com/2014/05/was-murray-rothbard-thick-libertarian_23.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28EconomicPolicyJournal.com%29); Christopher Cantwell, *Jeffrey Tucker Reduces Core Libertarian Ideals To 'Brutalism'*, CHRISTOPHER CANTWELL: RADICAL AGENDA (March 12, 2014), <http://www.christophercantwell.com/2014/03/12/jeffrey-tuckers-case-libertarianism>; David Gordon, *What Is Libertarianism?*, LRC BLOG (August 29, 2011), <http://archive.lewrockwell.com/gordon/gordon90.1.html>; Jacob Hornberger, *The Virtues of Libertarianism*, HORNBERGER'S BLOG (May 15, 2014), <http://fff.org/explore-freedom/article/the-virtues-of-libertarianism/>; Stephan N. Kinsella, *Homesteading, Abandonment, and Unowned Land in the Civil Law*, MISES DAILY ARTICLES (May 22, 2009), <http://blog.mises.org/10004/homesteading-abandonment-and-unowned-land-in-the-civil-law/>; Stephan N. Kinsella, *What Libertarianism Is*, MISES DAILY ARTICLES (Aug. 21, 2009), <https://mises.org/library/what-libertarianism>; Bionic Mosquito, *Sheldon Richman Takes Down Walter Block & Lew Rockwell?*, ECON POL'Y J. (May 3, 2014), [http://www.economicpolicyjournal.com/2014/05/sheldon-richman-takes-down-walter-block.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28Ec](http://www.economicpolicyjournal.com/2014/05/sheldon-richman-takes-down-walter-block.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+economicpolicyjournal%2FKpWH+%28Ec)

present paper: discern what is the proper libertarian position on immigration. In very sharp contrast, this is not an objection on that ground. That is, whether a policy will promote liberty, somewhat shockingly, is entirely irrelevant to the question of what is the proper libertarian analysis of the issue. Instead, it raises an entirely different question: what view of libertarianism, correct or incorrect, will best promote libertarianism, a very distinct concern. To clarify

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conomicPolicyJournal.com%29; Bionic Mosquito, *On Thick, BIG Libertarians*, ECON POL'Y J. (Aug. 6, 2014), [https://www.lewrockwell.com/2014/05/lew-rockwell/the-future-of-libertarianism/](http://www.economicpolicyjournal.com/2014/08/on-thick-big-libertarians.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+economicpolicyjournal%2FKpwH+%28EconomicPolicyJournal.com%29; Lew Rockwell, <i>The Current Libertarian Infighting and the Future of Libertarianism</i>, LRC BLOG (May 1, 2014), <a href=); Dan Sanchez, *Sophistry and the State: The Perils of Fuzzy (Thick) Thinking*, LRC BLOG (May 10, 2014), <https://www.lewrockwell.com/2014/05/dan-sanchez/the-perils-of-thick-thinking/>; Neil J. Smith, *Thick as a brick*, BEFORE IT'S NEWS (May 2, 2014), <http://beforeitsnews.com/alternative/2014/05/thick-as-a-brick-2949630.html>; Laurence M. Vance, *I Am a Libertarian*, LRC BLOG (May 6, 2014), <https://www.lewrockwell.com/2014/05/laurence-m-vance/i-am-a-libertarian/>; Robert Wenzel, *A Note on the Difference Between Libertarians and Libwaps*, ECON POL'Y J. (May 1, 2014), [Thick and Thin Libertarianism, and Duck Dynasty, THE TOM WOODS SHOW \(December 19, 2013\), <http://tomwoods.com/thick-and-thin-libertarianism-and-duck-dynasty/>.](http://www.economicpolicyjournal.com/2014/05/a-note-on-difference-between.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+economicpolicyjournal%2FKpwH+%28EconomicPolicyJournal.com%29; Robert Wenzel, <i>It's Here: Libertarian-Socialism</i>, ECON POL'Y J. (June 14, 2014), <a href=)



this, consider some other cases. For example, the minimum wage law prohibits consenting adults from negotiating a wage contract below the level stipulated by this legislation. As such, this is a *per se* violation of liberty, and thus incompatible with libertarianism. But, suppose, just suppose, that the best way to promote economic freedom would be to support the minimum wage law. This might be true if this enactment creates so much unemployment for unskilled workers that a general revulsion leads to a jettisoning of all sorts of economic interventionistic policies. Then, by stipulation, the minimum wage law would encourage the free enterprise system, paradoxical though this might sound. A similar procedure is taking place in the present debate over free and open immigration. Mosquito is claiming that such a policy will *lead* to greater statism. It might well do so, as far as I know. However, my concern here is not with which is the most efficient efficacious way to *achieve* liberty, or maintain it. It is, rather, with what liberty *consists of*, an entirely different matter.

Here is another example. It is a paradigm implication of libertarianism that all drugs should be legalized. But, posit, that if so, then some famous person will die from an overdose, and the electorate will become so revulsed by economic freedom, that democratic government will institute all sorts of horrid regulations. Still, drug legalization is the libertarian position, even though, under our present scenario, it will, paradoxically, lead to less liberty.

We must stress that there is nothing at all wrong with enquiring which policies lead to and away from freedom. These are very valuable studies. One does not become enmeshed into the wilds of thick libertarianism until one conflates the two; equating policies that promote liberty with the libertarian position. For example, consider the totally made up scenario where murdering innocent people will somehow bring liberty closer. It is still incompatible with libertarianism, and punishable by libertarian law, to do so. (Block, 2004, 2006).

## V. CONCLUSION

Libertarian open borders opponents emphasize the importance of a shared culture (Mosquito, 2015E) in terms of reducing intra-national hostilities. They are undoubtedly correct; there is little doubt that homogeneous societies tend to be more peaceful than heterogeneous ones.<sup>26</sup> This, of course, mitigates against the open border position. To be sure, some open border cases will fall victim to the Cologne, Germany objection based on rape. But not all, if the benefits of free immigration are ruled to outweigh this objection. And all of the free immigration perspectives based on the hypothetical imperative are immune to the charge that they promote rape.

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<sup>26</sup> Craig Calcaterra, *Majority of Baseball Brawls are between Players of Different Ethnicities*, NBC SPORTS (2015), <http://mlb.nbcsports.com/2015/09/30/majority-of-baseball-brawls-are-between-players-of-different-ethnicities/> (last visited Nov. 19, 2016) (offering an example of this that might well be unknown even to writers who maintain this stance in opposition to immigration).