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THE COST OF THE GOVERNMENT'S FAILURE TO PROTECT CHILDREN WITNESSING PARENTAL ARREST AND DETAINMENT

TIFFANY SIMMONS, J.D.,* DR. BAHIYYAH MUHAMMAD, PH.D.** AND KASANDRA DODD, LICSW***

Abstract

"[T]he majority of police departments have no written protocol delineating officers' responsibility to the children of arrested parents,

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and those protocols that do exist vary widely in their wording and their implementation. A national survey by the American Bar Association (ABA) Center on Children and the Law found that only one-third of patrol officers will handle a situation different if children are present. . . . The result is that an event that is by its nature traumatic—the forcible removal by armed strangers of the person to whom children naturally look for protection—happens in ways that are virtually guaranteed to exacerbate, rather than mitigate, that trauma."[1]

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1. NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 9 (2005).

I. INTRODUCTION[2]

In American society, parents are sent to prison at alarming rates, yet very little research has been conducted on how children and young adults are impacted after witnessing the detainment or arrest of a parent or guardian.[3] When young individuals witness such events, they are more likely to display post-traumatic stress symptoms as compared to children whose parents are not arrested.[4] Accordingly, the International Association of Chiefs of Police ("IACP"), in association with the Department of Justice ("DOJ"), Office of Justice Programs' Bureau of Justice Assistance ("BJA"), developed a model policy to serve as an important written guidance and resource for law enforcement to develop national guidelines and templates for internal policy to follow in these common situations.[5] With that in mind, providing written guidance can help to protect children and young adults in situations surrounding detainment and arrest of a parent or guardian.[6] The goal of this model policy is to address the lack of "most law enforcement [not having] policy, procedures, or specifically address actions that should be taken to reduce and prevent trauma associated with the arrest of a parent [or guardian]."[7] The IACP acknowledged that this deficiency negatively

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2. Part of this Article is included in Tiffany Simmons, et. al., *Kick in the Door, Wavin the Four-Four: Failure to Safeguard Children of Detained and Arrested Parents*, *in* CONTEMPORARY RESEARCH AND ANALYSIS ON THE CHILDREN OF INCARCERATED PARENTS: INVISIBLE CHILDREN (2018).

3. *See, e.g.*, Bruce Western & Becky Petit, *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRS. 4 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf (estimating that about 2.7 million children have an incarcerated parent and this translates to 1 in every 28 children, which is a stark increase from 25 years ago when it was 1 in every 125 children); *see also* Lisa H. Thurau, *First Do No Harm: Model Practices for Law Enforcement Agencies When Arresting Parents in the Presence of Children*, OJP DIAGNOSTIC CTR. 10, http://strategiesforyouth.org/sfysite/wp-content/uploads/2012/09/First_Do_No_Harm_Report.pdf (last visited Mar. 3, 2018).

4. *See* Thurau, *supra* note 3, at 10 (stating that 57% of children are more likely to display post-traumatic stress symptoms than those whose parents were not arrested); *see also id.* at 24 n.41 (reporting that the National Survey of Child and Adolescent Well-Being ("NSCA") sampled 1,869 children from ages 8 through 18 and noted that there was a 73% greater likelihood of having elevated post-traumatic stress symptoms from those children who witnessed the arrest of a family member and had a recently arrested parent).

5. *See Safeguarding Children of Arrested Parents*, INT'L ASS'N CHIEFS POLICE (Aug. 2014), www.bja.gov/Publications/IACP-SafeguardingChildren.pdf (noting that in addition to the IACP and BJA, other federal, state, local and tribal practitioners and experts in children mental health and child welfare were also involved in this process).

6. *See id*. at 1 (explaining that nearly 50% of responding child welfare agencies did not have written protocols that describe how to minimize trauma that the child may experience).

7. *Id*.

impacts the overall growth and development of children which may then have a spillover effect in the long run.[8]

With recent media attention directed to local law enforcement misconduct, there is an increased need for procedural requirements and protocols.[9] The legal system in the United States has provided limited guidance on police conduct.[10] However, in *DeShaney v. Winnebago County Department of Social Services'*,[11] the United States Supreme Court found that the police only hold a duty to safeguard children during the arrest of a parent or guardian when two specific instances exist: (1) a special relationship must be created, and (2) the state created the danger that must have caused the harm to the child.[12]

The purpose of this Article is to explore the failure of law enforcement to safeguard children of detained and arrested parents. It draws upon interviews with children of incarcerated parents who witnessed the arrest and/or detainment of their loved one, as well as interviews with the arrested and/or detained parents. It also provides critical analysis of the laws that have been created to protect and serve these young citizens following the arrest or detainment of their parents or guardians. The strength of the Article rests in its interdisciplinary approach and ability to address failures of the law and those who enforce it.

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8. *See id*. (in other words, what children bear witness to during the arrest of a parent or guardian may continue to affect them throughout their adulthood and they can develop immediate and long-term emotional, mental, social, and physical health problems such as sleep disruptions, separation anxiety, irritability, and even more serious disorders or post-traumatic reactions, and these events can lead to later problems with authority figures and law enforcement).

9. *See* Kenneth Adams et al., *Use of Force by Police: Overview of National and Local Data*, DOJ NAT'L INST. JUST. 1, 2 (Oct. 1999), https://www.ncjrs.gov/pdffiles 1/nij/176330-1.pdf (stating that the media gives attention to possible instances of police abuse and the use of force).

10. *See generally* Ken Wallentine, *Chief's Counsel: Legal Risks of Failing to Care for Children of Arrested Persons*, POLICE CHIEF, http://www.policechiefmagazine.org/ legal-risks-of-failing-to-care-for-children-of-arrested-persons/ (last visited Apr. 16, 2018) (noting that the legislative and executive branches of government are utterly silent on and attempts by the judiciary have resulted in limited and vague rulings with high burdens of proof).

11. 489 U.S. 189, 201 (1989).

12. *Compare id.* at 201 (holding that the state had no duty to the child because they did not cause the danger and their failure to intervene in private citizens affairs did not create the special relationship), *and* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (determining that no special relationship existed as there was no custodial relationship with Pinder because there was no confinement of her liberty that would trigger the duty), *with* White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979) (ruling that the police were grossly negligent because they knew that without their assistance, the children would be subject to danger).

Section II of this Article defines and discusses the nature of a special relationship because it is critical in understanding the unique consideration afforded to children who happen to be present during the arrest or detainment of their parent or guardian. Section III introduces the concept of the state-created danger and outlines the parameters for which the standard is applied. Section IV provides insight into the emotional and potential psychological effects when children and youth are present when their primary caretaker is arrested and detained and also presents the financial and tax implications of addressing such a problem. Section V details personal accounts of the children present during the arrest and detainment of their parents. The impact of which is illustrated through the presentation of data and statistics. Section VI discusses the development of policies and procedures designed to safeguard children and denotes successful efforts made by local police departments.

II. SPECIAL RELATIONSHIP: DEFINITION, APPLICATION AND EVOLUTION

The *public duty doctrine* holds that the police have no duty to protect the general public from harm absent a "special relationship."[13] The public duty doctrine has been widely accepted on both the state and federal levels, with many courts ruling that states are not required to provide police services, but complications arise from the fact that the parameters of what constitutes a special relationship are "hazy and indistinct."[14] The concept of a special relationship grew out of the policy that the police are required to act under certain circumstances and with regards to children, the duty to act translates into a duty to protect.[15] When a parent or guardian is arrested or booked in the presence of his/her children, the special relationship is created instantly because upon arrest, custody, or any deprivation of liberty of the parent or guardian, the law enforcement officer is now responsible for the well-being

13. *See* South v. Maryland, 59 U.S. 396, 401-03 (1865) (reiterating that the local law enforcement holds no duty to protect individuals, but only a general duty to enforce the laws).

14. *See* Gan v. City of New York, 996 F.2d 522, 534 (1993) (quoting *Gan v. City of New York*, No. 91 Civ. 4644 (MJL), 1992 WL 230188, at *5 (S.D.N.Y. Aug. 28, 1992) (finding that the deceased plaintiff's estate sued based on the special relationship created after the deceased identified a suspect in an investigation and was entitled to police protection upon threats he received); *see also* Reiff v. Philadelphia, 471 F. Supp. 1262, 1265 (E.D. Pa. 1979) (stating that the plaintiff, who was a minor, had no claim against the defendant because the idea that inadequate police protection is a violation of any constitutional right is not supported by any precedent).

15. *See DeShaney*, 489 U.S. at 201-02 (clarifying that state tort law may require that some "special relations" trigger an affirmative duty to protest, but that the duty does not necessarily transform into a constitutional duty to protect).

of the children.[16]

A. Application to Children of Detained Guardians and Parents: Courts in Favor

Several cases have defined the special relationship based on a variety of facts. The pivotal case that defined the concept of "special relationship" when applied to children was *White v. Rochford*.[17] In this case, an uncle was arrested and two nephews who were minors, were in the vehicle and upon arrest, the uncle pleaded with the arresting officers to take the children to the police station or to a phone booth to contact the mother.[18] The children left the vehicle to search for a telephone to contact the mother who was unable to pick them up and, thus, they were left in the cold for hours until a neighbor picked them up.[19] The children sustained trauma and the youngest, at five years old, had to be hospitalized.[20] The U.S. Court of Appeals for the Seventh Circuit ruled that the police officers created a "special relationship" with the children from the moment they arrested their uncle and, therefore, the officers had a duty to ensure the children's safety and were liable for the emotional and physical injuries they sustained.[21] Furthermore, in *Matheny v. Boatright*,[22] Angela Matheny sued Jimmy Boatright, the former sheriff in Jefferson Davis County Georgia, for violating both her and her children's constitutional rights.[23] Ms. Matheny claimed that her children were deprived of their due process rights by being forced to accompany their mother in the back of the squad car and subsequently to the detention center and, as such these actions were equivalent to "improper seizure of the children."[24] The

16. *See Pinder*, 54 F.3d at 1175 (4th Cir. 1995) (explaining that some type of confinement, such as incarceration, custody, or institutionalization, in order to trigger the affirmative duty).

17. 592 F.2d 381, 383, 385 (7th Cir. 1979).

18. *See id*. at 382 (highlighting that the defendant officers refused to provide any aid and left the children in an abandoned car on a cold and busy highway).

19. *See id.* (explaining that the children had to cross eight lanes of traffic and wander on the freeway at night to find the telephone, that the mother called the police who once again refused to assist, and that the mother had no car to search for and get the children).

20. *See id.* (noting that the five-year-old was hospitalized for a week due to complications from asthma).

21. *See id.* at 383, 385 (observing that the actions of the officers were "grossly negligent," and they showed "reckless disregard" for the safety of others).

22. 970 F. Supp. 1039 (S.D. Ga. 1997).

23. *See id.* at 1041 (noting that Matheny was arrested for the selling crack, but "[i]n executing the arrest warrant, the police allegedly conducted a search of Matheny's apartment using a drug-sniffing dog, and then transported Matheny and her three children to a detention facility").

24. *Id.* at 1043, 1046.

U.S. District Court for the Southern District of Georgia ruled that the police officers acted in accordance with the special relationship created and the children were kept in a safe environment.[25] In *Dixon v. City of Selma*,[26] a child relied on the due process clause of the Fourteenth Amendment to claim an unlawful separation from her father after his arrest.[27] The Alabama Department of Human Resources was given temporary custody of the child so she could be placed with her grandmother.[28] The U.S. District Court for the Southern District of Alabama determined the officers "acted reasonably." The special relationship was maintained as the primary objective of keeping the child safe was achieved.[29]

B. Application to Children of Detained Guardians and Parents: Courts Against

The first time the Supreme Court addressed the issue of "special relationship" was in *DeShaney*.[30] The Court established that "no constitutional obligation [exists on the part of the state officials] to protect those who are in danger of being harmed by third parties, unless that endangered person[s] [are] in the 'custody' of the state."[31] It appears the standard has become more and more stringent, despite the growing number of incidents of police misconduct.[32] *DeShaney* defined the type of actions that triggered the special relationships and subsequently the duty to protect.[33]

The abandonment of the child of a detainee was the basis for *Moore v. Marketplace Restaurant, Inc*.[34] Five adult patrons were arrested for failing to pay a restaurant bill.[35] At the time of her arrest, "Judith Kosmel advised

25. *Id.* at 1044-45.

26. No. 2:10-0478-KD-N, 2011 WL 28681474, at *1 (S.D. Ala. July 11, 2011).

27. *Id.* at *13.

28. *Id.* at *4.

29. *Id.* at *13.

30. 489 U.S. 189 (1989).

31. Abbey M. Marzick, Note, *The Foster Care Ombudsman: Applying an International Concept to Help Prevent Institutional Abuse of America's Foster Youth*, 45 FAM. CT. REV. 506, 509 (2007); *see id.* at 194 (reiterating that *DeShaney* set the standard by which the duty of government agents, including law enforcement, is judged).

32. *See* Austin v. Mylander, 717 So. 2d 1073, 1076 (Fla. Dist. Ct. App. 1998); *see also* Cherrington v. Skeeter, 344 F.3d 631, 647- 48 (6th Cir. 2003).

33. *DeShaney*, 489 U.S. at 189 (ruling that the State's knowledge of the danger to petitioner and the State's expressions of willingness to protect petitioner did not establish a "special relationship giving rise to an affirmative constitutional duty to protect").

34. 754 F.2d 1336 (7th Cir. 1985).

35. *See id.* at 1338, 1340 (listing Chauncey L. Moore, Jr., Hugo P. Kosmel, Jr., Arthur J. Ciolkowski, Andrea R. Ciolkowski, and Judith M. Kosmel as the five adults in attendance at dinner at Marketplace Restaurant, in addition to Kimberlee Kosmel,

the officer that her fifteen-year-old daughter [a minor] was in the camper alone."[36] "The officer gave her the choice of either having the daughter accompany them" and sitting "in the squad car while they were in custody or having her remain in the camper alone."[37] "Judith Kosmel told the officer . . . that either choice was unacceptable; however, she eventually decided to leave her daughter in the camper."[38] Although the daughter "suffered no physical injury . . . she claimed damages for emotional distress as a result of witnessing the arrest and handcuffing of her parents and being left alone in the camper without protection."[39] However, the court determined that the claim was without merit.[40]

C. How Other Circuit Courts Define Special Relationship

Though *DeShaney* is the landmark case defining special relationship, a few other circuit and district courts have refined the meaning.[41] In doing so, these differing interpretations by the different courts highlight the disparities in how police officers and government agents are held liable when accused of egregious constitutional violations.[42] The U.S. District Court for South Carolina used *Jensen v. Conrad*[43] to discuss the factors of a "special relationship."[44] These factors are "[w]hether [1] the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody

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daughter of Judith and a minor child, where they ordered meals which they did not receive, but consumed some items which they did not pay for).

36. *Id.* at 1340-41 (noting that plaintiffs were not detained until later that evening at their respective campers).

37. *Id.* at 1340.

38. *See id.* at 1341 (establishing that the camper was equipped with locks and heat).

39. *Id.*

40. *Id.* at 1355.

41. *See also* Milena Shtelmakher, Note, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations*, 43 LOY. L. REV. 1533, 1544 (2010) (stating that "[b]ecause the dictum [of the Court] provides no clear guidance on the doctrine, circuit courts differ in their applications of it. . . . [T]he Fourth Circuit rejects the doctrine completely while the First Circuit rejects it 'with some hesitation'" and other circuits tends to lean in favor of the defendant). *See generally id.* at 1537 (reiterating that the extent to which law enforcement are subject to liability for third party danger is dependent on how federal courts interpret *DeShaney*).

42. *See* Matthew D. Barrett, Note, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created" Danger Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 178 (2002) (noting that federal courts gave rise to the term "state-created danger" and there is a distinct irregularity in how the federal courts legitimize the theory).

43. 570 F. Supp. 114 (D.S.C. 1983).

44. *See id.* at 132.

prior to the incident. . . . [2] the state ha[d] expressly stated its desire to provide affirmative to a particular class or specific individuals. . . . [and 3] the State knew of the [victim's] plight."[45] Furthermore, in *Raucci v. Town of Rotterdam*,[46] the U.S. Court of Appeals for the Second Circuit refined the concept of a "special relationship" when law enforcement fails to act.[47] It held that the elements of a special relationship are:

> 1) an assumption by the municipality . . . of an affirmative duty to act on behalf of [a person that is] injured; 2) knowledge . . . that inaction could lead to harm; 3) . . . direct contact between the [police] and the injured [person]; and 4) the [injured person's] justifiable reliance on the [police's] affirmative undertaking.[48]

III. STATE-CREATED DANGER

Regardless of whether a special relationship exists between the arresting officer and the detainee, a duty to protect may still exist if the person has been harmed by a third party and who can prove that the state created the existence of danger.[49] The state-created danger theory implies that the law enforcement personnel can neither leave an individual in a more dangerous situation, create a previously nonexistent set of dangerous circumstances, nor increase the present danger.[50] This theory has predominantly been applied to cases involving "motorists and passengers, failure to arrest, and failure to serve orders."[51]

A. State-Created Danger as Defined by the Circuit Courts

Deshaney opened the door to the state created danger; however, it was brought into the legal vernacular by *D.R. v. Middle Bucks Area Vocational Technical School*.[52] The Second Circuit views a special relationship and

45. *See* Jensen v. Conrad, 747 F.2d 185, 194 n.11 (4th Cir. 1984).

46. 902 F.2d 1050 (2d Cir. 1990).

47. *Id.* at 1055 (imposing the relationship to only a narrow class of cases, particularly with respect to New York law).

48. *Id.* at 1055-56.

49. *See* L. Cary Unkelbach, *No Duty to Protect: Two Exceptions*, POLICE CHIEF, http://www.policechiefmagazine.org/no-duty-to-protect-two-exceptions/ (last visited Mar. 12, 2018) (clarifying that normally there is no constitutional duty to protect a private person from another private person but there are some exceptions).

50. *See generally Legal Doctrine of State-Created Danger and Police Liability*, HG.ORG, https://www.hg.org/article.asp?id=38300 (last visited Mar. 12, 2018) (providing examples of state created dangers as held in the U.S. Court of Appeals for the Sixth Circuit and other federal circuits).

51. *See, e.g.*, *id.*; *see also* Unkelbach, *supra* note 49.

52. 972 F.2d 1364, 1368-69 (3d Cir. 1992); *see also* Lauren Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165,

state-created danger as two separate exceptions and, thus, a plaintiff has two separate causes of action to prove a breach of the duty to protect.[53] The U.S. Court of Appeals for the Third Circuit applies a four-prong test when evaluating claims of state-created danger.[54] The U.S. Courts of Appeal for the Fourth and Fifth Circuits concur that a special relationship must exist to establish the state created danger.[55]

B. The Most Common Application to Children

The more successful factual situations from plaintiffs arguing that the state-created danger doctrine stems from the failure to protect in instances of domestic violence, abandonment of passenger after arresting the driver among others.[56] The more successful litigants arguing that the state-created danger doctrine has also established the special relationship as a means of proving the breach in the duty of the care. One such case was *Sorichetti v. City of New York*[57] where, from 1949 to 1975, Josephine and her children suffered physical abuse at the hands of her husband, Frank.[58] Josephine filed for divorce in September 1975, and Frank destroyed their personal property, but the police refused to arrest him because "he lived there."[59] The Family Court issued a protective order, which affirmed that the police had a duty to protect Josephine from Frank and must arrest him if he violated its terms, but the police refused to enforce the order, and subsequently, Dina, the minor child, was severely injured by her father.[60]

1172 n.37 (2005).

53. Erwin Chemerinsky, *The State Created Danger Doctrine*, 23 TOURO L. REV. 1, 3-4 (2007).

54. *See* Burella v. Philadelphia, 501 F.3d 134, 147 n.17 (3d Cir. 2007) (noting that the four elements include: (1) the harm caused was foreseeable and direct, (2) the state action shocks the conscience, (3) plaintiff was a foreseeable victim of defendant's acts, and (4) a state actor affirmatively created the danger to a citizen).

55. Chemerinsky*, supra* note 53.

56. *See, e.g.*, Oren, *supra* note 52, at 1167.

57. 482 N.E.2d 70 (N.Y. 1985).

58. *Id.* at 71-72 (explaining that the couple was married in 1949, and Frank's physical abuse was often fueled by his drunken binges and, in this case, the abuse was focused on the couple's youngest daughter Dina).

59. *Id.*

60. *See id.* at 74 n.1 (noting that the order stated that the "presentation of a copy of an order of protection or temporary order of protection or a warrant or a certificate of warrant to any peace officer, acting pursuant to his special duties, or police officer shall constitute authority for him to arrest a person charged with violating the terms of such order of protection or temporary order of protection and bring such person before the court and, otherwise, so far as lies within his power, to aid in securing the protection such order was intended to afford"); *see also id.* at 73 (finding that Lieutenant Leon Granello of the forty-third precinct refused to enforce the protective order and referred to it as

The New York Court of Appeals found that because (1) there was a protective order, (2) the police department had knowledge of Frank Sorichetti's violent history, which was known and verified through their actual dealings with him, the existence of the protective order, and their knowledge of the particular instance in which the infant was placed, (3) they failed to respond to Josephine Sorichetti's pleas for assistance on the day of the assault, and (4) Mrs. Sorichetti had a reasonable expectation of police protection, a special relationship was created between the City and Dina Sorichetti (the minor child) because the factors were satisfied.[61]

IV. THE UNDERESTIMATED CONSEQUENCES AND UNFORESEEN TRAUMA

As studies advance around the subject of Post-Traumatic Stress Disorder ("PTSD") and trauma, more attention is being given to how untreated trauma affects children and adults long after the traumatic event has occurred. The effects of trauma can manifest itself mentally, physically, cognitively, emotionally, and at times even socially/culturally. More specifically, mental health clinicians identify how early traumatic experiences can act as a predicate to other life challenges and health issues later in life.

In 1995, Kaiser Permanente and the National Center for Disease Control collaborated in conducting the Adverse Childhood Experience ("ACE") Study.[62] The purpose of the study was to establish a link between early childhood maltreatment (or trauma) and later problematic health issues in adulthood.[63] Although more data is being gathered; the current data from the ACES study show a link between early traumatic experiences and higher instances of problematic physical and mental health concerns in adulthood.[64]

Within the ACES questionnaire the participants are asked at what age they experienced exposure to particular characterized events of maltreatment throughout their childhood.[65] Two questions in particular on this

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"only a piece of paper"); *id.* at 74 (summarizing that on November 9, 1975, Frank attacked the child "with a fork, knife, and screwdriver and had attempted to saw off her leg" and by the time police found her, she was in a coma and her father was passed out with an empty whiskey bottle and a pill bottle in close proximity).

61. *See also id.* at 72, 75-76 (supplementing further that Mrs. Sorichetti and Dina were entitled to damages totaling $2,000,000 based on evidence that the police department breached its duty to protect and that breach was the proximate cause of the infant's injuries).

62. *See About the CDC- Kaiser ACE Study*, CDC, http://www.cdc.gov/violenceprevention/acestudy/about.html (last visited Feb. 13, 2018).

63. *Id.*

64. *Id.*

65. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults. The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245 (1998).

questionnaire specifically inquire whether the child ever witnessed the parent being threatened and if there is a household member in prison.[66] Per the ACES study, and the research that surrounds it, these experiences are deemed traumatic events.[67] A child witnessing his/her parent being arrested would fall within this category. In essence, a child witnessing the arrest of parent is more complex than he or she simply being in the room. Depending on how the responding officer interacts with the child during and after the experience, it can be paramount to that child's processing of the event and its potential after effects on the child (whether negative or positive). As one such child details:

> My dad was yelling, my mom was yelling, and I was crying. I don't know how they got in the house. I was waked up out my sleep. It was scary. I have night dreams about it all the time. I just wake crying sometimes. Loud noise at night make me scared. So my mom told me to sleep with the TV on so I can stop waking up all the time.[68]

The concept and perception of trauma is subjective, but it is defined as experiences or situations that are emotionally painful and distressing, that overwhelm people's ability to cope, leaving them powerless.[69] Even before parental incarceration takes place, the arrest of the parent can cause the child to feel shocked, bewildered, and scared.[70]

As mentioned, the outcome measures of the ACES study have been paramount in predicting long term effects of early childhood trauma.[71] More specifically, children exposed to extreme or lasting trauma have a higher rate of developing (as adults) substance abuse issues, high teen pregnancy rates, high levels of anxiety, extreme mental health disorders, developmental delays, improper brain development, engagement in criminal/violent behaviors, and higher rates of various physical ailments.[72] These factors are

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66. *Id.*

67. Thurau, *supra* note 3, at 8.

68. *See* Bahiyyah Miallah Muhammad, Exploring the Silence Among Children of Prisoners: A Descriptive Study (May 2011) (published Ph.D. dissertation, Rutgers University) (on file with author).

69. *See Healing Hurt People*, CTR. FOR NONVIOLENCE & SOC. JUST., www.nonviolenceandsocialjustice.org (last visited Mar. 13, 2018).

70. Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOL. BULL. 175, 178 (2012).

71. Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 AM. ACAD. PEDIATRICS e232, e237 (2012), http://pediatrics.aappublications.org/content/pediatrics/129/1/e232.full.pdf (noting that the association between ACE and unhealthy adult behavior has been well-documented).

72. *Id.* at e237 (noting that toxic stress during the early stages of childhood may cause significant adult ailments or diseases).

typically combined to lead to shorter life spans and an "intergenerational cycle of significant adversity, with its predictable repetition of limited educational achievement and poor health."[73]

While a single traumatic event may not significantly affect a child's development, the likelihood increases with repeated exposure.[74] For children observing the arrest of a parent, the "convergence between real life events and their worst fears" about injury and the loss of protection, combined with the connection to their parents, provokes a level of overwhelming anxiety about their sense of powerlessness and fear of abandonment.[75] "The loss of trust and security makes basic interactions with adults an exercise in risk-taking that triggers anxious responses."[76]

Although stress is a normal response from the body to regulate reactions to various experiences, the toxic stress response occurs when a child experiences strong, frequent, and/or prolonged adversity—such as physical or emotional abuse, chronic neglect, caregiver substance abuse or mental illness, exposure to violence, and/or the accumulated burdens of family economic hardship—without adequate adult support.[77] This kind of prolonged activation of the stress response systems can disrupt the development of brain architecture and other organ systems, and increase the risk for stress-related disease and cognitive impairment, well into the adult years.[78]

The impact of early trauma and difficulties later in life is so profound that the American Academy of Pediatrics ("AAP") is recommending that primary care doctors screen babies for social and emotional difficulties that can potentially be early signs of toxic stress and how to intervene.[79] Toxic stress, identified as one of the most dangerous form of stress responses, correlates with the findings of the ACES. The ACES findings strongly support the concept that altered brain development caused by extreme trauma in turn,

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73. *Id.* at e232, e237.

74. Thurau, *supra* note 3, at 8.

75. *See id.*

76. *Id.*

77. Andrew Garner & Jack Shonkoff, *Listening to a Baby's Brain: Changing the Pediatric Checkup to Reduce Toxic Stress,* HARV. U. CTR. ON DEVELOPING CHILD (May 30, 2013), http://developingchild.harvard.edu/science/key-concepts/toxic-stress/tackling-toxic-stress/listening-to-a-babys-brain-changing-the-pediatric-checkup-to-reduce-toxic-stress/.

78. *See* Shonkoff et al., *supra* note 71, at e243 (explaining that adversity and toxic stress disrupt the development of brain architecture and can cause permanent issues related to "linguistic, cognitive, and social-emotional skills").

79. See Garner & Shonkoff, *supra* note 77 (noting that the new screening would help make toxic stress a priority for all pediatricians and aid in reducing future costly and complex medical issues).

causes the maladaptive psychological, physical, behavioral, and developmental concerns that can potentially develop in these children as adults.[80]

The Adults Surviving Child Abuse ("ASCA") organization report provides insight into the importance of the parental bond and the significance of a child feeling safe and secure. Per ASCA, the life of a child revolves around that of the parent and or primary caregiver. Because the parent/caregiver is the main source of safety, security, love, and understanding, any threat to said relationship can evoke physiological and emotional scars.[81]

Arrests often occurs at night or the in the early morning, when people are likely to be home with their families. Postponing handcuffing the parents until the parents were out of children's sight only occurred in three percent of fathers' arrests and thirty percent of mothers' arrests.[82] Ross Parke and K. Allison Clarke-Stewart brought to light in their scholarly article that one in five children is present at the time of the arrest and witnesses the mother being taken away by authorities.[83] "More than half of the children who witness this traumatic event are under 7 years of age and in the sole care of their mother."[84] "[Christina] Jose-Keampfner interviewed 30 children who witnessed their mother's arrest and reported that these children suffered nightmares and flashback to the arrest incident."[85]

Lisa F. Thurau further points out in her article that "today, there are more parents in prison than at any prior time in American history."[86] The primary reasons for parental arrest are, in order of prevalence, domestic violence, drug-related incidents, and property crimes.[87] In collaboration with the Bureau of Justice Assistance ("BJA"), the IACP began offering trainings to

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80. *See* Shonkoff et al., *supra* note 71, at e236-37 (describing that altered brain development could explain in part the strong association between early adverse experiences and problems in linguistic, cognitive, and social-emotional development).

81. *See Childhood Responses to Threat/Coping Strategies*, BLUE KNOT FOUND., https://www.blueknot.org.au/Workers-Practitioners/For-Health-Professionals/Resources-for-Health-Professionals/Child-Coping-Strategies (last visited Mar. 13, 2018).

82. Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOL. BULL. 178 (2012).

83. Ross D. Park et al., *Effects of Parental Incarceration on Young Children*, NAT'L POL'Y CONF. 4 (Dec. 2001), https://aspe.hhs.gov/system/files/pdf/74981/parke%26stewart.pdf.

84. *Id.*

85. *Id.*

86. Thurau, *supra* note 3, at 7.

87. *Id.*

law enforcement through the Children of Arrested Parents ("CAP") project that focuses on providing resources for law enforcement to educate them to become better informed about trauma and ideally improve practices in addressing children with a parent involved in the criminal justice system. It was also through this project that a Model Policy was developed to outline procedures that law enforcement can use to prevent or minimize the potential emotional and psychological harm to children who may witness a parent (or caregiver's) arrest.[88] The development of this project and its ensuing Model Policy speaks to the acknowledged need to have police departmental procedures in place to further safeguard children placed in these situations. However, the policy is a model and not one that any state police department is required to use, but rather it is highly encouraged.

As more research is being done on trauma and the effects it has on those exposed to events disturbing to his/her sense of safety, reality, and perception, it is important that service providers, especially those in the role of "protector" fulfill the responsibility bestowed to them. It is also important the federal government and police districts provide police officers with the tools and knowledge to do so.

In some jurisdictions, the concept of "social work policing" has developed to address the psychological and emotional needs of those who come to the attention of the criminal justice system.[89] Law enforcement is often tasked with fulfilling various roles in times of emergencies. They are truly the first responders and have to make quick decisions to ensure the safety of the victim, the perpetrator, any bystanders, and themselves.[90] These responsibilities often go beyond crime intervention and often involve mediation, crisis interventions, and service identifications.[91] The Association of Police Social Workers ("APSW") gives police social work its own distinction as a specialization within the mental health field.[92] "The APSW is a group of mental health professionals dedicated to the development, practice, and enhancement of social services provided within police department settings."[93]

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88. George Patterson, *Police Social Work a Unique Area of Practice Arising from Law Enforcement Functions,* NAT'L ASS'N SOC. WORKERS (July 2008), http://www.naswnyc.org/general/custom.asp?page=77 (explaining that "[n]umerous police departments across the country have capitalized on [service related] functions by employing civilian police social workers to assist police officers with the provision of services. . . . [Such as] crisis intervention, mediation, and referrals").

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *About APSW*, ASS'N POLICE SOC. WORKERS, http://www.policesocialwork.org/

In Lumberton, North Carolina, the police department developed the Social Work and Police Partnership ("SWAPP").[94] This was developed to address victims of domestic violence and assist with providing resources, referrals to other agencies, and substance abuse treatment when warranted.[95] Police are often called to restore order and address an immediate situation; not provide referrals, monitoring, or follow up.[96] This is often where the need for human services is warranted and collaboration is necessary. As Charles Dean further explains, "[p]olice work is essentially crisis work. With area wide, twenty-four coverage, only police can provide immediate response and stabilization. But police calls without follow up services are little more than band-aids."[97] The common theoretical basis of crisis team models is crisis theory. "Crisis theory postulates that following an extremely stressful life event, individuals are in such a state of disequilibrium and upheaval that they are receptive to intervention and the acquisition of new coping skills."[98] For the police to not have the proper support or training to address the needs of victims or bystanders during a crisis is a missed opportunity to reduce the effects of trauma and initiate the healing process. Pillar Five of the *Final Report of the President's Task Force on 21st Century Policing* focuses on Training and Education.[99] This Pillar describes the need for improved standards of police training nationally and specifically around crisis

?page_id=44 (last visited Mar. 13, 2018).

94. Charles Dean et al., *Social Work and Police Partnerships: A Summons to the Village Strategies and Effective Practices*, CRIM. JUST. FAC. PUBLICATIONS 6-7 (2000), https://digitalcommons.brockport.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1000&context=crj_facpub.

95. *Id.*

96. *See id.* at 18 (highlighting the nature of policing and why police referrals are not prevalent).

97. *Id.* at 14-15.

98. Jacqueline Corcoran et al., *Perceptions and Utilization of a Police-Social Work Crisis Intervention Approach to Domestic Violence*, 82 FAMILIES SOC'Y J. 393, 394 (2001).

99. *See* Charles Ramsey & Laurie O. Robinson, *Final Report of the President's Task Force on 21st Century Policing*, DOJ 3-4 (May 2015), https://ric-zai-inc.com/Publications/cops-p311-pub.pdf (listing the focus areas as Pillar One: Building Trust and Legitimacy, Pillar Two: Policy and Oversight, Pillar Three: Technology & Social Media, Pillar Four: Community Policing & Crime Reduction, Pillar Five: Training & Education and Pillar Six: Officer Wellness & Safety); *see also 21st Century Policing Task Force*, INST. FOR COMMUNITY POLICE REL., http://www.theiacp.org/taskforcereport (last visited Mar. 13, 2018) (explaining that, "[o]n December 18, 2014, President Barack Obama issued an Executive Order appointing an 11 member task force on 21st century policing to respond to a number of serious incidents between law enforcement and the communities they serve and protect. The President wanted a quick but thorough response that would begin the process of healing and restore community trust").

intervention.[100] Crisis intervention training is important as it:

> [E]quips officers to deal with individuals in crisis or living with mental disabilities, as part of both basic recruit and in-service officer training—as well as instruction in disease of addiction, implicit bias and cultural responsiveness, policing in a democratic society, procedural justice, and effective social interaction and tactical skills.[101]

The financial cost associated with the trauma that results from the lack of structured protocols or incidents involving police misconduct impact more than just the individuals and personnel involved. Often the monetary burden trickles down to members of the community and government agencies. Qualified immunity and local procedures make it difficult for individuals to sue government agencies even when it is clear that their constitutional rights have been violated.[102] In the event a settlement is reached between the plaintiff and the police department, the proceeds traditionally come from a general fund, with little to no contributions from the violating agency.[103] As opposed to a corporation, "which will presumably get most of its resources from the products or services that it sells, local governments' funding comes from multiple sources, including property taxes; sales taxes; income tax; utilities; charges for parking, parks, and other services; fines; interest; and federal and state grants."[104] This often means less resources are allocated to expenditures for park improvements, public education, and even community welfare.

V. THE VOICES OF THE CHILDREN

A. Sample Description[105]

The stories from children and their incarcerated parents in this Article were collected through a qualitative methodological approach, the study aimed to contextualize the narratives of children of incarcerated parents. Interviews were conducted with those most qualified to provide these accounts of children living this experience. To explore the relationship, the study draws from in-depth interviews and observational data conducted in

100. Ramsey & Robinson, *supra* note 99, at 56.

101. *Id.* at 4.

102. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform,* 63 UCLA L. REV. 1144, 1152 (2016).

103. *See id.* at 1154, 1156; *see also* Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1340 (7th Cir. 1985) (citing commentators who argue that settlements and judgments should be, but are not, paid from law enforcement agencies' budgets).

104. Schwartz, *supra* note 102, at 1161.

105. *See* Muhammad, *supra* note 68, at 24-30 (tables below are extracted from the above dissertation within the Methodology section).

2006-2007 of children of incarcerated parents in urban New Jersey communities.

Data for this investigation came from a larger study on the children of incarcerated parents.[106] Children and their families were recruited from five non-profit organizations that provided services to children of incarcerated parents. The criteria for organization selection was threefold: (1) organizations had to offer services/programs to children of prisoners, (2) located in New Jersey, and (3) compiled demographic and background information on the population served. The selected organizations provided the researcher with demographic and background information on the children enrolled in their programs and contact information for parents, guardians, and/or caregivers.

Based on the client data, a master list was compiled of the children being served by each agency. One hundred children were randomly selected across the five sites, twenty children from each organization. Fifty-seven of the one hundred children agreed to participate in the study.

B. The Sample

General demographic information of children is presented below in Table 3.4. This sample includes a total of fifty-seven minor children. The majority of the sample was female (61.4%). Age of children is represented as the current age at the time of interview. The age variable was broken into two developmental stages including pre-adolescence and adolescent years. The average age of children was approximately eleven years (sd= 3.02). Ages ranged between seven thru eighteen years. Twenty-six percent of children were teenagers. Most were Black (77%), followed by Caucasians (14%) and Hispanics (9%).

Table 3.4. Demographics of Children (N=57)

Variables	%	(N)
Gender		
Female	61.4	(35)
Ethnicity		
Black		

106. *See id.* at 18-20 (exploring the experiences and perceptions of young urban children of the incarcerated through semi-structured interviews, collecting data from a sample of 57 child participants, aged 7-18 years, who resided in New Jersey and who were recruited from a local community organization, and consisting of a larger study of interviews with incarcerated parents, caregivers and friends and family of the incarcerated).

		77.2	(44)
	Caucasian		
		14.0	(8)
	Hispanic		
		8.8	(5)
Age[107]	Developmental Stage		
	7 – 12 years (Child)		
		73.7	(42)
	13-18 years (Adolescent)		
		26.3	(15)

i. Home Life

All fifty-seven children were residing in New Jersey at the time of the interview, and all lived in one of eight counties. More than half lived within Essex County (56%), followed by Cumberland County (23%). Five percent were living in Monmouth County and four percent lived in Ocean, Union Mercer, and Salem counties. The remaining (2%) lived in Atlantic County. Within Essex, children resided in Newark, East Orange, Orange and Irvington. In Cumberland, kids lived in Millville, Bridgeton and Vineland. The majority of these children resided with grandparents (42%), closely followed by biological mothers (40%). Approximately, nine percent were in the custody of foster caregivers. A few children lived with maternal aunts (5%) and biological fathers (4%). Three quarters had siblings (75%), and (15%) had been separated from their sibling(s) as a result of their parent's imprisonment. More than half of the children changed residences (68%) as a result of their parent's incarceration. Although a majority of the children (60%) were not involved with the Division of Youth and Family Services (DYFS). However, this means that twenty-three children (40%) were involved with DYFS.

Table 4.4. Characteristics of Home Life (N=57)

Variables			
		%	(N)
Current New Jersey County of Residence			
	Essex		
		56.1	(32)
	Cumberland		
		22.8	(13)
	Monmouth		
		5.3	(3)

[107] *Id.* at 24-25 (noting the mean age for the sample = 10.7 and range is 7–18 years).

Ocean	3.5	(2)
Union	3.5	(2)
Mercer	3.5	(2)
Salem	3.5	(2)
Atlantic	1.8	(1)
Current Caregiver		
Biological Mother	40.4	(23)
Maternal Grandmother	26.3	(15)
Paternal Grandmother	15.8	(9)
Foster Care	8.8	(5)
Maternal Aunt	5.3	(3)
Biological Father	3.5	(2)
Siblings		
Yes	75.4	(43)
No	24.6	(14)
Change in Residence as Result of Parents Incarceration		
Yes	68.4	(39)
No	31.6	(18)
Involvement with Division of Youth and Family Services		
Yes	40.4	(23)
No	59.6	(34)

ii. School Life

Thirty-nine percent of children had to change schools because of parental imprisonment. A quarter (26%) of the kids were enrolled in special education classes at their respective schools. Two-thirds (67%) of the

sample told peers about their parent's imprisonment.

Table 4.5. Characteristics of School Life (N=57)

Variables	%	(N)
Change in School as Result of Parents Incarceration		
Yes	38.6	(22)
No	61.4	(35)
Special Education Involvement		
Yes	26.3	(15)
No	73.7	(42)
Disclosed Parents Incarceration to Peers		
Yes	66.7	(38)
No	33.3	(19)

iii. Parental Incarceration

The number of children experiencing maternal incarceration (47%) was slightly higher than those children experiencing paternal incarceration (44%). Nine percent of children had experiences resulting from both parents being incarcerated. In terms of an ongoing relationship with incarcerated parents, 63% of children maintained contact. The majority of the sample (67%) was made aware of their parent's incarceration; leaving 33%unaware of their parent's whereabouts. Nearly all of the children (84%) desired lifelong relations with their incarcerated parent; another 14% did not and the remaining child claimed to be unsure.

iv. Present During Parental Arrest

Forty-three percent of the children in the sample witnessed the arrest of their parent; the majority (56%) did not.

Table 4.6. Characteristics of Parental Interaction (N=57)

Variables	%	(N)
Incarcerated Parent		
Mother	47.4	(27)
Father		

	43.9	(25)
Both Parents		
	8.8	(5)
Desires Lifelong Relations with Parent		
Yes		
	84.3	(48)
No		
	14.0	(8)
Unsure		
	1.8	(1)
Contact with Incarcerated Parent		
Yes		
	63.2	(36)
No		
	36.8	(21)
Knowledge of Parents Incarceration		
Yes		
	66.7	(38)
No		
	33.3	(19)

Table 4.7. Child Present During Arrest of Parent (N=57)

Variables	%	(N)
Witnessed Parents Arrest		
Yes		
	43.9	(25)
No		
	56.1	(32)

v. Child Problems

Approximately two-thirds of participants reported behavioral and emotional problems, while only 19% reported experiencing psychological problems. Children considered having psychological problems answered 'yes' to the dichotomous question asked during their interview. Psychological problems revolved around emotional trauma. Child responses included in this category included not being able to sleep at night, being easily startled, and having persistent negative emotions. In other words, children with psychological problems identified not being able to get images and feeling out of their heads. Of all child problems explored (psychological, emotional, and behavioral), the sample majority reported both emotional (66.7%) and behavioral problems (66.7%).

Table 4.8. Characteristics of Child Problems (N=57)

Variables	%	(N)
Psychological		
Yes		
	19.3	(11)
No		
	80.7	(46)
Emotional		
Yes		
	66.7	(38)
No		
	33.3	(19)
Behavioral		
Yes		
	66.7	(38)
No		
	33.3	(19)

vi. Risky Behaviors

This section only includes adolescent children (aged 13-18). Fifteen respondents (26%) of the sample children were teenagers at the time of interview. In terms of risky behaviors, all of the children (100%) self-reported having sex, drinking alcohol and/or using drugs. The majority of children disclosed their risky behaviors pertaining to alcohol use, followed by drug use and sexual intercourse.

All fifteen teenagers interviewed reported alcohol use during their parent's incarceration. Eleven teenagers reported drug use and six children reported having unprotected sexual intercourse. Forty percent of the sample reported involvement with one risky behavior; 33% of children had experiences with two risky behaviors; and 13% were involved in all three risky behaviors.

Table 4.9. Characteristics of Child Risky Behaviors among Teenagers (N=15)

Variables	%	(N)
Sexual Intercourse		
Yes		
	40.0	(6)
No		
	60.0	(9)
Drug Use		
Yes		
	73.3	(11)
No		

	26.7	(4)
Alcohol Use		
Yes		
	100.0	(15)
No		
	0	(0)

vii. Flashbacks to What They Witnessed

Jammie remembered the day his father was arrested as if it was yesterday, although it was five years ago. He was ten years old when police officers, who he refers to as the "popo,"[108] took his father into custody. Jammie is now fifteen years old. During the interview session Jammie's voice began to tremble as he verbally walked me through the incident.

Jammie:

> It was a sunny day and me and daddy and grandmommy were getting ready to eat breakfast. My grandmommy said that we should go to the store to get bread and milk to complete the meal. I ran to my room and put my t-shirt on and was ready to go. Me and my dad walked to the store and we were talking and laughing the whole way. The store was only three blocks away from our home, so it took a short time to get there. We got the milk and bread in no time and were on our way back home. Then popo came out of nowhere. I don't know where they came from. I didn't even see them coming. It happened so fast. They drove the cop car up on the sidewalk right in front of us and jumped out the car. I was confused and I think my dad was too. They grabbed him and shoved him into the side of the car. They were smiling the entire time. My dad dropped the milk and bread and I ran to pick it up. They never looked at me or said anything to me. I watched them being ruff with him the whole time. They put cuffs on him and threw him into the back of the cop car. As soon as they had jumped out of the car they jumped back into the car and drove off. I never got to say bye. I didn't get no chance to ask no questions or answer no questions. I never got to talk. I wanted to say something. I don't know what I would say. But I wanted to say something to my dad, to them, to someone, you know. I thought I was invisible for a second cause they never even looked my way. They wanted my dad and didn't think anything about me. His son who stood there helpless watching them abuse him. I walked home and thought about it the whole way. I told my grandmommy what happened and we both cried. That was the last time I spent quality time with my dad. The worst day of my life. A day I can't

108. All interview subject names have been altered to maintain confidentiality. The interview with Jammie took place in New Jersey in 2006. This was an in-person interview that took place at Jammie's home.

never forget even though I try many times.[109]

Similar to Jammie, many of the children who witnessed the arrest of their parent could remember everything that happened during the arrest. They described that day with the same emotion that they mentioned holding throughout the arrest. Johnay was seven years old when she was interviewed at her paternal grandmother's home, where she had lived since her mother and father have been in prison. Johnay was different from many of the children in the sample because she witnessed the arrest of both of her parents and carries those memories in her heart every day.

Johnay:

> My father went in prison first. Him and my mom lived here too, before they went in prison. They stayed in the basement and I was upstairs. My room is there. They came in the house at night. I was sleep but woke up when I heard my mom yelling and screaming loud. I was scared. I ran out my bed and saw granny in the hall and dad on the floor and mom standing there. The police was on top of dad and had his hands on his back. It look like it hurt. My dad was yelling, my mom was yelling, and I was crying. I don't know how they got in the house. I was waked up out my sleep. It was scary. I have night dreams about it all the time. I just wake crying sometimes. Loud noise at night make me scared. So my mom told me sleep wit the TV on so I can stop waking up all the time. When mommy got in prison it was worse. The police knocked on the door and I opened it. They just started running in. I called for my mom cause she was home and in the basement like all the time. My granny was out. They ran all over the house and my mom was running to the back to go out the door. I was going wit her cause I would be home alone. They grabbed her and she hit them. They hit her in the face and she was bleeding. Then another cop came to her and she spit on him. He hit her too. I ran to my room. Too much to watch. I heard them leave and close the door. I never came out my room. I feel asleep. My granny came in my room and woke me. I was thinking I was dreaming. I wasn't. I had to tell my granny what happened. It was hard to say. It was hard to see. It hard now to say again. I have night dreams and keeping the TV on don't work no more. I'm crazy over it. My granny is too. I don't know why the police took my parents. I don't know why they ain't take them at the same time? Why they wait and come back for my mommy? They ain't hit my dad in the face? And they came when my granny was home when he went in prison? They took my mom with just me in the house? I'm crazy over it. Its stuck in my heart now. I think when I get an adult they gone come for me?[110]

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109. *Id.*

110. Interview with Johnay. This in-person interview took place in New Jersey in 2006. Johnay was interviewed in her home inside her bedroom. This interview lasted

During her interview Day-Day talked about what she saw the day her mother was arrested. Day-Day is a fourteen-year-old who lived with her maternal grandmother while her mother was incarcerated.

Day-Day:

> It was crazy. I was walking home from school with my girls and when I got to my block I saw mad cop cars all over the place. I was wondering what was going on. I never thought they was on the block cause something that happen in my house. When I reached my house I saw like four cops on the porch and more in the cop cars. They had yellow tape up all around my porch so I couldn't get in the front door. I went to the back door and came through the basement. I wish I never did that. In the basement I saw blood on the floor. A lot of blood. I saw a chair. I saw a belt. The belt had blood on it. I almost threw up. I just stood there looking and then I ran right back out the back door. When I got outside my neighbor was out there and she called me to her. I was in shock. I wanted to know what went down. What happened in the basement? Whose blood was that? Yo, I was all jacked up at that point. I was walking into my neighbor house when I saw the cops bringing my moms out the front of the house. We caught eye contact. We stared at each other the whole time. It was like slow motion. It was so crazy. I wanted to say something. I wanted to yell something. I wanted to do so much. I wanted to know so much. They put my mom in the back of the car and they turned the sirens on and drove down the block. Everybody was outside looking and when the car rode down the block everyone saw my mom in the back seat with her head down. I was so embarrassed. I was so sad. I was fucked up. I'm still fucked up.[111]

Children such as Jammie, Johnay, and Day-Day, who witnessed the arrest of a parent, found it hard to forget that day.[112] These children had many questions about what took place during the arrests, but never received any answers. This seemed to leave them with unresolved emotions. The children carried their personal experiences throughout the entirety of their youthful lives.[113] Prior studies that have relied on interviews with parents, caregivers, and other individuals have failed to capture the personal experiences and point of view of the children. This study moves the field forward by allowing the voices of children to be heard. Without their input, we are left unaware

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approximately 60 minutes.

111. Interview with Day-Day. This in-person interview took place in New Jersey in 2006. Day-Day was interviewed in her home inside her bedroom. This interview lasted approximately 40 minutes.

112. Interview with Jammie, Johnay, and Day-Day. All of these interviews were face-to-face and took place at the subject's place of residence. These interviews took place in New Jersey between 2006 and 2007.

113. *Id.*

of what they see and how they perceive what they see. These children did not describe a typical arrest that one may see on television or read about in a newspaper.[114] They describe what they perceived as abuse, disrespect, and a life-changing scenario.[115] The children who witnessed the arrest felt invisible, silent and useless.[116] They wanted to speak out. Not knowing what they would or should say, but wanting to have a voice in what was happening to their parent. All three of these children mentioned that the interview session was the first time that they talked about what they saw since it occurred.[117] They all spoke of a sense of relief that they experienced from talking about what occurred and how they felt as a result.[118]

viii. Two Sides of the Same Coin

"I Want to Be an Officer": Positive Attitudes Toward the Police

Many of the younger children in the sample held positive attitudes toward the police. This is significant because most children in this study are between the ages of seven and ten. Children who held positive attitudes toward the police had the following to say:

Godoe (Male, 7 years old, incarcerated father): "I think the police are good. My dad did something bad. I want to be just like the police. They keep everyone safe."[119]

Pooh (Male, 7 years old, incarcerated mother): "They doing they job to clean up the streets. I want to be one."[120]

Quannie [121](Male, 7 years old, incarcerated mother): "They have nice cares. I love their sirens. I want to be a cop so I can drive that car and help people."

Nay-Nay[122] (Female, 7 years old, incarcerated father): "They keep us safe. I want to keep people safe too. I want to be a girl cop."

Tay (Female, 7 years old, incarcerated father): "The police help people.

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Interview with Godoe. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

120. Interview with Pooh. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

121. Interview with Quannie. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

122. Interview with Nay-Nay. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

My uncle is the police. I want to be a police too."[123]

Other children who held positive attitudes toward the police felt that police officers are doing their job by helping people, keeping their communities safe, and acting nice. Although the children did not elaborate much on their positive feelings, they had the following to say:

Jill (Male, 7 years old, incarcerated father):

> I like them because they are nice, and my dad is locked up and my little sister dad. They are nice because they lock bad people up who hit women. I don't listen to bad people that hit women or listen to women that hits men. I like my mommy because my mommy did not hit him. My dad hit her a lot. The cops did good to take him to locked up.[124]

Jilly is happy that the police took his father to prison, especially because he was abusive to his mother. Jilly feels satisfied that the police did their job. Other children also felt that the police are doing their job by taking bad people away:

Pooda (Male, 7 years old, incarcerated father): "They get the bad people."[125]

Leeah (Female, 10 years old, incarcerated mother): "I know that they are nice and if I'm in trouble I can call 911 and they will help me."[126]

Greg (Male, 11 years old, incarcerated father): "I don't think nothing about the police. They good."[127]

Pablo (Male, 11 years old, incarcerated father): "The police I saw outside were acting nice."[128]

All these young children had positive things to say about the police. The majority of these responses are comprised of the attitudes of young male children.

"I Hate the Popo": Negative Attitudes toward Police

Most children in the sample did not witness the arrest of their parent, yet approximately thirty percent of the children held negative attitudes toward the police. Many of the children disclosed hatred, lack of respect, mistrust,

123. Interview with Tay. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

124. Interview with Jill. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

125. Interview with Pooda. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

126. Interview with Leeah. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

127. Interview with Greg. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

128. Interview with Pablo. This face-to-face interview took place at the subject's place of residence in New Jersey in 2007.

and anger toward the police. For example, Nahna, a sixteen year old female, experiencing maternal incarceration, disclosed the following information when asked about her feelings and attitude toward the police:

Nahna:

> I don't like them at all. Cause you have black cops that really be sitting there like really trying to pick with you just to get on your last nerve, or just to see you get mad and curse them out, just so you could get locked up. They do everything in their power to just mess with somebody. So like I don't like them at all. I just don't see no purpose for them on earth. To me, East Orange police don't do their job anyway. You still have crack heads on the street, you still have people who steal cars, people that break into people house, rapist. You still have everything. They don't do nothing. I just don't like them. They came in my grandmother's house. My mom told us how everything was going to happen and an hour or two later the police came asking for my mother. She gave everyone their hugs and kisses and they took her. They wasn't rough with her because she participated. I think that's the reason why they wasn't rough with her. I don't like them at all. When they took my mother that made me hate them more. You should talk to my ex-boyfriend he used to stay getting locked up, but over some dumb junk like fighting, just little stuff like that. They would take him to jail and out him in the car and everything. He is worse than me in hating the police. I really can't stand them. A lot of people I know feel the same way or worse. It's just sad how no one respects them. They don't respect themselves.[129]

Little Bit, is another female teenager who holds similar attitudes toward the police as Nahna. Little Bit mentioned, "I never liked the cops. They are all crooked."[130] Another child discusses her lack of respect towards the police because of what was said to her after her father was arrested:

Nikki: "They are dumb. When they locked my dad up that day—they told me to have a nice day. I have no respect for the police. I never did. They took my dad and didn't tell me anything—but to have a nice day. How is that possible?"[131]

Ebby, a thirteen-year-old female, whose father is incarcerated held negative attitudes toward police because she feels they do not do their job:

Ebby: "The police don't help. When you call them to come out to help you they take a really long time to come. They don't care. If you were in

129. Interview with Nahna. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

130. Interview with Little Bit. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

131. Interview with Nikki. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

danger you could be dead by the time they come."[132]

Relly, a younger child, held anger and negative feeling toward the police because they took his father away from him. Relly mentioned:

Relly: "The cops are dumb and stupid cause they took my father away from me. I feel angry, mad, and sad. I feel like punching them. The police did not help me at all—they hurt me."[133]

ix. Summary

The children of the incarcerated have a lot to say about their experiences, perceptions, and feelings. In dealing with attitudes toward the police, some children hold positive attitudes while others hold negative attitudes. Data from the exploratory face-to-face interviews strongly suggests that most of the children's perceptions of police officers are not directly associated with their parent's imprisonment, but are nonetheless exacerbated by said incarceration. Negative attitudes toward the police were the most common feelings reported, which in many cases may handicap the child from having respect for officers in their school and communities. Those children who held positive attitudes toward the police tended to be much younger than those who held negative attitudes toward the police.

Although some children held negative attitudes toward the police because they witnessed the arrest of their parent or felt that the police were the cause of their parent's imprisonment, the majority did not witness the arrest of their parent and identified that they held negative attitudes toward the police prior to their parent's incarceration. According to Bernstein:

> The trauma children experience when a parent is arrested may set the tone for their subsequent relationship with the criminal justice system. A natural desire to protect oneself and defend one's family evolves into a hatred for the police, and authority generally—a rage that can make it difficult for a child to grow up to respect the law or trust its representatives.[134]

This study identifies that the hatred that children hold for police occurs prior to the arrest and, therefore, it may not be directly connected the arrest of their parent.

It was not found that children hate the police because of their desire to protect themselves or their families; rather it comes from the inability of the police to protect the children and their families. Furthermore, these children mentioned that they never liked the police because they do not do their jobs,

132. Interview with Ebby. This face-to-face interview took place at the subject's place of residence in New Jersey in 2006.

133. Interview with Relly.

134. BERNSTEIN, *supra* note 2, at 12.

and the children mistrust the police and their actions. In fact, those children who held positive attitudes toward the police desired to protect society and keep the streets safe.

VI. POLICY RECOMMENDATIONS: THE DEVELOPMENT OF PUBLIC POLICY AND REGULATORY CONTROL

"Children need to know that their lives and well-being are critically important to our society [and they] need to know that their safety is a priority."[135] In the early 1990s, this sentiment was already being discussed in many local law enforcement agencies.[136] Many states established initiatives and fund studies that led to recommended regulations, but few took formal legislative action.[137]

In 1991, the Yale Child Study Center and the New Haven Connecticut Department of Police Service formed a partnership that would change policing in America for decades to come.[138] The Child Development – Community Policing ("CD-CP") program was developed to "address the psychological impact of the chronic exposure to violence on children and families."[139] This model requires social workers from child-servicing agencies to go with police officers to particular incidents.[140] Mental health practitioners serve as an additional source of support.[141] To date, fifteen other cities have adopted the CD-CP model.[142] Among them are Baltimore, Maryland; Charlotte, North Carolina; Providence, Rhode Island; and Rochester, New York.[143] Although not initially dedicated to the trauma of

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135. *See generally Breaking the Cycle of Violence: Recommendations to Improve Criminal Justice Responses to Child Victims and Witnesses*, DOJ OFF. FOR VICTIMS CRIME (June 1999), http://www.ovc.gov/publications/factshts/monograph.htm.

136. *See, e.g.*, INST. OF MED. & NAT'L RESEARCH COUNCIL, NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH 360-62 (2014).

137. *See id*. at 349-50 (stating that regulations and protocols are "typical" and providing example of state legislative action).

138. *See* Yvonne Humenay Roberts et al., *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD & FAM. STUD. 214, 214-24 (Feb. 1, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4016966/; *see also The Childhood Violent Trauma Center*, Yale Sch. Med., https://medicine.yale.edu/childstudy/communitypartnerships/cvtc/ (last visited Mar. 15, 2018).

139. Steven Marans and Miriam Berkman, *Child Development–Community Policing: Partnership in a Climate of Violence*, OFF. JUV. JUST. AND DELINQUENCY PREVENTION: JUV. JUST. BULL. 1 (Mar. 1997), https://www.ncjrs.gov/pdffiles/164380.pdf.

140. Thurau, *supra* note 3, at 12.

141. *Id.*

142. *See* Julie Bosland & Michael Karpman, *The State of City Leadership for Children and Familie*s, NAT'L LEAGUE CITIES 1, 63 (2009), http://www.nlc.org/sites/default/files/state-city-leadership-rpt-sep09_0.pdf.

143. *See, e.g.*, *id.* (noting that other cities that have adapted New Haven's Child

children witnessing the arrest or detainment of a parent, the CD-CP model has evolved to include this particular area of focus.[144]

In 2015, DOJ published *The President's Task Force on 21st Century Policing Implementation Guidebook in October 2015*.[145] "This implementation guide offers a crucial blueprint for elected officials, law enforcement officers, and community leaders alike as they work to put important policies and reforms into practice across the country."[146] The Guidebook was created in response to requests from participating members of the task force on how the recommendations could be properly implemented.[147] Among the suggestions are ways in which the local government, law enforcements, and communities can take an active role in "changing the culture of policing" in America.[148]

A. Good Cops: Police Advocate Good Health in Schools

Approximately forty-five percent of children in this sample study held positive attitudes toward police officers. Half of these children described the police as being good. They mentioned that the officers come to their schools on career day with their canines and talk to the children about taking care of their teeth and staying healthy. Risa, a nine year old female, whose father was incarcerated at the time of her interview, mentioned:

> Cops are good. They keep us safe and healthy. They come to our school and tell us not to eat candy. They come into our class and talk to us. Then we go outside and they let us go inside their cars and hear the sirens. Two officers come to the class. We get to ask them questions. They come every year and I like when they come. They come to make sure that we are not eating a lot of candy. That we are staying safe and healthy. I am going to third grade. They have been coming to my school since I was in pre-K. Sometimes new cops come to the class. All of them are nice.[149]

Development-Community Policing Partnership are Bridgeport, Conn.; Chelsea, Mass.; Clearwater, Fla.; Framingham, Mass.; Guilford, Conn.; Madison, Conn.; Nashville, Tenn.; Raleigh, N.C.; Sitka, Alaska; Stamford, Conn.; Zuni, N.M.).

144. Thurau, *supra* note 3, at 12.

145. *See generally The President's Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action,* OFF. COMMUNITY ORIENTED POLICING SERVICES (2015), https://ric-zai-inc.com/Publications/cops-p341-pub.pdf.

146. Press Release, DOJ Community Oriented Policing Services, Department of Justice Announces New Guidebook on 21st Century Policing (Oct. 27, 2015), http://www.cops.usdoj.gov/Default.asp?Item=2828.

147. *See* Thurau, *supra* note 3, at 5-7.

148. *Id.*

149. Interview with Risa. This in-person interview took place in 2007 in New Jersey.

Risa's seven-year-old sister Nay-Nay, also feels that cops are good. She describes the police during her interview as being cool:

> Cops are cool all the time. They keep us safe and away from bad stuff. They like dogs and the dogs they have are cool too. The dogs they bring to school to show us are smart. They help them catch the bad guys. They bring us goodies to school, so after they finish talking to us they give us treats. The treats make us happy and they good for us. I like cops. They use dogs to catch bad people. They give the teacher treats too. The whole class smile when they come to our school. I like cops because they are cool to us. All my friends like them and their dog.[150]

Another child, Michael, a ten-year-old male whose father is incarcerated, also spoke positively about police officers visiting his school and how he looks forward to their visit every year:

> The officers that come in are so good. They keep your attention when they talk. They always come with treats. They care about what we think about them. They want us all to know what it is really like being an officer. They say that sometimes they get a bad name cause of their job. They talk about way people feel confused about them. They ask us all the good and bad stuff we hear about them, then they tell us the truth about it. They smile and shake all our hands and let us play with the dog before they pass out treats. They let us get more if any is left over."[151]

Beth, a nine-year-old female whose father is incarcerated, holds similar feelings toward the police that came to talk in her class. She talked briefly about how effective these presentations actually are:

> I remember everything they tell us and I tell my friends who don't go to my school. I share stuff about the officers with my mom too. She sometimes asks me questions. She didn't have officers come to her class when she was in school. But that was a long time ago anyway.[152]

The children that hold positive attitudes toward the police talk about the officers that come to their schools and some talk about their desires of wanting to be a police officer when they grow up. It is clear from this evidence that the personal experiences of each child shapes their attitudes towards the police.

B. Notable Departmental Approaches

Responding to Children of Arrested Caregivers Together ("REACT") is

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The subject was interviewed at their place of residence at the time.

150. Interview with Nay-Nay.

151. Interview with Michael.

152. Interview with Beth.

an expanded version of the CD-CP model.[153] REACT was adopted by the police departments in Manchester and Waterbury Connecticut.[154] "The REACT model seeks to integrate services to children earlier in the process and the most critical time for children's recovery."[155] This is achieved by providing training and available resources to law enforcement personnel and by identifying "high-risk" youth early and, thereby decreasing the need for more "significant and costly interventions."[156] It is important to note that two full-time child protective workers are housed within these departments.[157] This increases access to services and continues the interagency aspect.

The Fresno Police Department created a Children Exposed to Domestic Violence ("CEDV") team to reduce the trauma children experience during incidents of domestic violence and to mitigate the distress associated with parental arrest.[158] The team is comprised of a detective, a domestic violence advocate, and a child protective services worker.[159] The CEDV team is unique in that the team follows-up after the incidents to continue the connection with the victims and their families, which aids in the prevention of additional crimes.[160]

VII. CONCLUSION

All in all, the calls for action are being answered, but at a staggeringly slow pace. There are countless studies, reports, and initiatives that have been generated over the course of the last three decades. Yet there are no legislative requisites in place to safeguard this class of children. Law enforcement requires complete enforcement of the law. The state is truly creating a danger by failing to implement statutory procedures that provide guidance to the men and women who have sworn to protect the communities which they serve. Children are the most vulnerable members of these communities.

153. *See* Thurau, *supra* note 3, at 18-19.
154. *Id.* at 18.
155. *Id.*
156. *Id.*
157. *Id.* at 19.
158. *Id.*
159. *Id.*
160. *Id*. at 20.

SEC REGULATION OF FOREIGN-DOMICILED INVESTMENT ADVISERS: A STUDY OF THE POLICY VISION INSPIRING THE *UNIBANCO* LETTER

JOHN H. WALSH*

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Investment advisers ("advisers") registered with the Securities and Exchange Commission ("SEC") now manage more than $70 trillion in assets for more than 35 million clients.[1] Growing numbers of foreign-domiciled advisers are seeking access to this expansive market. Over the last two years, the number of foreign asset managers registering with the SEC has grown by an annual rate of 7.7-8.5%.[2] This trend is not new. As early as the 1980s, foreign-domiciled advisers began to seek access to the market for U.S. advisory services.[3] These advisers pose a difficult regulatory problem. Pursuant to the Investment Advisers Act of 1940 ("Advisers Act" or "Act") the SEC regulates advisers.[4] However, when foreign-domiciled advisers register with the SEC, they straddle the international border. While the SEC

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1. *Evolution Revolution: A Profile of the Investment Adviser Profession,* INV. ADVISER ASS'N 2, 5 (2017), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/Evolution_Revolution_2017.pdf.

2. *Id*. at 34.

3. *See infra* Section II.

4. Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq*. (2018).

regulates them, they can also have significant foreign operations and client relationships. How should the SEC account for these advisers' foreign activities in its regulation and oversight? This Article studies the policy-making process in which the SEC set out to answer that question.

As described more fully below, the fundamental regulatory policy that eventually emerged in this area was set out in an informal staff position issued in 1992 known as the *Unibanco* letter.[5] Over the years the *Unibanco* letter and its progeny[6] have drawn considerable attention from commentators, regulators, and practitioners. During the 1990s, a key period in this process, commentators recognized that the regulation of foreign-domiciled advisers played a role in the SEC's adaption to the global market.[7] More recently, the foreign reach of the Advisers Act has again drawn commentary as both the Supreme Court and Congress have addressed relevant legal doctrines.[8] Further, based on the Dodd-Frank Act of 2010,[9] the SEC engaged in rulemaking that cited to and relied upon the *Unibanco* letter's policy.[10] In March 2017 the SEC staff issued an information update for advisers relying on the *Unibanco* letters with suggestions on how they could document their compliance.[11] Finally, practitioners' guides have offered hands-on practical advice to advisers, both upon the initial issuance of the *Unibanco* letter,[12] and upon new developments.[13]

This Article takes a different approach. It focuses on the policy vision that inspired the *Unibanco* letter, and continues to be reflected in its progeny. The

5. Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter, Ref. No. 92-273-CC, File No. 132-3 (July 28, 1992) [hereinafter Unibanco letter], https://www.sec.gov/divisions/investment/noaction/1992/uniaodebancos072892.pdf.

6. For a discussion of the Unibanco letter's progeny, *see infra* Section IV.

7. *See, e.g.*, Bevis Longstreth, *A Look at The SEC's Adaption to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319, 327-28 (1995).

8. *See, e.g.*, Arthur Laby, *Regulation of Global Financial Firms After* Morrison v. Australia National Bank, 87 ST. JOHN'S L. REV. 561, 588-90 (2013) (discussing the impact of the United States Supreme Court's 2010 decision in *Morrison v. Australia National Bank* and Congress's response by way of the Dodd-Frank Act of 2010).

9. Dodd-Frank Wall Street Reform and Consumer Protection Act*,* Pub. L. 111-203, 124 Stat. 1376 (2010).

10. *See infra* Section IV.

11. *Information Update for Advisers Relying on the Unibanco No-Action Letters*, SEC DIVISION INV. MGMT. (Mar. 2017) [hereinafter *Update for Advisers*], https://www.sec.gov/investment/im-info-2017-03.pdf.

12. *See, e.g.*, Robert Mollen & Rachel Arfa, *Investment Advisers Caught in SEC Net*, 11 INT'L FIN. L. REV. 25 (1992) (discussing the practical requirements of the SEC staff's initial position).

13. *See, e.g.*, Gary Grandik et al., *Unibanco After Dodd-Frank: The Extraterritorial Reach of the Investment Advisers Act*, 20 INV. LAW. 1 (2013) (discussing the practical impact of the Dodd-Frank Act in this area).

Unibanco letter, this Article suggests, was motivated by a multi-faceted policy vision that appeared unevenly in the public record. Some of its elements were made explicit, some appeared only as tantalizing hints that require further explanation to be understood, and some were practically invisible. To explore the SEC's development of this policy vision this Article relies on interviews with the leading SEC participants.[14] With interviews it has been possible to more fully identify the pressures working on the agency and the vision that inspired its response. Beyond the worthy goal of adding to our understanding of this important area of international regulation, understanding the policy vision inspiring the *Unibanco* letter will enhance our ability to interpret and apply it, and its progeny, as developments in the wider world continue to unfold.

After this Introduction, Part I of this Article summarizes the Act, the SEC's regulatory regime for advisers, and how the agency established an early border regime that was consistent with the primary contemporary mode of communication, i.e., the mails. Part II discusses the challenges to this regime that arose in the 1980s, in the wake of new technologies and internationalization, the efforts of the SEC staff to respond through an informal staff position known as the *Richard Ellis* letter,[15] and the pressures that built against that position through the need for foreign enforcement cooperation, the threat of foreign multi-lateral intervention during the Uruguay Round of trade negotiations, and business pressures from foreign advisers that wished to enter the U.S. market. Part III discusses the critical moment in this narrative, when the SEC staff reconsidered its policy and issued the *Unibanco* letter. Part IV discusses the continuing relevance of the policy vision of the *Unibanco* letter, up to and including the new regulatory information issued in March 2017. The Article concludes that the *Unibanco* letter and its progeny should be understood and applied in light of the policy vision that inspired the agency action.

I. REGULATION OF INVESTMENT ADVISERS AND THE EARLY REGULATORY BORDER

The Advisers Act applies to persons who, for compensation, engage in the business of advising others, either directly or through publications and writings, as to the advisability of investing in, purchasing, or selling

14. Notes of interviews cited in this history are on file with the author. The author wishes to express his gratitude to the officials who agreed to be interviewed. Nonetheless, the author alone is responsible for all statements and conclusions herein.

15. Richard Ellis, SEC No-Action Letter, Ref. No. 80-401-CC, File No. 132-3, (Aug. 8, 1981) [hereinafter Ellis Letter], https://www.sec.gov/divisions/investment/noaction/1981/richardellis031981.pdf.

securities.[16] The essential purpose of the legislation was to protect the public from "the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser from the stigma" of those activities.[17] The SEC was given statutory responsibility for administering this regime.[18]

The SEC is an independent regulatory commission, composed of five Commissioners appointed by the President with the advice and consent of the Senate.[19] A Chairman named by the President from among the Commissioners leads the agency.[20] The Commissioners are supported by a professional staff, which has remained relatively small, numbering somewhat less than 3,000 employees in the early 1990s,[21] and approximately 4,600 today.[22] Division Directors are the most senior members of the staff, and Associate Directors report to Directors.[23]

As an independent regulatory commission, the SEC performs all three of the federal government's functions. The SEC has a legislative function, in the sense that it adopts rules that have the force of law.[24] Specialized divisions administer this work, such as the Division of Investment Management, which administers the statute and rules governing investment advisers.[25] The SEC has an executive function, in the sense that it enforces

16. Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11) (2018).

17. H.R. REP. NO. 76-2639, at 28 (1940).

18. 15 U.S.C. § 80b-2(a)(4) (defining "Commission" as the SEC); *id.* passim (assigning authorities and responsibilities to the "Commission").

19. Securities Exchange Act of 1934, 15 U.S.C. § 78d (2018).

20. Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175 (May 24, 1950), *reprinted in* 5 U.S.C. app. at 901 (2006), *and in* 64 Stat. 1265 (1950).

21. *1993 Annual Report*, SEC 150 (1993), https://www.sec.gov/about/annual_report/1993.pdf.

22. Chairman Jay Clayton, *Fiscal Year 2017 Agency Financial Report*, SEC (Nov. 14. 2017), https://www.sec.gov/reports-and-publications/annual-reports/sec-2017-agency-financial-report.

23. In the 1990s, both ranks required admission into the United States Senior Executive Service. Members of the Senior Executive Service ("SES") "serve in the key positions just below the top Presidential appointees." *Senior Executive Service, Leading America's Workforce*, OFF. PROF. MGMT., https://www.opm.gov/policy-data-oversight/senior-executive-service (last visited Apr. 10, 2018) [hereinafter *Senior Executive Service*]. Following legislation in 2002 intended to achieve pay parity between the SEC staff and other financial regulators, the SEC withdrew from the SES and now designates SES-level staff as Senior Officers. *See* Investor and Capital Market Fee Relief Act, Pub. L. 107-123, 115 Stat. 2390 (2002) (often called the "Pay Parity Act").

24. 15 U.S.C. § 78w(a) (2018). Additional rulemaking authority is scattered throughout the statutes administered by the SEC.

25. *See Seventh Annual Report of the Securities and Exchange Commission*, SEC 3 (1941), https://www.sec.gov/about/annual_report/1941.pdf.

the securities laws and its own rules.[26] The Division of Enforcement administers this work.[27] Finally, the agency has a judicial function, in the sense that it interprets the securities laws and its own rules. At the SEC, the Chief Counsels, or senior lawyers of the specialized divisions, administer this work.[28] The Chief Counsels' interpretations often take a form known as "no-action" letters - so called because the staff indicates it will not recommend enforcement action to the Commission if its interpretative guidance is followed.[29]

Through these means—rules, enforcement actions, and interpretations—the SEC has created a regulatory regime for investment advisers. Perhaps most importantly, under U.S. law, advisers are fiduciaries.[30] This requires them to adhere to a rigorous standard of professional conduct, known as the fiduciary duty.[31] In addition, advisers are required to register with the SEC.[32] They are required to provide disclosure information to clients and potential clients.[33] They are prohibited from charging performance fees—that is, sharing in their clients' profits—unless certain conditions are met.[34] Moreover, the SEC tests advisers' compliance through regulatory examinations[35] and brings enforcement actions against advisers when violations are found.[36]

Where then is the international border for this regulatory regime? When Congress enacted the Advisers Act, it defined the conduct that brought one within its scope. The Act applies to investment advisers who "make use of the mails or any means or instrumentality of interstate commerce" in

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26. *See, e.g.*, 15 U.S.C. § 78u.

27. *See, e.g.*, *1993 Annual* Report, *supra* note 21, at 1-17.

28. When a Chief Counsel is given the title "Associate Director-Chief Counsel," he or she has been admitted to the Senior Executive Service, or after 2002, made a Senior Officer of the SEC. S*ee Senior Executive Service*, *supra* note 23.

29. Informal & Other Procedures, 17 C.F.R. § 202.1(d) (2018).

30. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 291 (1963) (demonstrating an instance whereby the Supreme Court upheld advisers' fiduciary status following an enforcement action brought by the SEC).

31. *See, e.g.*, *Information for Newly-Registered Investment Advisers*, SEC DIVISION INV. MGMT. AND COMPLIANCE INSPECTIONS AND EXAMINATIONS (Nov. 23, 2010), www.sec.gov/divisions/investment/advoverview.htm (stating that as fiduciaries advisers "have a fundamental obligation to act in the best interest of [their] clients and to provide investment advice in [their] clients' best interests"). They also owe their clients a duty of undivided loyalty and utmost good faith. *Id.*

32. Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(a) (2018).

33. 17 C.F.R. § 275.204-3(a).

34. 15 U.S.C. § 80b-5.

35. *Id.* § 80b-4(a).

36. *Id*. § 80b-9(d).

connection with their business as investment advisers.[37] As a matter of U.S. Constitutional Law, this provision identifies the "means" by which the federal government is exercising jurisdiction, here by means of the Commerce Clause.[38] Further, this provision is given additional reach by another section of the Act, section 208(d), which makes it unlawful "for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions" of the Act or any rule thereunder.[39] In other words, if an adviser (as defined by the Act) uses the U.S. mail or another means of U.S. interstate commerce, either directly or indirectly, in connection with its advisory business, it is subject to the regulatory regime.[40] At first glance, this seems to be a straightforward and sufficient answer to the jurisdictional question. Indeed, when the law was enacted in 1940, it probably was. At the time, U.S. investment advisers appear to have been small businesses that were located and operating solely within the U.S. As one Representative said on the floor of the House during debate on the Act, the legislation would apply to "hundreds of small partnerships and thousands of individuals."[41]

Nonetheless, at a relatively early date in the regulatory regime, the SEC became concerned about its ability to oversee advisers whose principal offices were located outside of the U.S. As early as the 1950s, the SEC worried that it would be unable to take enforcement action if a foreign-domiciled adviser engaged in violations.[42] To give itself the same opportunity to enforce rights and duties that it had in regards to domestic advisers, as part of the registration process, the SEC required non-domestic advisers to provide written irrevocable consents and powers of attorney naming the SEC as an agent for service of any process, pleadings or other papers in regards to relevant civil suits or actions.[43] This provision remains in place today.[44]

In this environment, foreign advisers who sought to do business in the U.S. without registration posed the primary foreign threat to the regulatory regime. Given the technological state of communications in which the

37. *See, e.g.*, *id.* § 80b-3(a).

38. U.S. CONST. art I, § 8, cl. 3.

39. 15 U.S.C. § 80b-8(d).

40. Exceptions to the statutory and regulatory positions set out in the text will be mentioned only when pertinent to the relevant policy developments.

41. 86 CONG. REC. 9811, 9813-14 (1940) (statement of Rep. Hinshaw).

42. *21st Annual Report of the Securities and Exchange Commission*, SEC 104 (1955), https://www.sec.gov/about/annual_report/1955.pdf.

43. *Id.*

44. The modern signature requirements are contained in Form ADV, the adviser registration form.

Advisers Act had been enacted, one could expect this threat to manifest itself through the use of the U.S. mails. In the late 1960s the SEC brought an enforcement case that epitomized this era. C.V. Myers, a resident of Calgary, Canada, published a newsletter called *Myers' Finance Review*.[45] He deposited multiple copies of his newsletter bearing U.S. addresses, as well as solicitations to subscribe, into the Canadian mails. In the ordinary course, the items were delivered to the U.S. addressees. When the SEC accused him of operating as an unregistered U.S. adviser, Myers responded that he had lawfully deposited the items at the Canadian Post Office Building, and had not made use of the U.S. mails. A U.S. federal court rejected his argument.[46] The court found that Myers had engaged in the business of investment advising in the U.S., because, while he had deposited the envelopes in a Canadian post office, the addresses on the envelopes were within the U.S..[47] The court issued an injunction against him, despite Myer's objection to its assertion of personal jurisdiction over him.[48] Of course, one should note, Myers' threat to continue to "infiltrate from the north" by sending thousands of letters into the U.S. without SEC registration did not help his case.[49]

Once an adviser was registered in the U.S., the SEC staff took an expansive view of its jurisdiction over the adviser's activities. A no-action letter issued in 1973 is illustrative. A U.S. citizen informed the Chief Counsel of the Division of Investment Management that he was considering registering as an investment adviser, and asked whether he could handle foreign clients and set up a subsidiary to deal with foreign clients without complying with SEC regulations.[50] The SEC staff responded that he must comply with the U.S. regulatory regime in both regards.[51] As a registered adviser, the SEC staff said, he could not violate SEC regulations in advice to foreign clients, and his foreign subsidiary would be required to register and be subject to the Act.[52] Similarly, in a no-action letter issued in 1975, the Chief Counsel took the view that an SEC-registered adviser must comply with applicable U.S. standards for clients both "within and without of the United States."[53] Eventually, the staff did recognize some slight flexibility,

45. SEC v. Myers, 285 F. Supp. 743, 745 (D. Md. 1968).
46. *Id.* at 745-46.
47. *Id.* at 747.
48. *Id.* at 747-48.
49. *See id.* at 747.
50. Hany Kamal, SEC No-Action Letter, 1973 WL 11796 (May 2, 1973).
51. *Id.*
52. *Id.*
53. S&R Management Co., SEC No-Action Letter, 1975 WL 10884 (Jan. 31, 1975).

such as allowing a foreign adviser serving only foreign clients to use the U.S. jurisdictional means to obtain information about U.S. stock prices and to instruct a U.S. broker-dealer to buy or sell such securities on behalf of the foreign clients.[54] However, the fundamental policy position remained: other than these minimal contacts from abroad, once a foreign adviser had entered the U.S. market and registered with the SEC, all of its advisory activities, affiliates, and clients, both domestic and foreign, were subject to the U.S. regulatory regime.

II. THE CHALLENGE OF GLOBALIZATION IN THE 1980S

In the 1980s, new technology and enhanced communications began to break down the barriers between previously isolated national financial markets. As an SEC Commissioner put it, technological and telecommunications developments that had "accumulated gradually below the surface" suddenly began to have a substantial impact.[55] Investment advisers participated in these developments as U.S. investors developed an appetite for foreign advice. Specifically, U.S. managed funds containing foreign securities grew, and foreign investing became both practical and popular.[56] Foreign advisers were interested in meeting this demand and they increasingly sought to enter the U.S. market, including by serving as sub-advisers to U.S. advisers who were managing mutual funds.[57]

In early 1981 the Office of Chief Counsel of the Division of Investment Management issued the no-action letter that came to define this era. In March of 1981, Richard Ellis, a partnership organized under the laws of the United Kingdom, wrote to the staff requesting a no-action letter.[58] Richard Ellis had an indirect subsidiary in the United States—owned through an intervening holding company—that wanted to register as an investment adviser. The U.S. subsidiary wanted to advise both domestic and foreign clients regarding investments in securities. As the subsidiary's corporate parent, Richard Ellis wanted to know if it would also be required to register as an investment adviser.

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54. *See, e.g.*, Forty Four Management, SEC No-Action Letter, 1983 WL 30741 (Jan. 31, 1983).

55. Edward Fleischman, Comm'r, SEC, Address to the First General Plenary Session of the U.S./Japan Bilateral Session: A New Era in Legal and Economic Relations (Aug. 29, 1988), https://www.sec.gov/news/speech/1988/082988fleischman.pdf.

56. *See* David Ruder, Chairman, SEC, Address Before the 1988 Mutual Funds and Investment Advisers Conference: A Changing Environment for Investment Companies, Speech (Mar. 21, 1988) [hereinafter Ruder Address], https://www.sec.gov/news/speech/1988/032188ruder.pdf.

57. *Id.*

58. *See* Ellis Letter, *supra* note 15.

In August 1981, the SEC staff replied by granting Richard Ellis the requested no-action relief.[59] The letter sets out the regulatory problem, as well as the staff's solution. First, after noting the definition of an investment adviser, the staff said: "an unregistered foreign company engaged in investment advisory business which does not make use of jurisdictional means in connection with its investment advisory business is not in violation" of the Act's registration provision.[60] However, the staff continued, the question remained whether Richard Ellis would be doing indirectly, through its subsidiary, what it could not do directly without registering, which could be in violation of section 208(d) of the Act. In short, the question was: if an unregistered foreign company creates and owns a subsidiary that uses the U.S. jurisdictional means in connection with an advisory business, would that subject the foreign parent to the U.S. regulatory regime?

This question presented itself to the staff as a matter of regulatory interpretation: what is the meaning of indirect action pursuant to section 208(d) of the Act?[61] The effect, however, was to decide the location of the U.S. regulatory border. In 1981, the staff decided that if a subsidiary functioned independently and had an existence independent of the parent, the mere fact of its creation and continued ownership by the parent would not bring the parent within the scope of the prohibition on indirect action.[62] In other words, if the subsidiary was truly independent, the regulatory border would run between the U.S. registered adviser and its foreign parent.

In the no-action letter to Richard Ellis, the staff also set out a series of steps the subsidiary should take to assure its independence. These steps were similar to those set out in an earlier rule proposal. In 1972, the SEC proposed a rule that would have established the factors to be considered when determining whether the corporate parent of a registered investment adviser must itself register with the SEC.[63] The rulemaking process only considered domestic relationships, and the rule was never adopted, but the Commission's explanation at the time for considering the rule is

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 8.

63. Notice of Proposals to (1) Adopt New Rule 202-1 Under the Investment Advisers Act of 1940, as Amended ("Advisers Act"), with Respect to Exemption from the Definition of "Investment Adviser", and (2) Amend Rule 204-2(A) Under the Advisers Act by Amending Paragraph (12) and Adopting New Paragraphs (13) and (14) Thereunder with Respect to Record-Keeping Requirements for Certain Investment Advisers Registered Under the Advisers Act, Investment Advisers Act Release No. 353, 1972 WL 128952 (Dec. 18, 1972).

illuminating. It was concerned, the SEC said, that registered advisers would be used as conduits for advice from entities that were not registered and would remain beyond the scope of its jurisdiction.[64] The same problem presented itself in Richard Ellis's request for no-action relief, and the SEC staff set out similar factors.[65] The SEC staff said: One, the subsidiary should be adequately capitalized. Two, it should have a buffer between its personnel and the parent, such as a board of directors a majority of whose members were independent of the parent. Three, employees who were engaged in providing day-to-day advice should not be otherwise engaged in an investment advisory business of the parent. Four, the subsidiary should decide what investment advice is to be communicated to its clients and have sources of information not limited to its parent. Five, the subsidiary should keep its investment advice confidential until communicated to its clients.[66]

Reception of the *Richard Ellis* letter was mixed. On the one hand, foreign advisers availed themselves of the opportunity to enter the U.S. market. Within a few years, the SEC later noted, many foreign advisers had created separate and independent registered subsidiaries or affiliates to service U.S. clients, in reliance upon this no-action letter and the factors it had set out.[67] Separately, in early 1988 the SEC Chairman indicated that the number of foreign advisers registered with the SEC had reached more than 200.[68] However, in practice, many observers believed the letter was not particularly helpful.[69] Thomas Harman ("Harman") joined the Division of Investment Management in 1982, rose through the ranks to become Chief Counsel in 1988, and then became the Associate Director-Chief Counsel in 1992, a position in which he continued to serve until he left the agency in 1994. He recalls that under the *Richard Ellis* letter any sharing of employees between the U.S. entity and the foreign enterprise subjected the entire enterprise to registration under the Advisers Act.[70] All institutions, he noted, roll up to some small number of executives, so it was difficult to avoid subjecting the entire enterprise to U.S. jurisdiction.[71] Nor could the different entities share

64. *Id.*

65. *See* Ellis Letter, *supra* note 15, at 2.

66. *Id.*

67. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,325 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

68. *See* Ruder Address, *supra* note 56.

69. *See* Telephone Interview with Thomas Harman (Apr. 28, 2017) [hereinafter Harman Interview].

70. *Id.*

71. *Id.*

affiliates.[72] Finally, the staff would not say much about how the letter applied in different factual circumstances.[73] People in the regulated community, Harman recalls, were frustrated because the factors were difficult to apply and the staff did not provide a lot of guidance for particular fact patterns.[74] Further, from an international perspective, the *Richard Ellis* letter had staked out a lot of territory.[75] Michael Mann ("Mann") was an Associate Director in the SEC's Division of Enforcement in the 1980s, where he led the division's international efforts, until in 1989 became the first Director of the SEC's Office of International Affairs ("OIA"), in which position he served until he left the agency in 1996. By reaching into foreign jurisdictions, Mann said, the SEC was "trying to protect people who [had not] signed up for our protection."[76] The *Richard Ellis* letter, he says, "drove everyone crazy."[77]

In the years after issuance of the *Richard Ellis* letter, the pace of internationalization began to accelerate. Through technological and telecommunications developments, a regulatory environment predicated on the use of the mails was being transformed. By the mid-1980s, the pressures of internationalization were becoming apparent. In 1986, an SEC Commissioner gave a speech in which she said: "[a] few years ago we used to speak of capital markets as <u>becoming</u> international. Globalization was denominated 'a trend.' Currently available information shows that tomorrow has become today. The markets <u>are</u> internationalized and are becoming increasingly global."[78]

Not surprisingly, given the increasing internationalization of the markets, the SEC announced it was giving new attention to international issues. Its efforts included working with the International Organization of Securities Commissions ("IOSCO"), then a thirty-nation association of securities regulators, to form multinational committees on a variety of issues, including

72. *Id.*

73. *Id.*

74. *Id.*

75. *See* Interview with Michael Mann (Apr. 13, 2017) [hereinafter April 13 Mann Interview].

76. *Id.*

77. *Id.*

78. Aulana L. Peters, Comm'r, SEC, Remarks to North American Securities Administrators Association, Inc. at the 69th Annual Conference in Honolul, Hawaii: Internationalization: A Prediction Has Become Reality (Nov. 17, 1986), www.sec.gov/news/speech/1986/111786peters.pdf. The Commissioner went on to identify the twenty-four-hour global trading market in securities, multi-national linkages among exchanges, and the regulatory issues these developments raised. *Id.*

international transactions and access to foreign markets.[79] In addition to the IOSCO initiatives, internationalization was producing three specific forms of pressure on the SEC, all of which would play a role in the agency's actions regarding foreign-domiciled advisers. One, internationalization was challenging the SEC's ability to police the securities markets in the U.S. Two, foreign de-regulatory initiatives were challenging the SEC's regulatory regime. Three, increasing numbers of foreign advisory businesses wished to enter the U.S. market.

The first pressure felt by the SEC was its growing need for foreign cooperation in its enforcement activities.[80] In the 1980s, the SEC recognized that "cooperation from abroad" was an increasingly important element in its enforcement activities.[81] In many cases, SEC officials noted, information was needed from foreign jurisdictions to police the U.S. markets.[82] In a speech given in London, in late 1986, the Director of the Division of Enforcement noted that after an unsuccessful effort to assert direct jurisdiction over foreign sources of information, the agency had instead pursued the negotiation of bilateral information sharing agreements.[83] These agreements, known as Memoranda of Understanding, or "MOUs," were negotiated with other financial regulators.[84] They were not treaties, and merely stated the parties' intent to cooperate, including, in some cases, intent to seek authority for cooperation that was currently beyond the signatory's authority.[85] The first breakthrough MOU was between the SEC and Swiss regulators.[86] In 1986 the Director of Enforcement said: "mutual assistance is becoming the norm rather than the exception."[87]

In 1988, this program was codified in an Act of Congress. When members of Congress expressed concern that foreign regulators were not helping the SEC fight frauds launched at the U.S. from abroad, the SEC staff recommended that the SEC be given authority to reciprocate such

79. *Fifty-Second Annual Report*, SEC 3 (1986), https://www.sec.gov/about/annual_report/1986.pdf. Today, IOSCO has more than 120 Ordinary Members, as well as multiple Associated and Affiliated Members.

80. *Id.*

81. *Id.* at 15-16.

82. Gary Lynch, Dir., SEC Div. of Enforcement, Address to the Financial Times International Conference: Developing the Global Market for Equities 9-10 (Oct. 21, 1986), www.sec.gov/news/speech/1986/102186lynch.pdf.

83. *Id.*

84. Interview by Wayne Carroll with Michael Mann, SEC Historical Soc'y (June 13, 2005) [hereinafter June 13 Mann Interview].

85. *Id.*

86. *Id.*

87. Lynch, *supra* note 82, at 13.

assistance.[88] Congress responded by amending the Securities and Exchange Act to authorize the SEC, in its discretion, to assist foreign regulators, even when the conduct under investigation did not violate U.S. law.[89] The SEC then entered into agreements with the Departments of Justice and State regarding how it would use this new power.[90]

This trend toward cooperation was institutionalized within the SEC in 1989, when OIA was created as a stand-alone office to focus on international issues.[91] OIA was given primary responsibility for negotiating international information sharing agreements and developing initiatives to facilitate international cooperation.[92] It was a small office, initially having only two attorneys and two support staff.[93] Nonetheless, OIA created an institutional presence within the agency focusing on international cooperation. Mann recalls: "[w]e needed incentives for cooperation."[94] Creating regulatory incentives for foreign regulators to cooperate with the SEC, Mann said, would work to both parties' advantage.[95]

The second pressure felt by the SEC was from the growing appeal of foreign de-regulation. U.S. regulators felt they were being pressured to de-regulate a market that was, in their view, already well functioning.[96] London's 1986 de-regulatory Big Bang drew attention around the world, including at the SEC.[97] Those favoring less regulated foreign regimes began to challenge U.S. regulators, sometimes directly. For example, in a 1986 meeting in the Netherlands, SEC Commissioner Aulana Peters was called

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88. April 13 Mann Interview, *supra* note 75. Mann recalls in particular the concerns raised by Representatives Dingell of Michigan and Markey of Massachusetts.

89. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, §6(b), 102 Stat. 4677 (1988) (enacting the Securities Exchange Act, 15 U.S.C. §78u(a)(2)).

90. *See* Joseph A. Grundfest, Comm'r, SEC, Address at King's College: International Cooperation in Securities Enforcement: A New United States Initiative (Nov. 9, 1988), www.sec.gov/news/speech/1988/110988grundfest.pdf.

91. *1990 Annual Report*, SEC (1990), https://www.sec.gov/about/annual_report/1990.pdf.

92. *Id.*

93. Interview by Wayne Carroll with Robert Strahota, SEC Historical Soc'y (Apr. 18, 2006).

94. April 13 Mann Interview, *supra* note 75.

95. *Id.*

96. *Id.*

97. *Id.* In the Big Bang, the United Kingdom deregulated its securities markets. It was nicknamed "Big Bang" because many of the changes took place on a single day, October 27, 1986. For a discussion of the changes from the perspective of a respected American academician, *see* Norman S. Poser, *Big Bang and the Financial Services Act Seen Through American Eyes*, 14 BROOK. J. INT'L L. 317 n.1, 319 (1988).

upon to give a point-by-point response to foreign claims that U.S. finance was over-regulated and that U.S. standards, such as corporate disclosure, should be lowered.[98]

Moreover, in 1986, those favoring international deregulation were given a means to realize their goals. The Uruguay Round of trade negotiations opened in 1986 and included bargaining over trade in services.[99] Even though financial services were included in the talks, which implicated the SEC's jurisdiction, no one had asked the SEC to participate.[100] Indeed, when representatives of the SEC sought a seat at the table, the Treasury Department told them no.[101] There was a lot of concern at the SEC about the possible breadth of an agreement and its impact on the SEC's regulations.[102] Mann recalls that the SEC did not want securities regulations used as bargaining chips in the negotiations.[103] Indeed, Mann recalls: "[e]normous pressures were building for rethinking the whole exercise of jurisdiction from a more business-friendly point of view."[104]

The third pressure felt by the SEC was from foreign advisory businesses that wished to enter the U.S. market. As one senior U.S. regulator recalls: the SEC had foreign advisers "at our doors" who wanted to do business in the U.S.[105] The SEC had to decide what to do about them, she said: "business pressures were pushing us."[106] This can be seen in an episode from the mid-1980s. Stanley B. Judd was the SEC attorney who had signed the 1981 *Richard Ellis* letter.[107] In 1986 he published an article about "international investment advisers."[108] These advisers, he said, could be residents in one country and giving advice in another, or nationals of one country and

98. *See* Aulana L. Peters, Comm'r, SEC, Remarks to Representative of the Dutch Financial Community: "Peters vs. Peters" Internationalization: Are the Regulators Ready? (Oct. 15, 1986), www.sec.gov/news/speech/1986/101586peters.pdf. Commissioner Peters was responding to Jaap F.M. Peters, President of AEGON, a Dutch company.

99. *See* ERNEST H. PREEG, TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM 26-45 (1995).

100. June 13 Mann Interview, *supra* note 84.

101. *Id.*

102. *Id.*

103. April 13 Mann Interview, *supra* note 75.

104. *Id.*

105. Telephone Interview with Marianne Smythe (Mar. 16, 2017) [hereinafter Smythe Interview].

106. *Id.*

107. *See* Ellis Letter, *supra* note 15.

108. Stanley B. Judd, *International Investment Advisers*, 19 REV. SEC. & COMM. REG. 1 (1986).

offering advice from offices located in another.[109] Contemporary members of the staff in the Division of Investment Management recall that Judd's article had a strong impact on their thinking.[110] Indeed, in at least one case, Judd's article was cited by the staff as authority.[111] International advisers posed problems under the Advisers Act, Judd said, including how to resolve them being subject to both SEC and foreign regulation.[112] Perhaps most importantly, for purposes of this study, Judd questioned whether the SEC intended to apply the securities laws to actions arising exclusively outside of U.S. jurisdiction, including to the "wholly foreign activities of a registered, non-resident adviser."[113]

The growing tension between internationalization and the SEC's regulatory policy toward advisers came to a head in 1986. The law firm, Reavis & McGrath, requested a no-action letter on behalf of several investment advisers that were domiciled within the U.S. and registered with the SEC.[114] The advisers managed offshore funds domiciled in the Cayman Islands and Netherlands Antilles, and investors in the funds were primarily from Western Europe, including France, the United Kingdom, Switzerland, the Netherlands, and Italy. Reavis & McGrath presented a memorandum to the SEC staff, which was treated as a no-action request, arguing that the SEC's jurisdiction should not extend to foreign investors in the offshore funds. Specifically, it argued, a provision of the Advisers Act, and SEC rule thereunder, limiting an adviser's ability to charge performance fees—that is, share in its clients' profits—should not apply to foreign clients.[115]

In essence, the rule governing performance fees provided that an adviser could not charge such fees unless certain conditions were met, generally going to the clients' resources and invested assets.[116] In its memorandum, Reavis & McGrath conceded that the advisers would comply with the rule in

109. *Id.*

110. Author's Telephone Interview of Robert Plaze (conducted by telephone on May 19, 2017) [hereinafter Plaze Interview].

111. *See, e.g.*, Gim-Seong Seow, SEC No-Action Letter, Response of the Office of Chief Counsel, Division of Investment Management, 1987 WL 755518 (Oct. 30, 1987).

112. Judd, *supra* note 108, at 1-2.

113. *Id.* at 6.

114. Memorandum from Reavis & McGrath to Thomas P. Lemke, Chief Counsel, Div. of Inv. Mgmt. and John Banks-Brooks, Attorney, Office of Disclosure Review, Div. of Inv. Mgmt. (Aug. 14, 1986) [hereinafter Reavis & McGrath Memo.] (seeking clarification about investment advisers acting under the authority of various foreign jurisdictions).

115. *Id.*

116. *See* § 275.205-3 Exemption from the Compensation Prohibition of Section 205(a)(1) for Investment Advisers, 17 C.F.R. § 275.205-3 (2018).

regards to the small number of U.S. clients who invested in the funds.[117] However, in arguing against the rule's applicability to foreign clients, the law firm made three points.[118] First, the securities laws do not favor transnational application.[119] The law firm pointed to several statutory provisions and rules (none from the Advisers Act) that explicitly provided that they did not apply to foreign activity.[120] Second, even if the SEC believed it should retain jurisdiction over fraudulent behavior, other provisions need not apply.[121] Fraud, the law firm argued, was wrong wherever it occurred, while the substantive (or non-fraud) provisions were conditioned by the regulatory regime in which they took place.[122] Third, the law firm argued: "[t]he staff's concurrence in the position expressed in this Memorandum would be conducive to sound foreign policy because that position would reconcile the divergent interests of the various jurisdictions involved."[123] Specifically, the law firm argued, the nations in which the foreign funds maintained their places of business (Cayman Islands and Netherlands Antilles), and the nations of the non-U.S. investors (France, United Kingdom, Switzerland, Netherlands and Italy) would be able to assert their own jurisdiction, without being preempted by the United States and the SEC's rule.

The SEC staff rejected these arguments.[124] In response to the argument that the securities laws disfavored a transnational reach, the staff indicated that the absence of comparable limitations with respect to the Advisers Act could argue against the law firm's position. Further, the staff stated, as a general proposition it did not concur with the position that the rule at issue, or other substantive provisions of the Act and rules, were designed solely for U.S. clients. In general, the staff said, the provisions of the Advisers Act applied to an adviser's "non-U.S. clients, as well as U.S. clients."[125] Finally, while no specific mention was made in the staff's response to the law firm's argument based on foreign policy, the staff denied Reavis & McGrath's request for no-action relief. This letter was probably clearest expression of the policy underlying the *Richard Ellis* no-action letter. The staff explicitly recognized the transnational consequences of their policy, rejected the

117. Reavis & McGrath Memo., *supra* note 114.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

suggestion that their focus should be on U.S. clients, and ignored arguments arising from international relations. In the late 1980s, the pressures building against this policy became increasingly powerful.

III. THE RED BOOK STUDY AND ITS IMPLEMENTATION IN THE *UNIBANCO* LETTER

The Advisers Act, along with the Investment Company Act, had been enacted in 1940. Thus, as the 1980s drew to a close, their 50th Anniversary was looming. David Ruder, SEC Chairman from 1987 to 1989, believed some recognition of the anniversary date would be appropriate.[126] An industry group, the Investment Company Institute ("ICI"), was of the same view.[127] As a result, work began on an anniversary study.[128] In 1990, Marianne Smythe ("Smythe") was Executive Assistant to the SEC's Chairman (a position now known as Chief of Staff), and from November 1990, Director of the Division of Investment Management, a position in which she continued to serve until she left the agency in 1993. She recalls that the creation of the anniversary study was largely fortuitous, when viewed in relation to the issues at stake in the foreign reach of the Advisers Act.[129] The initial goal was simply to recognize the Act's anniversary, perhaps with the idea of issuing a report on the anniversary itself, that is, in 1990.[130]

In March 1990, the Division of Investment Management established a Task Force to conduct the study.[131] The SEC reported that the Task Force would reexamine the agency's regulatory approach on a variety of issues.[132] In the Chairman's Office, Smythe was busy with a number of issues and had only slight contact with the study's early development.[133] Nonetheless, she recalls that the selection of topics for the study took account of the small size of the Division of Investment Management.[134] Given its constraints, Smythe said, it made sense to focus on practical issues that could lead to specific agency actions. In her words, that is how the foreign reach of the Advisers Act "made the cut."[135]

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126. Smythe Interview, *supra* note 105.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *1990 Annual Report*, *supra* note 91, at 48.
132. *Id.*
133. Smythe Interview, *supra* note 105.
134. *Id.*
135. *Id.*

In June 1990, the Commission issued a Concept Release, setting out the ideas the Task Force was considering.[136] The Concept Release was a formal statement of the Commission that asked for public comments.[137] In the course of its discussion the Commission identified two motivating factors for reforming the foreign reach of the Advisers Act.

The first factor sounded in economic efficiency and client service. The need to establish a separate and independent subsidiary to enter the U.S. market, the SEC said, could divide scarce personnel within an advisory firm and reduce the capital resources available to both the parent and subsidiary, thus diminishing the services provided to both foreign and U.S. advisory clients.[138] In raising these concerns, the Concept Release cited to the staff position taken in the *Richard Ellis* letter.[139] The question for the Task Force, Smythe recalls, was how to allow foreign advisers to have a business presence in the U.S., and how to give U.S. regulators the ability to deal with that presence.[140]

The second factor set out in the Concept Release was a classic concern of foreign relations: fear of retaliation. "[F]oreign governments [the Commission said] may perceive application of the [U.S.] Advisers Act to their investment advisers' activities with respect to non-United States clients as contrary to principles of international comity and might react by reciprocating the treatment."[141] Thus, the SEC continued, U.S. investment advisers might find their overseas operations subject to increased restrictions and their U.S. operations subject to the laws and regulations of foreign countries.[142] Mann recalls that this concern was driven by events in the Uruguay Round of trade negotiations, which, as noted above, was ongoing at the time and threatened to encompass SEC regulations in negotiations over market access.[143] In June 1990, the risk of foreign intervention in the SEC's regulatory regime was at its height.

The SEC's Concept Release was issued on June 15, and just a few days before, from June 11 to 13, the Uruguay Round's Working Group on Financial Services had held its first meeting.[144] At the meeting, "financial

136. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

137. *Id.*

138. *Id.* at 25,325.

139. *Id.*

140. Smythe Interview, *supra* note 105.

141. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. at 25,325.

142. *Id.*

143. April 13 Mann Interview, *supra* note 75.

144. *Working Group on Financial Services Including Insurance*, *Note on the Meeting*

advising" was identified as among the "services that offered possibilities for multilateral liberalization."[145] Moreover, market access was defined as encompassing licensing and certification.[146] For his part, the representative of the U.S. indicated that reciprocity was a problem.[147] A few weeks later the U.S. representative would warn that "[r]eciprocity in the financial area would guarantee chaos."[148]

At the June meeting, the Working Group's Chairman recognized that domestic regulations may continue to have a role, through a prudential carve-out from the trade agreements.[149] However, the Chairman also recognized several options for the carve-out, including that it could be narrow, broad, or limited to certain approved examples of regulatory action.[150] Given the SEC's status and history as an independent regulatory agency, one can understand why it would take a negative view of the possibility that trade negotiations might limit it to certain multi-laterally-approved examples of regulatory action.

In its Concept Release, the SEC asked for suggestions on how it could best provide for cross-border and international sales of adviser services, consistent with the protection of investors and its own enforcement capability.[151] Specific possible policy approaches identified by the SEC included: amending or reinterpreting domestic law, entering into multi-national or bilateral treaties, harmonizing conflicting regulation, or applying concepts of comity and mutual recognition.[152] In response to the Concept Release, several comments were filed with the SEC, including eight addressing the foreign reach of the Advisers Act.[153]

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of 11-13 June 1990, WTO: GATT GROUP NEGOTIATIONS ON SERVICES (July 5, 1990) [hereinafter *Working Group June 1990*], https://www.wto.org/gatt_docs/English/SULPDF/92100236.pdf.

145. *Id.* ¶ 20, at 5 (statement of the Representative from Canada).

146. *Id.* ¶ 22, at 5-6 (statement of the Representative from Japan).

147. *Id.* ¶¶ 59, 72, at 19 (statement of the Representative from the United States).

148. *Working Group on Financial Services Including Insurance, Note on the Meeting of 12-13 July 1990*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES ¶ 50, at 14 (Aug. 10, 1990) [hereinafter *Working Group July 1990*], https://www.wto.org/gatt_docs/English/SULPDF/92110082.pdf.

149. *Working Group June 1990*, *supra* note 144, ¶ 78, at 23 (statement of the Chairman).

150. *Id.*

151. Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

152. *Id.*

153. *See Protecting Investors: A Half Century of Investment Company Regulation*, SEC DIVISION INV. MGMT. 221 n.14 (May 1992) [hereinafter *Protecting Investors*

The Division of Investment Management provided the Task Force with a full-time staff of ten.[154] Moreover, fifty other members of the Division staff assisted the full-time staff.[155] This was a substantial commitment in such a small division. In the early 1990s the division operated with less than 160 staff years.[156] The Office of Chief Counsel made an especially large contribution to the study, and at the time it had a total of only five or six attorneys.[157] As a result the study was a "huge drain" on its resources.[158] Attorneys in the Office were responsible for drafting several chapters and Harman, the Chief Counsel, both drafted a chapter and consulted with those drafting others, including the one relating to the foreign reach of the Advisers Act.[159] Harman also recalls that the staff assigned to the study were the "best and the brightest," so the diversion of resources had a bigger impact than numbers alone would suggest.[160] Moreover, other policy issues continued to press on the attention of the staff, and had to be addressed.[161] Smythe recalls that whatever the original intent for the schedule, when she became the Division's Director in November 1990, the study was still underway.[162] In fact, the Task Force released its report in May 1992.

The Task Force entitled its report: *Protecting Investors: A Half Century of Investment Company Regulation* ("*Protecting Investors Report*" or "Report").[163] While the Report generally focused on investment companies, as shown by its title, Chapter 5 addressed the international reach of the Advisers Act.[164] The Task Force explained its recommendations in regards

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Report], https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf. The author filed a Freedom of Information Act ("FOIA") request with the SEC seeking access to these eight comments and was told they could not be found.

154. *See* Letter from Marianne K. Smythe, Dir. SEC Div. Inv. Mgmt., to Richard C. Breeden, Chairmen, SEC (May 1, 1992) [hereinafter Smythe Letter], https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf (published in *Protecting Investors Report*, *supra* note 153).

155. *Id.*

156. *See, e.g., In Brief Budget Estimate Fiscal 1996*, SEC 3 (Feb. 1995), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1990/1995_0201_SECBudget.pdf (providing "Investment Management Regulation" figures for 1994 (actual) and 1995 (estimate) and noting that staff years may differ from a head count of employees).

157. Harman Interview, *supra* note 69.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Smythe Interview, *supra* note 105.

163. *Protecting Investors Report*, *supra* note 153.

164. *Id.* at 221-36.

to foreign-domiciled advisers as motivated by three considerations.[165] First, the study said, foreign advisers may be reluctant to register with the SEC and advise U.S. clients, because doing so subjects all of their clients to the U.S. regulatory regime.[166] The Report continued: this avoidance had the unfortunate effect of limiting U.S. investors' access to foreign advisory expertise.[167] Second, the Report identified "general principles of comity," under which "nations recognize legislative and judicial acts of other nations, having due regard for the rights of their own citizens."[168] The Report continued:

> Comity suggests that the Advisers Act should not apply to a foreign registered adviser's relationship with its non-United States clients outside the United States, just as the Commission would not expect the laws and regulations of a foreign country to apply to a United States adviser's relationship with its United States clients.[169]

The Report went on to note that the laws of other countries were consistent with principles of comity, in terms of their extraterritorial reach or enforcement, and cited to the regulatory regimes of the United Kingdom, Brazil, Japan, and France.[170] Third, the Report said, foreign clients of foreign advisers do not expect "and may not desire" their adviser to be subject to the Advisers Act.[171] Assuming, the Report continued, "a foreign adviser does not hold itself out as being registered under the Advisers Act, there would be no apparent reason for a foreign investor to expect to be protected by United States law."[172]

Based on this analysis—maximizing the availability of advice, international comity, and the expectations of foreign investors—the Task Force team concluded that the approach set out in the *Richard Ellis* no-action letter should be changed.[173] Some new means of addressing the foreign reach of the regulatory regime should be found. The Task Force team considered several alternatives.[174] A "nationality" approach would have applied the U.S. regulatory regime to U.S. citizens, "wherever they are located," and regardless of where any conduct or the effects of any conduct might have

165. *Id.* at 228-30.
166. *Id.* at 231.
167. *Id.*
168. *Id.* at 229.
169. *Id.*
170. *Id.* at n.26.
171. *Id.* at 229.
172. *Id.*
173. *Id.* at 221.
174. *Id.* at 234-36.

occurred. The Report stated that this approach was "generally disfavored," had not been extensively applied by the courts, and was not recommended.[175] A "local law for local clients" approach would have excused from the U.S. regulatory regime any dealings between a U.S. adviser and clients residing outside the U.S., even when the advice was formulated and provided by persons residing in the U.S.[176] This approach would have enhanced U.S. advisers' ability to compete abroad by allowing them to meet more lenient foreign standards, but the United States and the SEC, the Report stated: "have a strong interest in preventing this country from being used as a base for fraudulent or abusive practices by investment advisers."[177] This approach was not recommended. An antifraud-only approach would have applied the Act's anti-fraud provisions, "but not its regulatory provisions" to the dealings of U.S. advisers and foreign clients.[178] Here the Task Force team observed that many of the regulatory requirements were intended as prophylactic means to prevent fraud, and picking and choosing among them would be a difficult and probably fruitless task.[179] This approach was not recommended. Finally, a "territorial" approach would focus on conduct and the effects of conduct.[180] The U.S. regulatory regime would apply when "a sizeable amount of advisory services takes place *in the United States*[,] or where the advisory services have effects *in the United States*."[181] This is the approach that the Report recommended.

The cited legal standard—the conduct and effects test—had already been the subject of extensive adjudication when the *Protecting Investors Report* was issued.[182] Moreover, the standard has continued to draw attention, including in recent litigation before the Supreme Court and in legislation by Congress.[183] As discussed above, however, this article is less concerned with the articulated legal standard, and more with the policy choices being made by the agency. Those choices necessarily required the agency to consider what it would, and would not seek to regulate. In this regard, the Report said, when a foreign adviser registered with the SEC deals with U.S. clients,

175. *Id.* at 234.

176. *Id.* at 235.

177. *Id.*

178. *Id.* at 234-36.

179. *Id.* at 236.

180. *Id.* at 222.

181. *Id.*

182. *See id*. at 227 n.18. In addition, for a roughly contemporaneous discussion of the test, *see, e.g.*, Dennis R. Dumas, *United States Antifraud Jurisdiction over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. PA. J. INT'L BUS. L. 721 (1995) (collecting cases).

183. *See* Laby, *supra* note 8, at 561-62.

it can be assumed that advisory services will take place in the U.S., and the Act will apply.[184] On the other hand, the Report continued, when the same adviser deals with its foreign clients, advisory services will not take place in the U.S. and the Act will not apply.[185] In other words, in a fundamental policy shift, the SEC staff was willing to forgo regulation of a foreign-domiciled adviser's dealings with foreign clients, even when that adviser was registered with the SEC.

The Task Force described this new policy as one of comity with foreign regulatory regimes.[186] That is, as noted above, pursuant to a policy of comity, SEC regulations should not apply to a foreign domiciled adviser's relationship with its foreign clients, just as the SEC would not expect the laws and regulations of a foreign jurisdiction to apply to a U.S domiciled adviser's relationship with its U.S. clients.[187] This was consistent with the Commission's statement in the 1990 Concept Release that the study staff would consider the concept of comity.[188] However, several aspects of this policy choice warrant further attention.

First, comity was not reciprocity. In its 1990 Concept Release, the Commission appeared to link together the concepts of comity and mutual recognition.[189] However, the approach recommended by the Report was inconsistent with reciprocity. Harman recalls meetings with British regulators, in which they pressed the SEC representatives for a policy of mutual reciprocity.[190] The British, Harman recalls, took the view that each regulator should oversee advisers in its own jurisdiction, and then share the results with each other.[191] Of course, this was inconsistent with the Report's recommendation that the SEC should assert jurisdiction over foreign—meaning here British—advisers' advice to clients in the U.S.[192] In the event, Harman recalls, whatever the recommendations in the Report, finite regulatory budgets eventually made mutual reciprocity the practical or *de facto* result.[193]

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184. *Protecting Investors Report*, *supra* note 153, at 222.

185. *Id.*

186. *Id.* at 229.

187. *Id.*

188. *Compare id.* at 221-36, *with* Request for Comments on Reform of the Regulation of Investment Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

189. *Id.* at 25,326.

190. Harman Interview, *supra* note 69.

191. *Id.*

192. *Id*.

193. *Id.*

Second, while comity was not reciprocity, it relied to a considerable degree on international regulatory cooperation. As Mann describes it, due to international regulatory cooperation the whole concept of jurisdiction had changed.[194] So long as the SEC could cooperate with a foreign entity's home regulator, and obtain the information it needed, all the foreign entity had to do was cooperate with the oversight.[195] To facilitate this type of oversight, the Report recommended that foreign advisers registered with the SEC should be required to keep certain records about their foreign operations, so the SEC could monitor and enforce compliance issues implicating U.S. clients.[196] For example, the Report suggested, trading records would show if U.S. clients were being disadvantaged.[197]

Third, choosing comity as a policy required the SEC staff to forego certain previously held views. Most important was its view of performance fees. Through the years, performance fees had raised recurring issues regarding the foreign reach of the Advisers Act. As discussed above, U.S. advisers' ability to charge performance fees was subject to regulation, while in many foreign jurisdictions such fees were an accepted practice.[198] For example, the offshore funds represented by Reavis & McGrath in 1986 had been seeking a no-action letter primarily so they could charge performance fees.[199] Their request was denied.[200] However, in Chapter 6 of the Report, the Task Force adopted a new policy.[201] Robert Plaze ("Plaze") drafted the chapter describing the new policy. Plaze joined the Division of Investment Management in 1983, rose through the ranks to become Associate Director for Regulation in February 1996, a position in which he continued to serve until he was made Deputy Director of the Division in 2011, after which he left the agency in 2012. In Plaze's words, as a matter of regulatory policy: "What do we care if a Brit pays a performance fee?"[202] In light of this new thinking, the Report recommended legislation that would authorize the SEC to exempt from its performance fee requirements those clients of U.S. advisers who do not reside in the U.S.[203] The Task Force reasoned that under

194. April 13 Mann Interview, *supra* note 75.

195. *Id*.

196. *Protecting Investors Report*, *supra* note 153, at 230.

197. *Id*.

198. *Id*. at 246-47.

199. *See* Reavis & McGrath Memo., *supra* note 114.

200. *Id*.

201. *Protecting Investors Report*, *supra* note 153, at 238 (recommending the concept of performance fee exemptions).

202. Plaze Interview, *supra* note 110.

203. *See Protecting Investors Report*, supra note 153, at 246-48.

the conduct and effects test recommended elsewhere in the Report, foreign advisers would be permitted to charge such fees to their foreign clients, even when registered with the SEC.[204] Through the recommended legislation, U.S. advisers would be permitted to do so as well, with regards to their foreign clients.[205]

In short, by recommending a policy of comity the study team was withdrawing from the agency's prior expansive reading of its jurisdiction. One should also note, by selecting comity and not reciprocity, the SEC would retain its freedom of unilateral action, since there would be no binding bilateral commitments to reciprocate, only the general statements of intent to cooperate set out in MOUs. Finally, by foregoing oversight of foreign performance fees, the agency was conceding what had been, up to that point, a significant point of frustration with its regulatory regime. All of these measures would seem to be directed at one of the key concerns identified by the agency in its Concept Release: the danger that an overreaching regulatory posture could lead to foreign reciprocation. Yet, this leads to something of a mystery in the historical narrative: the agency's earlier fear of reciprocation seems to have disappeared.

The Report was silent on the threat of foreign reciprocation. Moreover, neither Smythe nor Plaze recall that concern playing any role.[206] Harman, for his part, recalls foreign concerns arising primarily in response to the policy of comity.[207] Only Mann recalls the threat posed by potential reciprocation.[208] While puzzling at first glance, the inconsistency could be explained by the officials' respective duties. Mann was, after all, Director of the office charged with managing the agency's foreign relations. Moreover, at a more substantive level, the threat posed by the Uruguay Round appears to have passed rather quickly.

Shortly after the SEC released its Concept Release, the U.S. trade delegation in the Uruguay Round circulated a communication to the Working Group on Financial Services in which it argued that any agreement should "respect the traditional duties, rights, and responsibilities of finance ministers, central bank governors, and other regulators and officials in the financial services sector."[209] The agreement must contain a provision, the

204. *Id.* at 247.

205. *Id.* at 247-48.

206. Smythe Interview, *supra* note 105; Plaze Interview, *supra* note 110.

207. Harman Interview, *supra* note 69.

208. June 13 Mann Interview, *supra* note 84.

209. *Submission by the United States on Financial Services*, WORKING GROUP ON FIN. SERVICES (July 12, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100258.pdf.

United States said, which permits a party: "[To take] reasonable actions necessary for prudential reasons, for the protection of . . . persons to whom a fiduciary duty is owed by a financial service provider."[210] As noted above, one of the defining characteristics of an adviser under U.S. law is its status as a fiduciary.[211] Furthermore, while the SEC had been denied membership on the trade delegation, it was able to insert representatives into the process, who could monitor developments and advocate for a prudential carve-out that would respect the agency's traditional powers.[212] The Working Group held further meetings in July and September 1990 and various drafts were circulated of a prudential carve-out for domestic regulators.[213] Then, in November 1990, the Chairman of the Working Group submitted his report to the Brussels Ministerial Meeting, and it identified a carve-out for inclusion in an annex or annotation that was largely consistent with the U.S. position.[214] In 1991, there would be further dickering over the carve-out, and compromise language would be added to the effect that it could not be used to avoid a member's obligations under the agreement.[215] Nonetheless, the submission of a favorable carve-out to the Ministerial level in November 1990 seems to be an important moment. Smythe became Director of the Division of Investment Management in that month, and she does not recall reciprocal or *quid pro quo* concerns having any impact on how the Report was completed.[216] This suggests that the danger of reciprocation had largely passed.

To implement its recommendations the Task Force recommended the use of no-action letters.[217] Smythe recalls that this approach was selected

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210. *Id.*

211. *See supra* text accompanying notes 31-32*; see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963) (reinforcing the idea that "[t]he Investment Advisers Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship'").

212. June 13 Mann Interview, *supra* note 84.

213. *See generally Working Group July 1990*, *supra* note 148, at 1; *Working Group on Financial Services Including Insurance, Note on the Meeting of 13-15 September 1990*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES 1 (Oct. 16, 1990), https://docs.wto.org/gattdocs/q/UR/GNSFIN/3.PDF.

214. *Report by the Chairman of the Sectoral Ad Hoc Working Group to the GNS*, WTO: GATT GROUP NEGOTIATIONS ON SERVICES 1 (Nov. 6, 1990), https://docs.wto.org/gattdocs/q/UR/GNS/W110.PDF.

215. *See* Marrakesh Agreement Establishing the World Trade Organization, *Annex* on Financial Services, Apr. 15, 1994, 1869 U.N.T.S. 183.

216. Smythe Interview, *supra* note 105.

217. *Protecting Investors Report*, *supra* note 153, at 230-34 (suggesting several possible approaches, including: the possibility of amending or reinterpreting domestic law, entering into multi-national or bilateral treaties, or harmonizing conflicting regulations); *see* Request for Comments on Reform of the Regulation of Investment

because each foreign adviser's facts were sufficiently unique that the process did not lend itself to a "cookie-cutter" rule-based approach.[218] Plus she recalls, the simple press of time and the need to wrap up the study and publish the Report worked against an effort to formulate the new policy in the text of a rule.[219] Moreover, Mann recalls: "[w]e were incrementalists, and we had a vision for it."[220] By being incrementalists, he added, the staff was trying to learn.[221] They also avoided extraordinary risks by working on incremental changes.[222] Smythe agrees, stating that implementing the Task Force's recommendations through no-action letters gave the staff "an opportunity to make sure they did it right."[223]

In the spring of 1992, the work of the Task Force was concluded. Smythe recalls that the Report was released in May of 1992 for two reasons.[224] The President, George H.W. Bush, launched an initiative in which federal agencies were asked to review their regulations and consider how to modernize them.[225] Smythe met with the SEC's Chairman, Richard Breeden, and they discussed the relationship of the Task Force to the President's initiative.[226] The Chairman then asked Smythe to wrap up the work of the Task Force so the Report could be released in a timely fashion.[227] Also, given the interest of the ICI in the project, it was decided to schedule its issuance to coincide with the ICI's annual membership meeting in May.[228] Smythe recalls that while the Report was not presented to the Commission for a vote—it was a staff report—she and the members of the Task Force had extensive meetings with the Commissioners and the Commissioners' Counsels, to brief them on its conclusions.[229] She recalls no controversy with the Commissioners.[230] Following these consultations, Smythe signed the

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Companies, 55 Fed. Reg. 25,322, 25,326 (proposed June 21, 1990) (to be codified at 17 C.F.R. pt. 270).

218. Smythe Interview, *supra* note 105.

219. *Id.*

220. June 13 Mann Interview, *supra* note 84.

221. *Id.*

222. *Id.*

223. Smythe Interview, *supra* note 105.

224. *Id.*

225. *See* Memorandum from President George H.W. Bush on Implementing Regulatory Reforms to Certain Department and Agency Heads (Apr. 29, 1992), http://www.presidency.ucsb.edu/ws/index.php?pid=20894.

226. Smythe Interview, *supra* note 105.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Report's cover letter on May 1, 1992.[231] The Report was then issued with a red cover, giving it the common nickname: the "Red Book."

Ten days later, on May 11, 1992, the Division of Investment Management received a request for a no-action letter to implement the Report.[232] The request was made by Uniao de Bancos de Brasileiros S.A., known as Unibanco.[233] At the time, Unibanco was the third largest non-governmental bank in Brazil, and it provided a variety of financial services, including investment management, commercial banking, and investment banking.[234] It also had a wholly owned subsidiary: Unibanco Consultoria de Investimentos, S/C Ltda ("Consultoria"), which had registered with the SEC as an investment adviser.[235] Consultoria advised institutional investors in the U.S., including an investment company, the Brazilian Investment Fund, Inc.[236] Unibanco asked, must it register with the SEC, and Consultoria asked: may it provide advice to non-U.S. clients solely in accordance with Brazilian law?

Smythe, as Division Director, was personally involved in identifying Unibanco as the "right candidate" for implementing the new policy.[237] Indeed, Smythe recalls that Unibanco made its interest known while the Task Force was still at work, and its situation had been considered as a test case against which the recommendations in the Report were formulated.[238] The Task Force wrote the language of the Report, she said, with the Unibanco facts in front of them.[239] As Smythe recalls: Unibanco was the patient "on whom the various experimental procedures were being tried out."[240] Harman, as the Division's Chief Counsel led the effort to respond.[241] Mann on behalf of OIA also played an active role in working out the terms of the staff's response.[242] Unibanco received a speedy response.

On July 13, 1992, the Office of Chief Counsel issued a no-action letter

231. Smythe Letter, *supra* note 150.

232. Letter from Marcia L. MacHarg, Debevoise & Plimpton, to Thomas S. Harman, Assoc. Dir. and Chief Counsel, Div. of Inv. Mgmt. (July 13, 1992), https://www.sec.gov/divisions/investment/noaction/1992/uniaodebancos072892.pdf (citing the Firm's prior letter, dated May 11, 1992, sent on behalf of Unibanco).

233. Unibanco Letter, *supra* note 5.

234. *Id.*

235. *Id.*

236. *Id.*

237. Harman Interview, *supra* note 69.

238. Smythe Interview, *supra* note 105.

239. *Id.*

240. *Id.*

241. Harman Interview, *supra* note 69.

242. *Id.*

that showed the impact of the new policy.[243] As the Report suggested, the Division of Investment Management indicated that a "more flexible interpretation" of the agency's jurisdictional reach was appropriate.[244] In place of the strict institutional segregation of parent and subsidiary set out in the *Richard Ellis* letter, the SEC staff told Unibanco it need not register so long as it met significantly less intrusive conditions.[245] The separation of parent and subsidiary would be recognized, the staff said, so long as the two affiliated companies were separately organized (i.e., two legal entities); the SEC-registered entity was staffed with personnel in the U.S. or abroad who were capable of providing investment advice; all persons involved in U.S. advisory activities would be supervised by the SEC-registered entity; and the SEC would have sufficient access to the books and records of unregistered affiliates involved in U.S. advisory activities to allow the SEC to monitor and police conduct that might harm U.S. clients or markets. In the last regard, Unibanco agreed to designate a U.S. agent for service of SEC subpoenas and other process relating to any action arising out of Consultoria's advisory services.[246] It agreed to keep books and records in English for Consultoria, consistent with the Adviser's Act requirements, and separate from Unibanco's other books and records.[247] It agreed to keep certain records for Unibanco itself, generally relating to its financial status, brokerage orders, discretionary authority, and client agreements.[248] Both its own and Consultoria's books and records would be made available for inspection by the SEC.[249] All Unibanco employees involved in Consultoria's U.S. advisory activities, such as research analysts, would be produced to the SEC for testimony.[250] The SEC staff agreed that Unibanco need not necessarily identify its customers, but Unibanco agreed it would not contest the validity of an SEC subpoena, except under the laws of the United States.[251]

Further, in place of the far-reaching assertion of jurisdiction over all clients of registered firms that had been set out in previous no-action letters, the SEC staff told Consultoria that it could provide advice to non-U.S. clients solely in accordance with Brazilian (or other applicable) law, and without

243. *See* Unibanco Letter, *supra* note 5, at 3-5.
244. *Id*. at 3-4.
245. *Id.* at 5-7.
246. *Id.* at 5-6.
247. *Id.* at 6-7.
248. *Id.*
249. *Id.*
250. *Id.* at 7.
251. *Id.* at 5-7.

necessarily complying with the Advisers Act.[252] On the other hand, Consultoria would keep records relating to all of its activities, including those relating to foreign clients.[253] This would enable the SEC to monitor and enforce the adviser's performance of its obligations to its U.S. clients and the integrity of U.S. markets, including how Consultoria was treating its U.S. clients in comparison to its foreign clients.[254]

The no-action letter to Unibanco and its subsidiary Consultoria shows the immediate impact of the new policy. In a fitting indication of the seriousness of the new policy, it was presented to the Commission for a vote.[255] Harman recalls that it was rare to send a proposed no-action letter to the Commission for a vote.[256] In this case, however, a vote of the Commission was deemed appropriate. Harman does not recall any negativity or controversy at the Commission level.[257] The study, he recalls: "had paved the way."[258] Finally, Harman signed the Unibanco letter himself, which was unusual. Typically, more junior attorneys in the Office of Chief Counsel sign no-action letters. Harman recalls that as he signed it, he was thinking: "[t]his is what the study had intended."[259]

IV. AFTER THE STUDY: 1993 TO 2017

The Task Force had recognized that a policy of comity would involve fact-specific determinations, and they began to arise almost immediately. Over the next several years, the Office of Chief Counsel in the Division of Investment Management issued a series of no-action letters addressing questions arising under the new policy. For example, did the new policy apply to the relationship between an SEC-registered adviser and an affiliate under common control? The SEC staff answered yes, so long as the names of participating affiliates were disclosed to U.S. clients and their activities were supervised consistently with the *Unibanco* letter.[260] Could an SEC-registered firm obtain research reports from a foreign affiliate, without

252. *Id.* at 4-5.

253. *Id.* at 6-7.

254. *Id.* at 4-5.

255. Harman Interview, *supra* note 69. The author made a Freedom of Information Act request to the SEC for a record of the vote the SEC responded that all records regarding the vote were privileged.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Mercury Asset Management. Plc, SEC No-Action Letter, 1993 WL 136967 (Apr. 16, 1993), https://www.sec.gov/divisions/investment/noaction/1993/mercuryasset041693.pdf.

requiring the SEC-registered firm to supervise the research staff? The SEC staff responded yes, so long as ethical barriers separated the advisory personnel serving U.S clients from the researchers drafting the reports.[261] Could an SEC-registered firm and its foreign affiliates share office space, records, telephone lines, other facilities, and personnel, including directors, officers and employees? Again, the SEC staff answered yes.[262] Would the new policy apply to a foreign universal bank that could not provide the SEC with the access required in other no-action letters, due to the law of the bank's domicile preventing it from requiring employees to cooperate in a foreign (*i.e.,* SEC) regulatory inquiry? The SEC staff answered yes, so long as the bank agreed to certain practical measures, such as making a good faith effort to obtain employees' consent, providing records to the SEC with a non-consenting employee's name redacted, and if necessary, helping the SEC enlist the assistance of the bank's home nation regulators.[263] This last condition is notable as one of the few places where the new role of international regulatory cooperation slipped into the agency's public deliberations regarding foreign-domiciled advisers. In the event, implementing the new policy through no-action letters led to a large body of fact-specific letters that advisers had to master in detail to understand the agency's position.[264] On the other hand, as a matter of regulatory policy, this produced the type of incrementalist case-by-case decision-making envisioned by the staff.[265]

In 1996, Congress consummated the SEC's change in policy. In the National Securities Markets Improvement Act of 1996 ("NSMIA"), Congress amended the Advisers Act so the regulations governing performance fees would no longer apply to an advisory client "who is not a resident of the United States."[266] Plaze played a key role in the legislative process and recalls that it added "the final pieces" to the SEC's new policy.[267] With Congressional authorization regarding performance fees, the SEC

261. Kleinwort Benson Investment Management Limited, SEC No-Action Letter, 1993 WL 530060 (Dec. 15, 1993), https://www.sec.gov/divisions/investment/noaction/kleinwort121593.htm.

262. Murray Johnstone Holdings Limited, SEC No-Action Letter, 1994 WL 570699 (Oct. 7, 1994), https://www.sec.gov/divisions/investment/noaction/1994/murrayjohnstone072194.pdf.

263. ABN AMRO Bank N.V, SEC No-Action Letter, 1997 WL 1038179 (July 1, 1997), https://www.sec.gov/divisions/investment/noaction/1997/abnamro070197.pdf.

264. *See supra* text accompanying notes 256-259.

265. *See supra* text accompanying notes 214-219.

266. National Securities Markets Improvement Act of 1996, Pub. L. 104-290, § 210, 110 Stat. 3416 (1996).

267. Plaze Interview, *supra* note 110.

could withdraw from this long-running source of international regulatory conflict. The 1996 NSMIA legislation put this final piece in place.[268]

In the years after the NSMIA legislation, the SEC has had several opportunities to reiterate its adherence to the policy set out in the *Protecting Investors Report* and implemented in the *Unibanco* letter. The most important occasion arose in the aftermath of the Dodd-Frank Act, when the SEC was called upon to extend registration and regulatory oversight to several types of previously unregulated investment advisers.[269] In a formal release voted upon and approved by the Commission, the SEC availed itself of the opportunity to restate its: "long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principals of international comity."[270] Indeed, the Commission made this point more than once,[271] and in doing so, it cited to the Report.[272] The cascading effects of this policy on the specific registration and reporting requirements set out in the Dodd-Frank Rules are beyond the scope of this Article, but one can see that the SEC believed its actions were fundamentally consistent with the policy it had chosen in the early 1990s.

Further, during the Dodd-Frank rulemaking the SEC stated that nothing it said was intended to withdraw any prior statement of the Commission or the views of the staff as expressed in the *Unibanco* letters.[273] Moreover, the continuing life of those letters was reiterated as recently as in March 2017

268. *Id.* Plaze also recalls that the SEC's new policy was reflected in Congress's decision in the NSMIA legislation to assign regulatory responsibility for foreign-domiciled advisers to the SEC, even when they failed to meet the standards that domestic advisers were required to meet for federal registration (generally based on the amount of assets they had under management). In Plaze's view this facilitated internationalization by shielding foreign advisers from the burden of regulation by multiple states.

269. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 408, 124 Stat. 1376 (2010) (repealing the private adviser exemption that permitted unregistered advisers to manage private funds).

270. Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 Fed. Reg. 39,646, 39,667 (July 6, 2011) (to be codified at 17 C.F.R pt. 275).

271. *See* 17 C.F.R. § 275 (2018).

272. *See, e.g.*, *id.*

273. *Id.* at 39,681. While the SEC stated that it was not overruling the *Unibanco* letters, it also stated that the Dodd-Frank Act had changed the regulatory context in which those letters had been issued, most importantly, by repealing the exemption for private advisers. Going forward, it said, it expected that the staff would "provide guidance, as appropriate, based on facts that may be presented to the staff regarding the application of the letters in the context" of the new Dodd-Frank provisions. While this may have suggested some ambivalence about the on-going validity of the letters, later developments, as set forth in the following text, seem to have laid such concerns to rest.

when the SEC staff issued an *Information Update for Advisers Relying on the Unibanco No-Action Letters*.[274] The update recites the assurances provided in the letters, states that multi-national financial firms rely upon them, and then describes various documents that the firms may provide to the SEC staff to demonstrate their compliance.[275] Twenty-five years after issuance of the *Unibanco* letter, a formal process was established for relying on its terms, and those of its progeny.

V. CONCLUSION

Reading the *Unibanco* letter today, twenty-five years after its issuance, it is easy to view its spare language as a series of discrete requirements imposed on a specific factual scenario. However, this falls well short of its full importance. A long history of shifting policies lay behind the letter, and a range of new policy considerations inspired its terms. This context must be understood, if the letter and its policies are to be correctly applied in a changing world.

In the history behind the *Unibanco* letter, one can see steadily building pressures as the SEC staff's view of its jurisdiction came increasingly into conflict with international developments. Initially, the SEC sought a regulatory border that would encompass all actions by advisers that touched the U.S. jurisdictional means, wherever the conduct took place. Further, once an adviser entered the U.S., by registering with the SEC, the agency's staff purported to regulate all the adviser's activities, wherever they took place. Then, in the early 1980s, in a first response to internationalization, the SEC staff issued the *Richard Ellis* letter, which had allowed a certain degree of foreign affiliation. However, the conditions it imposed were difficult to meet and provided little satisfaction. Finally, in the early 1990s, pressured by the need for foreign enforcement cooperation, the threat posed by multi-lateral trade negotiations, and businesses seeking to enter the U.S. market, the SEC staff developed a new policy: comity with foreign regulatory regimes. Through this new policy of comity, as implemented in the *Unibanco* letter, foreign-domiciled advisers could register with the SEC, provide services in the U.S., and be subject to SEC regulation within the U.S., without subjecting all their foreign operations and clients to SEC regulation.[276] Moreover, in the following twenty-five years, the SEC and its staff have reiterated their attachment to this policy.

Of course, the durability of the policy implemented in the *Unibanco* letter

274. *See generally Update for Advisers*, *supra* note 11.

275. *Id.*

276. *See* Unibanco Letter, *supra* note 5.

has provided ample opportunities for its interpretation. What was comity, one could ask, beyond passive deference to foreign regulators? Stated another way, were there positive values in the SEC's new policy that could be used to understand and apply the letter and its progeny? Having reviewed the process in which the SEC adopted this new policy, including the pressures that were working on it and the policy vision that was adopted in response, one can see that comity embodied several positive values. Three, in particular, stand out.

First, the *Unibanco* letter reflected a new regulatory flexibility regarding border-straddling firms. Indeed, where the *Protecting Investors Report* spoke of 'comity,' the *Unibanco* letter spoke of 'flexibility.'[277] Because of this flexibility, one could not say with precision where the regulatory border fell, at least not—to use Smythe's words—in a cookie cutter rules-based approach. Rather, it would depend on individual facts and circumstances. Lawyers and regulators who prefer the precision of bright lines and clear binary choices might find this flexibility uncomfortable. Nonetheless, it was a serious policy. In the context of the time, Plaze notes, as foreign markets were opening to U.S. interests, how could the SEC continue to follow restrictive policies at home?[278]

Second, the new policy of comity also addressed the concern raised in the SEC's 1990 Concept Release that the agency's then-expansive assertion of jurisdiction over foreign-domiciled advisers could lead to foreign reciprocation. In 1990, the U.S. Representative to the Uruguay Round's Working Group on Financial Services had also highlighted the danger of reciprocity. It would, he said, "guarantee chaos."[279] The threat of reciprocation, however, has not received the attention it deserves, probably because it appears to have been at its height for only a few months. A few days before the SEC issued its Concept Release, in June 1990, the session of the Uruguay Round's Working Group on Finance which considered possible multilateral intervention in the regulation of advisory services. Then, only about five months later, in November, a proposed prudential carve-out favorable to the SEC had reached the Brussels Ministerial Meeting. Perhaps not surprisingly, given that the danger passed so quickly, several members of the staff involved in the study, in the *Unibanco* letter, and in later legislation do not recall this concern. Nonetheless, in Mann's view, in responding to the challenge of internationalization, the greatest liberalization may have taken place in regards to the foreign reach of the Advisers Act, but

277. *See* Unibanco Letter, *supra* note 5, at 4.

278. Plaze Interview, *supra* note 110.

279. *Working Group July 1990*, *supra* note 148, ¶ 50, at 14 (statement of the Representative of the United States).

that was simply because the *Richard Ellis* no-action letter had previously staked out such a large amount of territory.[280] Further, while Smythe does not recall the threat of reciprocation, she concurs that the Richard Ellis policy had become anachronistic, because it "just didn't make any sense" that foreign advisers had to obey U.S. law "in all the countries where they operated."[281]

Third, the new policy of comity reflected a positive vision for the future of international regulatory cooperation. As Mann put it, in pursuing a policy of voluntary MOUs, the SEC's goal was to find ways through problems and develop a level of trust with foreign regulators.[282] Further, he says, because of the newly cooperative international regulatory environment established by the MOUs, the nature of jurisdiction could be reconsidered.[283] The SEC need not assert its own jurisdiction over an adviser's foreign operations and relationships when it could obtain whatever assistance it might need through voluntary collaboration with a firm's foreign regulator (backed, one must add, by the recordkeeping requirements in the *Unibanco* letters). This hope for cooperation was nearly invisible in the SEC's policy-making process regarding foreign-domiciled advisers. Yet, as Mann indicates, it was a serious policy consideration. Moreover, as Harman noted, in the event, even comity eventually gave way to something closer to *de facto* reciprocity.[284]

In sum, to understand and apply the *Unibanco* letter and its progeny one must read them as the result of a long policy process and as expressing a new policy vision of comity that embodied several affirmative values: flexibility, restraint, and international cooperation. It is beyond the scope of this article to attempt to trace those values through the letter's progeny, or how they might apply to the interpretative questions that could arise going forward. Nonetheless, based on the letter's durability, one could conclude that the policies had been well chosen. Perhaps, though, in a study based on interviews, the final concluding word should be given to the SEC official who signed the *Unibanco* letter. As Harman recalls, when the SEC embarked on its new policy, it "did not give up much."[285]

280. Plaze Interview, *supra* note 110.
281. Smythe Interview, *supra* note 105.
282. June 13 Mann Interview, *supra* note 84.
283. *Id.*
284. Harman Interview, *supra* note 69.
285. *Id.*

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A SEARCH BY ANY OTHER NAME: GOOGLE, GENERICISM, AND PRIMARY SIGNIFICANCE

ERICA C. HUGHES*

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I. INTRODUCTION

"When you use 'xerox' the way you use 'aspirin,' the advertisement reads, 'we get a headache.'"[1] Much like the Xerox Corporation, Google has sustained quite the headache over the years due to threats of genericide.[2]

Genericide is a phenomenon in which a business can lose trademark protection of its otherwise incontestable mark.[3] A trademark is a symbol used in the marketplace that identifies a distinct source of goods or services.[4] Google is a well-known trademark, but dictionaries often define the word "google" as a verb, meaning to search something online.[5] In addition, the word "google" was frequently used as a verb in both casual conversation and in the media.[6] Moreover, as one of the most valuable brands, Google[7] has

1. *See* Timothy J. Lockhart, *Did You Know . . . There's a Trademark Graveyard?*, INTABULL. (Dec. 15, 2008), http://www.inta.org/INTABulletin/Pages/DidYouKnowTheresaTrademarkGraveyard.aspx (describing Xerox Corporation's advertising campaign to combat genericide and alluding to the loss of trademark protection for the mark "aspirin" due to genericide).

2. *See* Jeff John Roberts, *Is 'Google' Generic? Supreme Court May Decide*, FORTUNE, (Aug. 21, 2017), http://fortune.com/2017/08/21/google-trademark-supreme-court/ (reporting that the plaintiffs in *Elliott v. Google* filed a petition to the United States Supreme Court to overturn the U.S. Court of Appeals for the Ninth Circuit's ruling that protected Google, Inc.'s trademark from genericide).

3. *See* 1 JEROME GILSON & ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 2.02 (2017) (defining genericide as the evolution of a trademark's meaning from a single source of products to a word of the product itself).

4. *See What Is Trade-Mark*, L. DICTIONARY, http://thelawdictionary.org/trade-mark/ (last visited Jan. 23, 2018) (defining a trademark as "[a] distinctive mark, motto, device, or emblem, which a manufacturer stamps, prints, or otherwise affixes to the goods he produces, so that they may be identified in the market, and their origin be vouched for.").

5. *See* Jacob Gershman, *Yes, 'Google' Is Used As a Verb, But It's Still a Trademark, Court Says*, WALL ST. J. (May 16, 2017, 7:07 PM), https://www.wsj.com/articles/no-googling-on-bing-search-leader-avoids-genericide-in-trademark-case-1494976044 (listing ways that the trademark "Google" is used as a generic verb "to search for something online").

6. *Id.*

7. *See* Julien Rath, *The 10 Most Valuable Brands in the World*, BUS. INSIDER (Apr. 1, 2017, 9:12 AM), http://www.businessinsider.com/brand-finance-10-most-valuable-brands-in-the-world-2017-3 (ranking ten companies using financial and business

good reason to be concerned.[8] With a brand worth $109.4 billion,[9] it is no wonder that Google needs an aspirin or two.

However, both Google and the Xerox Corporation now have another form of relief.[10] The U.S. Court of Appeals for the Ninth Circuit ruled in *Elliott v. Google, Inc.*,[11] that the Google trademark did not fall prey to genericide because (1) the claim of genericide did not relate to a good or service and (2) Google's verb usage does not automatically constitute a generic use.[12] The Ninth Circuit's holding contrasts with the traditional tenet of genericism avoidance: do not use the trademark as a noun or verb.[13] The protection of the Google trademark, despite the mark's generic verb usage, is significant.[14] On October 16, 2017, the United States Supreme Court denied the plaintiff's petition for certiorari, which asked the Court to consider whether the test for primary significance is the Ninth Circuit's "majority understanding" test or the "majority usage" test utilized by the U.S. Court of Appeals for the Second Circuit.[15]

This Comment will analyze the effect of the *Elliott* decision on the phenomenon of genericide and generic trademarks. Part II will discuss the Lanham Act, the inherent distinctiveness of trademarks, and the cancellation of trademarks. It will also discuss the *Elliott* holding and the Ninth Circuit's variation of the primary significance test. Part III will apply the Ninth Circuit's reasoning in *Elliott* to both the Xerox Corporation trademark as it

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performance data and interviews with over three million consumers).

8. *See* Simon Tulett, *'Genericide': Brands Destroyed by Their Own Success*, BBC NEWS (May 28, 2014), http://www.bbc.com/news/business-27026704 (stating that a brand is usually "the most valuable asset of a company").

9. *See* Rath, *supra* note 7 (ranking Google as the most valuable brand in the world).

10. *See* Elliott v. Google, Inc., 860 F.3d 1151, 1163 (9th Cir. 2017) (exemplifying that Google's trademark was challenged on the basis of genericide).

11. *Id.*

12. *Id.* at 1156.

13. *See* GILSON & LALONDE, *supra* note 3, § 2.02(b) (including "do not use the trademark as a noun or a verb" in a checklist for preventing loss of distinctiveness).

14. *See* Eric Goldman, *Google Gets Big Ninth Circuit Win That Its Eponymous Trademark Isn't Generic – Elliott v. Google*, TECH. & MKTG. L. BLOG (May 16, 2017), http://blog.ericgoldman.org/archives/2017/05/google-gets-big-ninth-circuit-win-that-its-eponymous-trademark-isnt-generic-elliott-v-google.htm (stating that the *Elliott* decision is a big win for companies with well-known brands whose marks are used as nouns or verbs); *see also* Wirtz Law APC, *GOOGLE Trademark Still at Risk: U.S. Supreme Court Review Sought by Wirtz Law APC in Case Seeking Cancellation of GOOGLE Trademark*, BUS. WIRE (Aug. 17, 2017, 3:43 PM), http://www.businesswire.com/news/home/20170817005962/en/GOOGLE-Trademark-Risk-U.S.-Supreme-Court-Review (reporting the plaintiffs petition for certiorari to the Court in *Elliott*).

15. *See Elliott*, 860 F.3d 1154, *cert. denied*, 138 S.Ct. 362 (2017) (presenting the two genericide questions and one evidence question to the U.S. Supreme Court).

pertains to genericide and the facts presented in *Booking.com B.V. v. Matal*,[16] as it relates to genericness. Part IV will recommend that the evidence of indiscriminate verb usage should not be used as evidence of genericism or genericide in trademark disputes involving domain names. Finally, this Comment will recommend that the Internet era requires a strict application of the primary significance test.

II. THE GENERICIDE DOCTRINE: LOSING YOUR MARK TO THE PUBLIC DOMAIN

A. What Is a Trademark?

A trademark is a term, symbol, object, or a sensation that is legally protected if it is connected to a unique source of a good or service and distinguishes that source from other sources.[17] Trademark protection is a particularly important property right because it authenticates the quality of a product or service from a particular source and makes it easier for consumers to decide which good or service they want to use.[18] Without this protection, the public would be vulnerable to both confusion and deception in the economy.[19] The Lanham Act was enacted in 1946 to regulate and protect trademarks for the purpose of promoting competition, clarity, and fostering the goodwill of businesses in the marketplace.[20] The Act defines the word "trademark" as any word, symbol, or device that is used or is intended to be used, in commerce, to distinguish goods and indicate the source of the goods.[21]

As the language in the statute indicates, trademark protection requires a

16. No. 1:16-cv-00425 (LMB/IDD), 2017 WL 3425167, at *1 (E.D. Va. Aug. 9, 2017).

17. *See* GILSON & LALONDE, *supra* note 3, § 1.02 (noting the Lanham Act definition is consistent with definitions under federal law and at common law before the Lanham Act was adopted).

18. *See id.* § 1.03 (explaining that trademarks communicate quality of goods, good will or function as an advertising until it has an association with a particular source).

19. *See id.* (stating that trademarks assure consumers that what they bought from the source before will be the same product or of the same quality when they go back to purchase more).

20. *See* Park 'n Fly v. Dollar Park & Fly, 469 U.S. 189, 198 (1984) (explaining Congress' conclusion that national trademark protection is important); *see also* GILSON & LALONDE, *supra* note 3, § 1.02 (stating that the adoption of the Lanham Act brought precise definitions to basic trademark law that decreased uncertainty in interpreting the law).

21. 15 U.S.C. § 1127 (2012); *see also* GILSON & LALONDE, *supra* note 3, § 1.02 (noting that the statutory definition of trademark is "virtually limitless," as suggested by the word "includes" in the direct quotation of the trademark definition in the Lanham Act).

single source be tied to a good by consumers, in order to distinguish the goods.[22] Therefore, to be eligible for protection under the Lanham Act, a trademark must be distinctive.[23] A trademark can either be inherently distinctive or it may acquire distinctiveness through secondary meaning.[24]

B. The Lanham Act, the Inherently Distinctive Requirement, and the Development of the Genericide Doctrine

There are four categories of distinctiveness: "(1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful."[25] A generic mark refers to a category where the good belongs.[26] An example of a generic mark is a "Ping-Pong Paddle" for a brand that sells ping-pong paddles.[27] Conversely, a descriptive mark can only be protected through evidence of the distinctiveness of the applicant's goods.[28] An example of a descriptive mark is "American Ping-Pong Paddle" because the mark describes the particular ping-pong paddle brand as being American.[29] A suggestive mark is a protectable mark that requires imagination to reach a conclusion about its source.[30] Arbitrary and fanciful marks are afforded the strongest protection.[31] Arbitrary marks are common words attached in an unfamiliar

22. *See* 15 U.S.C. § 1052 (stating that a mark that distinguishes its goods from other sources will be given trademark registration).

23. *See* Daniel E. Mangis, *When Almost Famous Just Isn't Famous Enough: Understanding Fame in the Federal Trademark Dilution Act as a Term of Art Requiring Minimal Distinctiveness,* 21 REV. LITIG. 455, 458 (2000) (citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 10 (2d Cir. 1976)) (stating that trademarks must be distinctive to be eligible for protection).

24. *See id.* at 459 (citing Steven Wilf, *Who Authors Trademarks?,* 17 CARDOZO ARTS & ENT. L.J. 1, 33 (1999)) (defining secondary meaning (also referred to as acquired distinctiveness) as "the public's association of a once independent word or symbol with a product that transforms the word of symbol into a distinctive mark").

25. *See Abercrombie*, 537 F.2d at 9 (describing the four categories of distinctiveness); *see also* GILSON & LALONDE, *supra* note 3, § 2.01 (laying out the four categories on the trademark distinctiveness spectrum that were originally articulated by Judge Friendly in *Abercrombie & Fitch Co)*.

26. *See id.* ("[O]ne that refers, or has come to be understood as referring, to the genus of which the particular product is a species.").

27. *See* Mangis, *supra* note 23, at 458.

28. *See Abercrombie*, 537 F.2d at 10; *see also* Mangis, *supra* note 23, at 459 (noting that, unlike a generic mark, a descriptive mark can gain distinctiveness through secondary meaning).

29. Mangis, *supra* note 23, at 459.

30. *Abercrombie*, 537 F.2d at 11; *see also* Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1371 (2015) (explaining that according to trademark doctrine, a suggestive mark is "inherently distinctive because there is a weak connection between" the source and the good).

31. *Abercrombie*, 537 F.2d at 11.

way.[32] Fanciful marks are words that were solely invented for their use as trademarks.[33]

The Lanham Act allows for a mark's cancellation if the mark "becomes the generic name for the goods or services . . . for which it is registered."[34] Even if a secondary meaning is proven for the newly generic mark, it is still not enough to make that mark protectable.[35] When the public primarily understands a former trademark as the name of a good and not the source of a good, genericide occurs.[36]

Historically, genericide cases have primarily turned on whether the mark passed into the public domain.[37] Courts analyzed evidence of (1) alternative generic terms for the mark;[38] (2) what the mark meant to the public;[39] and (3) evidence of generic and descriptive use without any indication of the good's origin.[40] Even when companies try to reclaim marks from the public domain, courts hold that the mark is generic.[41] When a company in one case used their trademark to describe their product, rather than just indicate its source, the mark fell victim to genericide.[42] In addition, a company's failure to police its own mark is taken into account.[43]

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32. *Id.* at n.12; *see also* Linford, *supra* note 30, at 1376 (using as an example for an arbitrary mark the registered trademark "Apple" for computers).

33. *Abercrombie*, 537 F.2d at n.12; *see also* Linford, *supra* note 30, at 1376 (giving the registered trademark "Xerox" for photocopiers as an example of an arbitrary mark).

34. 15 U.S.C. § 1064(3) (2012).

35. *Abercrombie*, 537 F.2d at 9; *see also* Linford, *supra* note 30, at 1378 (stating that courts and scholars presume a mark that is used as the name of a product cannot serve as a signifying mark, even public sees the term as a trademark).

36. *See, e.g.,* Elliott v. Google, Inc., 860 F.3d 1151, 1156 (9th Cir. 2017) (citing Bayer Co. v. United Drug Co., 272 F. 505, 512 (S.D.N.Y. 1921)); Freecycle Network, Inc. v. Oey, 505 F.3d 898, 905 (9th Cir. 2007); DuPont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75, 81 (2d Cir. 1936).

37. *See* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 579 (2d Cir. 1963) ("thermos"); *DuPont Cellophane Co.*, 85 F.2d at 81 ("cellophane"); *Bayer Co.*, 272 F. at 512 ("aspirin"); Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q (BNA) 80 (Dec. Comm'r Pat. 1950) ("escalator").

38. *Bayer Co.*, 272 F. at 510.

39. *DuPont Cellophane Co.*, 85 F.2d at 77.

40. *Haughton Elevator Co.*, 85 U.S.P.Q (BNA) at 80.

41. *See Bayer Co.*, 272 F. at 510 (holding that it was too late to reclaim the trademark "aspirin" once the public learned to know the trademark as the name of the drug).

42. *See DuPont Cellophane Co.*, 85 F.2d at 78 (holding that the trademark "cellophane" was now generic because Plaintiff had used the mark as a descriptive term in advertising and was referred to in a generic sense in industry magazines).

43. *See King-Seeley Thermos Co.*, 321 F.2d at 579 (stating that King-Seeley failed police its trademark because it did not actively seek out generic use of "thermos" by non-trade publications).

C. The Primary Significance Test: Secondary Meaning, the "Who-Are-You/What-Are-You" Test and the Elliott Decision

Under the Lanham Act, the test for determining genericism is finding the primary significance of the mark to the public.[44] The primary significance of a trademark is also used in the test for determining secondary meaning.[45] A descriptive mark, which is not inherently distinctive, can acquire distinctiveness through secondary meaning and, thus, become a protectable trademark.[46] The Supreme Court held "secondary meaning is acquired when in 'the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.'"[47] In *Kellogg Co. v. National Biscuit Co.*,[48] the Supreme Court writes regarding section 43 in the Lanham Act "to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer."[49]

The green-gold color trademark in *Qualitex Co. v. Jacobson Products Co.*,[50] developed secondary meaning because customers identified the green-gold color as the Plaintiff's mark.[51] Thus, the color identified the product's source and was protected through acquired distinctiveness.[52] Direct evidence of secondary meaning can include: (1) trial testimony; (2) affidavits; (3) survey and statistical data; and (4) unsolicited consumer response and testimonials.[53] A variety of other factors, considered as indirect evidence, include: (1) extent or amount of advertising; (2) extent of sales of

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44. *See* 15 U.S.C. § 1064(3) (2012) ("The primary significance of the registered mark to the relevant public [is] . . . the test for determining whether the registered mark has become . . . generic.").

45. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163 (1995) (holding that a color can serve as a trademark through acquired distinctiveness by a showing of secondary meaning).

46. *See id.* (explaining that when a brand's mark attains secondary meaning, the brand is distinguished a particular brand and indicates a source).

47. *Id.*; *see also* David E. Rigney, Annotation, *Application of Secondary Meaning Test in Action for Trademark or Tradename Infringement Under § 43(a) of the Lanham Act (15 U.S.C.A. § 1125(a))*, 86 A.L.R. Fed. 489 (1988) ("[I]t is not necessary that the public know who or what the source really is.").

48. 305 U.S. 111, 118 (1938).

49. *Id.* at 118.

50. 514 U.S. at 166.

51. *Id.*

52. *Id.*

53. *See* Rigney, *supra* note 47, at 18 (listing types of direct evidence the courts have relied on to determine secondary meaning).

the product or service;[54] (3) nature and extent of unsolicited media coverage that the product or service has received; (4) extent and nature of copying and third party use of the mark; and (5) length of use of the mark.[55] The Court's articulation of the primary significance test for secondary meaning of a trademark is instructive for the issues of genericide and genericness.[56]

Circuit courts have developed multiple tests for analyzing the primary significance of a term.[57] The tests can overlap with one another and some circuits use a combination of different tests.[58] The U.S. Court of Appeals for the Third Circuit's primary significance test will not initiate the test until it decides on the mark's genus[59] at issue.[60] The U.S. Court of Appeals for the Sixth Circuit determines the genus of the product first and then establishes the primary significance of the term to the public when used for said genus of products.[61] The U.S. Court of Appeals for the First Circuit states the primary significance to the relevant public is their ability to identify the nature of the good, not its source.[62] The U.S. Court of Appeals for the Fourth

54. *See id.* (giving success or popularity of a product or service, and the nature of the sales as examples of showing "extent of sales of the product or service).

55. *See id.* at 19 (listing indirect evidence of secondary meaning that courts will consider in their determination of secondary meaning).

56. *See Qualitex Co.*, 514 U.S. at 163 (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 (1982)) ("'Secondary meaning' is acquired when 'in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.'"); Elliott v. Google, Inc., 860 F.3d 1151, 1156 (9th Cir. 2017) (stating that a term becomes generic when the primary significance of the mark to the public is the name for a particular good, regardless of its source).

57. *See* Scott Brown, Note, *"I Tweeted on Facebook Today:" Re-Evaluating Trademark Genericide of Internet-Based Trademarks*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 457, 461 (2012) (explaining the Second Circuit's substantial majority test and the Ninth Circuit's "Who-Are-You/What-Are-You?" test as examples of slightly different standards for testing primary significance).

58. *See* GILSON & LALONDE, *supra* note 3, § 2.02(6)(0a) (describing how courts have used more specific language to determine whether a mark is generic).

59. *See Genus*, DICTONARY.COM, http://www.dictionary.com/browse/genus?s=t (last visited Feb. 9, 2018) (defining "genus" as a "class or group of individuals, or of species of individuals").

60. *See* GILSON & LALONDE, *supra* note 3 § 2.02(6)(b) (describing different types of primary significance tests and highlighting a test that invokes genus-species language).

61. *See* Nartron Corp. v. STMicroelectronics, Inc., 305 F.3d 397, 404 (6th Cir. 2002) (quoting Blinded Veterans Ass'n v. Blinded Veterans Found., 872 F.2d 1035, 1041 (D.C. Cir. 1989)) (stating that the appropriate test for genericness is whether the relevant public perceives the term primarily as the designation of the article); *see also* GILSON & LALONDE, *supra* note 3 § 2.02(6)(e) (describing the Sixth Circuit test for genericness).

62. *See* Boston Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1, 18 (1st Cir. 2008)) (defining the legal standard of the genericism analysis as determining the primary significance of the mark to the relevant public); *see also* GILSON & LALONDE, *supra* note 3 § 2.02(6)(e) (describing the First Circuit test for genericness).

Circuit's test also stipulates that a generic term's primary significance must indicate the class of the product or service to the relevant consuming public, not its source.[63] The Second Circuit's primary significance test involves a showing that the term is an indication of the nature of the article, rather than an indication of its origin.[64] The Ninth Circuit articulated the "Who-Are-You/What-Are-You" test in *Official Airline Guides, Inc. v. Goss.*[65] The court stated the test as follows: "A mark answers the buyer's questions 'Who are you? Where do you come from?' 'Who vouches for you?' But the name of a product answers the question 'What are you?'"[66] If the type of product is described instead of the producer, the trademark is deemed generic.[67]

In *Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc.*,[68] the Ninth Circuit rejected a broad reading of *Surgicenters of America, Inc. v. Medical Dental Surgeries*[69] and held that the combination of the two generic marks (in this case "Filipino" and "yellow pages") did not automatically make the resulting combination generic.[70] However, the court still found that the plaintiff's trademark was generic or, in the most favorable reading of the evidence, was descriptive without secondary meaning.[71] The court reasoned that if faced with the "What are you?" question under the test, the various Filipino directories would answer: "A Filipino yellow pages."[72]

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63. *See* Glover v. Ampak, Inc., 74 F.3d 57, 59 (4th Cir. 1996) (holding that "[w]hen a trademark ceases to identify in the public's mind the particular source of a product or service but rather identifies a class of product or service, regardless of source, that mark has become generic and is lost as an enforceable trademark"); *see also* GILSON & LALONDE, *supra* note 3 § 2.02(6)(e) (describing the Fourth Circuit test for genericness).

64. *See* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 580 (2d Cir. 1963) (stating that to become generic, a mark must indicate the class of a good, not the origin of the good); GILSON & LALONDE, *supra* note 3 § 2.02(6)(e) (describing the Second Circuit test for genericness).

65. 6 F.3d 1385, 1391 (9th Cir. 1993).

66. *Id.* (quoting 1 J. MCCARTHY, TRADEMARKS & UNFAIR COMPETITION § 12.01 (3d ed. 1992); *see* Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc., 198 F.3d 1143, 1147 (illustrating a test to distinguish unprotectable generic marks that describe a class of good (answers "What-Are-You?") and protectable marks that describe the producer of a good (answers "Who-Are-You?")).

67. *See Filipino Yellow Pages*, 198 F.3d at 1147 (quoting Anti-Monopoly, Inc. v. Gen. Mills Fun Grp., 611 F.2d 296, 304 (9th Cir. 1979)) ("[I]f the primary significance of the trademark is to describe the *type of product* rather than the *producer*, the trademark [is] a generic term and [cannot be] a valid trademark.").

68. *Id.*

69. 601 F.2d 1011, 1020 (9th Cir. 1979) (holding that the mark "Surgicenter" was generic or descriptive without secondary meaning).

70. *Filipino Yellow Pages*, 198 F.3d at 1148.

71. *Id.* at 1151-52.

72. *Id.* at 1151.

In *Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc.*,[73] the Ninth Circuit held that the response to "what are you?" was expected to be "a taxicab company" or "a cab company."[74] Additionally, it was suggested that by asking to refer to the yellow cab company, a company was likely to point to a business operating under the name "Yellow Cab."[75] As a result, summary judgment was reversed because the "who-are-you?" question was a genuine issue of material fact.[76]

In the *Elliott* case, the Ninth Circuit held that the lower court correctly applied the primary significance test.[77] The plaintiffs acquired 763 domain names that included the word "google" and sought to cancel Google's mark because it became a generic term for searching the Internet.[78] The Ninth Circuit reasoned that without making a claim with regard to a particular type of good, arbitrary marks could not be protected.[79] Without the connection to the particular good or service, an arbitrary mark for one product could be deemed generic because it is generic as applied to a completely different product.[80]

The Ninth Circuit also rejected Elliott's argument that verb usage automatically constituted genericism.[81] The court affirmed the lower court's articulation of indiscriminate verb usage and discriminate verb usage.[82] Since the claim "must relate to a particular type of good," the court held that

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73. 419 F.3d 925 (9th Cir. 2005).

74. *See id.* at 929-30 (explaining that the question "Who-are-you?" was a question of fact and that summary judgment was improperly granted).

75. *Id.* at 929.

76. *See id.* at 929-30 (noting that the plaintiff provided evidence that there was a genuine issue of material fact as to whether "yellow cab" was generic or, in the alternative, descriptive without secondary meaning).

77. *See* Elliott v. Google, Inc., 860 F.3d 1151, 1163 (9th Cir. 2017) ("The district court did not misapply the primary significance test . . . .").

78. *See id.* at 1154-55 (stating the plaintiffs filed an action to cancel the "Google" trademark after the National Arbitration Forum ("NAF") transferred the plaintiffs' domain names to Google in 2012, after Google filed their lawsuit).

79. *See id.* at 1156-57 (holding that the Lanham Act requires a link between a claim of genericide and a particular good or service under the primary significance test).

80. *See id.* at 1157 (using "IVORY" as an example of a mark that could be cancelled because it is generic for tusks of elephants but arbitrary for soap).

81. *See id.* at 1157-58 (stating that Congress's intent when amending the Lanham Act was to specify "that a speaker might use a trademark as the name for a product, i.e., as a noun, and yet use the mark with a particular source in mind, i.e., as a trademark").

82. *See id.* at 1158 (defining indiscriminate verb usage as use of a mark with no particular source in mind and defining discriminate verb usage as use of a mark with a source in mind). The court further recognized that a consumer may use the word "google" with no particular search engine in mind (i.e., indiscriminate) or may use the trademark with the Google search engine in mind (i.e., discriminate). *Id.*

the assumption under which the public uses a mark in a generic and indiscriminate sense is irrelevant to determining how the public primarily understands the mark itself.[83] Further, the court found Elliott's evidence of indiscriminate verb usage by consumers, the media, and Google employees, to be insufficient.[84]

D. Headaches of Genericism: Booking.com and the Xerox Corporation

The *Elliott* decision's effect on genericness and genericide will be played out in the future.[85] In *Booking.com*, the plaintiff company appealed the Trademark Trial and Appeal Board's ("TTAB") decision that their mark "Booking.com" is generic.[86] The mark in this case was being used by a travel and accommodations site that offers travel and accommodations services.[87] The plaintiff argued that the mark cannot be used in a grammatically coherent way to refer generically to anything.[88] In other words, one cannot refer to something as a "Booking.com" or use "Booking.com" as a verb.[89] The TTAB in *Booking.com* argued the mark's use is irrelevant.[90] On appeal, the court held that the mark "Booking.com" was descriptive with secondary meaning and, thus, was protectable.[91] The court also noted that evidence indicating consumer use, such as referring to services as "booking.coms," was relevant in its analysis.[92]

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83. *See id.* at 1157-59 (stating that the Ninth Circuit has already rejected the theory that trademarks can only be used as adjectives).

84. *See id.* at 1161-62 (holding that the dictionary evidence only showing secondary definitions was insufficient for a finding of genericide and that there was an efficient alternative for the word "google" because the other internet search engine competitors do not call their searches a "google").

85. *See* Goldman, *supra* note 14 (stating that the Elliott decision was a big win for trademark owners because the ruling makes genericide challenges more difficult).

86. *See* Kat Greene, *Booking.com Demands Better Answers from USPTO,* LAW360 (Sept. 6, 2016, 5:51 PM), https://www.law360.com/articles/836232 (summarizing Booking.com's appeal of the TTAB's decision).

87. *Id.*

88. *See* Complaint ¶ 41, Booking.com B.V. v. Lee, No. 1:16-cv-00425 (LMB/IDD), 2017 WL 3425167 (E.D. Va. Apr. 15, 2016) (stating that there is no evidence that any consumers refer to sites as "Booking.com's").

89. *See* Greene, *supra* note 86.

90. *See* Booking.com B.V. v. Matal, No. 1:16-cv-425 (LMB/IDD), 2017 WL 3425167, at *11, *16 (E.D. Va. Aug. 9, 2017) (relying on the Federal Circuit's statement in a case involving the denial of registration to "Mattress.com" and a genericness test); *see also* H. Marvin Ginn Corp. v. Int'l Ass'n Fire Chiefs, Inc., 782 F.2d 987, 989-90 (Fed. Cir. 1986) (explaining how the Federal Circuit concluded that use is irrelevant based on the test of genericness).

91. *Booking.com*, No. 2017 WL 3425167, at *1, *20, *23.

92. *Id.* at *20.

The district court held that alone, the word "booking," was generic for the classes of hotel and travel reservation services because competitors use the word "booking" to describe making a reservation.[93] However, the mark at issue in this case was "Booking.com," and not "booking."[94] As a result, the court analyzed the impact of the top level domain ".com" on the mark and determined that top level domains are source identifying. Additionally, a mark with a generic second level domain (e.g. "booking") and a top level domain (e.g. ".com") can be protected if it has acquired distinctiveness.[95]

The court noted the absence of evidence of public use of the term "booking.com" and rejected the plaintiff's argument, supported by a statement from the U.S. Court of Appeals for the Federal Circuit that use of a mark to determine genericness "is irrelevant."[96] In determining that "booking.com" is descriptive with secondary meaning, the court primarily relied on evidence that consumers understand the mark to be a brand.[97] After analyzing the plaintiff's survey,[98] the court concluded that the defendants had not established that "Booking.com" is generic and that the mark is in fact descriptive.[99] In addition, the court held the mark "Booking.com" is descriptive with secondary meaning after analyzing other surveys provided by the plaintiff, advertisements, sales, media coverage, length and exclusivity of use, and social media following.[100]

The Xerox Corporation's brand stands to be the most affected by the application of the Ninth Circuit's primary significance test combined with its ruling on verb usage in genericism and genericide cases.[101] The Xerox

93. *Id.* at *7.

94. *Id.* at *9.

95. *Id.* at *11 (stating that the court declines to rely on Federal Circuit precedent that ".com" has no source identifying significance and instead approaching the genericness of ".com" as an issue of first impression).

96. *See id.* at *16 (relying on the Federal Circuit's statement in a case involving the denial of registration to "Mattress.com" and a genericness test).

97. *Id*. at *17-20, *22-23 *(*stating the survey indicated that 74.8% of consumers of online travel services recognize BOOKING.COM as a brand and dismissing the defendants' arguments that (1) genericness inquiries are not relevant when the term was commonly used prior to being a mark; (2) ".com" marks should be tested without the ".com;" (3) that there are methodological flaws in the survey pertaining to the survey population, not accounting for the ability to distinguish ".com" common names and ".com" brand names and the order in which the marks were presented in the survey).

98. *See id.* (reproducing the tables used in the survey results, and discussing the defendants' expert's critiques).

99. *See id.* at *19 ("[T]he Court finds that the relevant consuming public primarily *understands* that BOOKING.COM does not refer to a genus, rather it is descriptive of services involving "booking" available at that domain name.").

100. *Id.* at *20-23.

101. *See* Goldman, *supra* note 14 (stating that the *Elliott* decision is a win for "[b]ig

trademark was in danger of becoming generic before the corporation ran an aggressive ad campaign to view the mark as a name that indicates the source of their products and services, not a name for the service itself.[102] Despite the risk of becoming their mark is generic, Xerox has so far avoided genericide.[103] There are several brands of photocopiers on the market: Hewlett Packard, Canon, Epson, Brother, Dell and, of course, Xerox.[104] There are fifteen search results in a search for "Xerox" using Hewlett Packard's search engine but all of the results use the mark to describe a product affiliated with the Xerox Corporation.[105] In Canon's "About Section" on their website, there is no mention of the mark "Xerox."[106] In the Canon's website's search engine, there are thirteen results for the term "Xerox" but all of the results refer to the company itself.[107] Epson's "About Section" does not use the mark "Xerox" and have no search results for the mark in its search engine.[108] In Brother's "About Section" there is no mention of the mark Xerox and no search results for the mark in the website's search engine.[109] Finally, Dell's "About Page" does not mention the mark

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[t]rademark [o]wners"); *see also Best Global Brands 2016 Ranking,* INTERBRAND, http://interbrand.com/best-brands/best-global-brands/2016/ranking/#?listFormat=ls (last visited Jan. 30, 2018) (ranking Xerox as the 84th brand in 2016).

102. *See* Gary H. Fechter & Elina Slavin, *Practical Tips on Avoiding Genericide,* INTABULL. (Nov. 15, 2011), https://www.inta.org/INTABulletin/Pages/PracticalTipsonAvoidingGenericide.aspx (explaining how companies use advertising to prevent the genericide of their trademarks).

103. *See id.* (suggesting that because Xerox's mark has not been deemed generic, it seems the ad campaign to combat genericide was successful).

104. *All-In-One Printers*, STAPLES, https://www.staples.com/Printers/cat_CL167883/8msca?fids=&pn=2&sr=true&sby=&min=&max= (last visited Feb. 9, 2018).

105. Search Results for Xerox, HP, http://www8.hp.com/us/en/search/search-results.html?ajaxpage=1#/page=1&/qt=xerox (last visited Feb. 9, 2018) (input "xerox" into website's search engine).

106. *About Canon,* CANON GLOB., http://global.canon/en/about/index.html (last visited Feb. 9, 2018).

107. Search Results for Xerox*,* CANON GLOB., http://search.global.canon/en_all/search.x?q=xerox&ie=utf8&cat=0&pagemax=10&imgsize=3&pdf=ok&zoom=0&sort=0&ctor=0&lfor=0&ref=search.global.canon&pid=ZRsqIrjuo2aBqsSxxGm5TQ..&qid=Oei31Wq98raDXtOhdlise0Xm9Eg3J02D&page=1 (last visited Feb. 9, 2018) (input "xerox" into website's search engine).

108. *About Epson,* EPSON*,* https://www.epson.eu/about (last visited Jan. 30, 2018); Search Results for Xerox, EPSON, https://www.epson.eu/productfinder/xe/en/content/open/productfinder/index.php?search=xerox (last visited Feb. 9, 2018) (input "xerox" into website's search engine).

109. *About Us,* BROTHER, https://www.brother-usa.com/Brother.aspx (last visited Feb. 9, 2018); Search Results for Xerox, BROTHER, https://www.brother-usa.com/sitesearch.aspx?SK=xerox&searchBtn4=++&sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&client=fe_www_com&proxystylesheet=fe_www_com&site=col_www_com_comin

Xerox[110] and its search results page only referred to Xerox as a brand.

The *Elliott* decision and the "Who-Are-You/What-Are-You" test gives both Booking.com and Xerox a stronger defense against claims of genericness.[111] The application of the Ninth Circuit's reasoning to the foregoing facts show a better and more efficient way to analyzing genericness than the test articulated by the plaintiffs in *Elliott*.[112]

III. THE *ELLIOTT* DECISION AND ITS APPLICATION TO GENERICISM AND CLAIMS OF GENERICIDE.

A. Application of the Elliott decision: Genericism

The *Elliott* decision is correct in ruling the use of a trademark as a noun or as a verb is not relevant to the primary significance analysis.[113] By focusing on the public's understanding of the trademark, rather than the public's use of the mark, the test of genericness becomes more straight-forward.[114] The Ninth Circuit's "Who-Are-You/What-Are-You" test primarily focuses on the public's understanding of the trademark and is an efficient way of analyzing issues of genericness and genericide.[115] This straightforward approach is supported by the notion that a trademark can serve the dual function of naming a product and simultaneously indicating its source.[116] With the application of the *Elliott* decision, the question of genericness and genericide has turned in the favor of trademark owners.[117]

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f_sol (last visited Feb,. 9, 2018) (input "xerox" into website's search engine).

110. *About Dell,* DELL, http://www.dell.com/learn/us/en/uscorp1/corp-comm (last visited Mar. 2, 2018; *Dell Search*, DELL, http://pilot.search.dell.com/xerox (last visited Mar. 2, 2018) (input "xerox" into website's search engine).

111. *See* Goldman, *supra* note 14 (suggesting that the *Elliott* decision was a "[b]ig [w]in" for trademark owners with big brands).

112. *See infra* notes 148-159, 189-198 and accompanying text.

113. Elliott v. Google, Inc., 860 F.3d 1151, 1156 (9th Cir. 2017).

114. *See id.* (holding that the lower court did not misapply the primary significance test by not recognizing the alleged importance of verb use).

115. *See* Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 929 (9th Cir. 2005) (articulating the "Who-Are-You/What-Are-You" analysis); Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc., 198 F.3d 1143, 1147 (9th Cir. 1999).

116. *See Elliott*, 860 F.3d at 1158 (quoting Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1255 (9th Cir. 1982)) (stating that the court has already noted that "the mere fact that consumers order 'a coke,' i.e., used the mark as a noun, failed to show 'what . . . customers [were] thinking,' or whether they had a particular source in mind").

117. *See* Goldman, *supra* note 14 (suggesting that the *Elliott* decision was a "[b]ig [w]in" for trademark owners with big brands).

i. Dual Function and Verb Usage as It Relates to Genericness

In *Elliott*, the district court quotes an amendment to the Lanham Act stating a trademark can serve the dual function of both naming a product while also indicating its source.[118] The court's use of this explanation supports its ruling that irrelevance of verb usage can extend to noun usage.[119] Further, the court acknowledged indiscriminate and discriminate verb use of "google" in the same sense that a consumer could use the word "coke."[120] If the treatment of verb usage and noun usage are the same, the inability to use the mark "Booking.com" to refer to something generically and in a grammatically coherent way has significantly less weight in the analysis of genericism.[121] Consequently, if the primary significance test were one of majority usage rather than majority understanding, the analysis of genericism for this mark would be less efficient because the mark cannot be used in a grammatically coherent way.[122] Subsequently, evidence that a majority of the public uses "google" in a generic way is not only insufficient to support a finding of genericism, but it says very little about the subject matter at all.[123]

The Ninth Circuit holds that even if there were an assumption that the word could be used, and is used, in a generic and indiscriminate sense, it would say nothing about the public understanding, which is an assertion that is mentioned in the *Booking.com* complaint.[124] While the appeal does not

118. *See Elliott*, 860 F.3d at 1158 (quoting S. REP. No. 98-627, at 5 (1984)) ("A trademark can serve a dual function—that of [naming] a product while at the same time indicating its source. Admittedly, if a product is unique, it is more likely that the trademark adopted and used to identify that product will be used as if it were the identifying name of that product. But this is not conclusive of whether the mark is generic.").

119. *See id.* (stating that Congress' acknowledgement of the dual function has instructed the court that a consumer could use a trademark as a noun and still use the trademark to identify the source).

120. *Id.* at 1159 (citing Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250 (9th Cir. 1982)).

121. *See* Complaint, *supra* note 88, ¶ 38 (stating that it is impossible to generically use the mark "Booking.com" in a grammatically coherent way).

122. *See id.* ¶ 55 (addressing the fact that the Trademark Trial and Appeal Board found the mark Booking.com was impossible to use in a grammatically coherent way to refer generically to anything).

123. *See id. (*explaining that the Trademark Trial and Appeal Board instead broke the mark "Booking.com" into pieces and speculated about the meanings of the component pieces and how the consumers understood the meanings in order to determine whether the mark would be generic, as opposed to trying to figure out how the mark could be "used" generically).

124. *See Elliott*, 860 F.3d at 1158 ("If Elliott were correct that a trademark can only perform its source-identifying function when it is used as an adjective, then we would

deal with genericide directly, the Ninth Circuit decision may be applied to determine whether the mark is generic.[125] *Booking.com* differs in that the mark in question involves a gerund and a verb, not a noun like "google."[126] In addition, the *Booking.*com mark includes a generic mark ("Booking") and a top level domain (".com").[127] But it follows that if the evidence of grammatical generic use of the word does not indicate how the public primarily understands the word, the lack of ability to grammatically use the mark generically does not indicate how the public primarily understands the word.[128] The application of the *Elliott* decision, therefore, changes *Booking.com's* argument against genericism because the TTAB does not need to address the inability to grammatically use the mark in a generic way.[129] Without the weight of grammatical genericness, a finding of genericism rests on the literal application of the "Who-Are-You/What-Are-You" formulation, and not an apparent lack of genericism because the mark cannot be used grammatically in such a way.[130]

The uniqueness behind trademarks of domain name registrations is mentioned in the *Booking.com* complaint.[131] The plaintiff company established the uniqueness of combining two generic terms "Booking" and ".com" to create a mark that, by definition cannot be used to signify another source because it is a URL.[132] One of the major differences between the circumstances in the *Elliott* decision and prior genericism cases is that the claim of genericism came as a result of a domain name registration

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not have cited a need for evidence regarding the customers' inner thought processes.").

125. *See id*. at 1156 (emphasis added) (stating that plaintiffs claimed "he has presented sufficient evidence to create a triable issue of fact as to whether the GOOGLE trademark is *generic*" and not that it has fallen victim to genericide, suggesting that "being generic" and "falling victim to genericide" does not have a separate analysis, apart from the stage at which the claim is made).

126. *See* Booking.com B.V. v. Matal, No. 1:16-cv-425 (LMB/IDD), 2017 WL 3425167, at *11 (E.D. Va. Aug. 9, 2017) (finding that "booking" is a generic term for hotel and travel reservation services, but the mark in question is "Booking.com," not "booking").

127. *Id.* at *16-17.

128. *Id.*

129. *See Elliott*, 860 F.3d at 1159 (finding that verb use does not automatically constitute generic use and cannot sustain a finding of genericness on its own)*; see also* Complaint, *supra* note 88, ¶ 41.

130. *See Elliott*, 860 F.3d at 1158 (holding that the correct framework for the primary significance test is whether the mark to the relevant public is understood as a generic name for internet search engines, not merely used in a generic way).

131. Complaint, *supra* note 88, ¶ 55.

132. *Id.* ¶ 70 ("Because the trademark is also a URL that cannot be used by any other third parties, it is all but impossible for it to achieve recognition as a generic term.").

dispute.[133] This difference is fundamental in that the Google mark, an internet-based trademark, and its domain name indicates a *single source* associated with the mark.[134] For example, the mark "VITAMINS.COM," as a URL, will uniquely distinguish a single website location that no other third party can link to with a different mark.[135] Thus, by definition, the mark is inherently distinctive and perhaps should not be considered generic.[136] However, the policy of making any domain name, even generic ones, a protected trademark can be problematic because it would monopolize necessary generic terms needed to describe products or services.[137] Consumers could also still not tell from a purely generic second level domain, what website it will ultimately lead to.[138] In other words, if the mark cannot be used in a generic way, then the majority usage test is unhelpful for determining genericism and the primary significance test must then be based on majority understanding.[139] If the primary significance test is based on a majority understanding, then the issue of application of genericness for a mark that cannot be used in a logically generic way, would not come up at all.[140]

ii. Evidence of Public Use Versus Evidence of Public Understanding

The evidence of the public using the mark "Booking.com" as a way to refer to a class of services is irrelevant because it cannot be applied to the mark due to its grammatical nature.[141] Furthermore, the District Court for the Eastern District of Virginia could have reached the same holding without considering this evidence.[142] As *Elliott* explains, Congress indicates in its

133. *Elliott*, 860 F.3d at 1151.

134. *See* Sarah E. Akhtar & Robert C. Cumbow, *Why Domain Names Are Not Generic: An Analysis of Why Domain Names Incorporating Generic Terms are Entitled to Trademark Protection*, 1 CHI.-KENT J. INTELL. PROP. 226, 227 (1999) (defining domain names as "ordinary words, letters, or numbers that signify the location of a Web site on the Internet, such as *drugstore.com.* Domain names are easily recognizable and, therefore, powerful").

135. *Id.*

136. *Id.*

137. *Id.* at 241 (explaining that it "would be against public policy to allow a trademark owner to assert dilution claims against every domain name registrant whose domain name comprised part of a trademark that consisted of a generic [second level domain]").

138. *See id.* at 228 (stating that the mark "DRUGSTORE.COM" is arguably generic because no consumer can identify a source looking solely at the second level domain mark "DRUGSTORE").

139. *Elliott*, 860 F.3d at 1159*;* Complaint *supra* note 88, ¶ 38.

140. Complaint *supra* note 88, ¶ 38.

141. *Id.*

142. *See* Booking.com B.V. v. Matal, No. 1:16-cv-425 (LMB/IDD), 2017 WL

amendment to the Lanham Act that a trademark can serve a dual function in that it can be used grammatically as a noun or verb, and serve a source-identifying function.[143] The TTAB's argument in *Booking.com* is similar to the conclusion reached in *Elliott*.[144] The evidence regarding the use of the mark "Booking.com" was in fact irrelevant.[145] The district court primarily focused on the plaintiff's evidence that the public understands the trademark in question to be a specific brand.[146] While the court did analyze the public's use of the mark, the deciding factor in the mark's protectability was ultimately the evidence of public understanding, not use.[147] The court relied heavily on the plaintiff's survey, proving that the public understood the mark as a specific brand and not a generic name for online booking services.[148] Despite the court's statement that evidence of use is highly relevant to the analysis, it relied heavily on the survey evidence that pointed directly to the public's understanding of the mark rather than how the public used the mark.[149]

In addition, the plaintiffs in *Elliott* assert that their usage argument is supported by their understanding that verbs cannot indicate the source of a good or service.[150] The plaintiffs in *Elliott* argue that verbs cannot indicate the source of a good or service because it describes an action.[151] The

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3425167, at *19-20 (E.D. Va. Aug. 9, 2017) (stating that the absence of evidence of consumer usage of the mark "Booking.com" to refer to a class of services is "highly relevant").

143. *Elliott*, 860 F.3d at 1158.

144. *See id.* at 1161 (stating that even with a favorable inference that the majority of the public uses the verb "google" to refer to generically searching the internet, it cannot support a finding of genericide).

145. *See Booking.com*, 2017 WL 3425167, at *19 (declining the invitation to rely on theoretical and indirect sources of consumer understanding over direct and persuasive evidence in a survey that shows how the consuming public understands the mark as a brand).

146. *See id.*

147. *Id.*

148. *See id.* at *17 (quoting 2 MCCARTHY ON TRADEMARKS § 12:16) (describing the Plaintiff's Teflon survey, a survey from a source that are the "most widely used format to resolve a genericness challenge").

149. *Id.* at *20 (emphasis added) ("Because plaintiff's Teflon survey is the only evidence . . . speak[ing] directly to how consumers *understand* plaintiff's mark, it weighs heavily in the secondary meaning analysis and the survey . . . indicates strong brand awareness.").

150. *See* Elliott v. Google, Inc., 860 F.3d 1151 (9th Cir. 2017), *petition for cert. filed*, 2017 WL 3601395, at *9 (U.S. Aug. 14, 2017) (No. 17-258) ("The Ninth Circuit's first holding is illogical because verbs cannot indicate the source of a good or a service. A verb describes an action. It does not identify the item which must be used to perform that action, let alone that item's producer.").

151. *Id.*

plaintiffs also argue that a verb cannot possibly identify either an item or a source.[152] If this were the case, then clear and direct evidence that the public understands the trademark in question as source indicating would be disregarded.[153] Rejecting evidence of actual primary significance to the public in favor of a use based doctrine, runs contrary to the language set forth in the Lanham Act.[154] There is no preferential treatment for the use of the mark in the Lanham Act as an indicator of true primary significance.[155] Further, the meaning of the phrase "primary significance" does not suggest use.[156] Thirdly, Congress states that a trademark can in fact have dual function and be used as grammatically as a noun or verb and be used in a source-identifying sense.[157] Finally, the Court's articulation of the primary significance test as it relates to secondary meaning suggests that primary significance is mental process, not mere usage.[158] The Court states "in *the minds* of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself."[159] The phrase "in the minds" is more compatible with the "Who-Are-You/What-Are-You" test because it deals with majority understanding.[160] Disregarding evidence of actual majority understanding in favor of majority usage conflicts with the primary significance language used by both Congress and the Supreme Court.[161]

Despite the irrelevance of the lack of grammatically generic uses for the mark "Booking.com" under the *Elliott* decision, the strict application of the "Who-Are-You/What-Are-You" variation of the primary significance test

152. *Id.*

153. *See Booking.com*, 2017 WL 3425167, at *23 (stating that a consumer survey statistician found the survey results indicating that 74.8% of consumers recognize "Booking.com" as a brand name as strongly establishing that consumers do not perceived the mark as a generic or common name).

154. *See* 15 U.S.C. § 1064(3) (2012) ("The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.").

155. *See id.*

156. *Id.*; *see also Significance*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/significance (last visited Feb. 9, 2018) (defining "significance" as either (1) "something that is conveyed as meaning often obscurely or indirectly;" (2) "the quality of conveying or implying;" (3) "the quality of being important" or (4) "the quality of being statistically significant").

157. *Elliott*, 860 F.3d at 1158 (quoting S. REP. No. 98-627, at 5 (1984)).

158. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163 (1995).

159. *Id.* (emphasis added) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n.11 (1982)).

160. *See id.*; *Elliott*, 860 F.3d at 1158.

161. *Qualitex Co.,* 514 U.S. at 163; 15 U.S.C. § 1064(3).

will determine that the "Booking.com" mark is not generic.[162]

B. Application of the Elliott decision: Genericide

i. The Same Bottle of Aspirin: Xerox and Google

The Xerox Corporation's trademark "Xerox" is often used as a verb, and the company has attempted to combat this by using advertising campaigns that discourage the use of the word "Xeroxing."[163] Under the Ninth Circuit ruling, the policing of verb usage is no longer necessary, so long as it passes the "What-Are-You/Who-Are-You" test.[164] In order for the Xerox mark to become generic under the genericide doctrine, the claim must be made in regard to a particular type of good or service.[165]

Xerox is similar to Google in that the indiscriminate verb usage of the mark is an act and not an actual good or service.[166] The assumption in *Elliott* would be similar to that posed in a genericide case for Xerox.[167] If there is an assumption that the public uses the verb "Xerox" in a generic and indiscriminate sense, it says nothing about how the consumers primarily understand the word, irrespective of its grammatical function.[168] Congress' explanation in its amendment to the Lanham Act downplays the importance of the grammatical use of the mark.[169] If a trademark can be used as a verb or noun and still maintain its source indicating function, then evidence of the verb or noun use cannot be determinative in whether a mark is generic.[170] Even if the product is unique and the trademark is eventually used to describe the product, it is not conclusive regarding the mark's genericness.[171]

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162. *See Elliott*, 860 F.3d at 1158.

163. *See* Lockhart, *supra* note 1 (describing techniques used to prevent genericide, including anti-genericide advertisements, creating a generic name for the branded good, and consistently using the word "brand" beside the mark).

164. *See Elliott*, 860 F.3d at 1155 (holding a consumer can use the trademark in either an indiscriminate sense, with no source in mind, or in a discriminate sense, with the brand of the product in name without subjecting the term to a finding of a genericide).

165. *See id.* (finding the framework for genericide is to determine whether the primary significance of the mark to the public is a generic name for the good or service in question).

166. *See id.* at 1158 ("[A]n internet user might use the verb 'google' in an indiscriminate sense . . . ."); Mike Hoban, *Google This: What It Means When a Brand Becomes a Verb*, FAST COMPANY (Jan. 18, 2013), https://www.fastcompany.com/3004901/google-what-it-means-when-brand-becomes-verb (describing an advertisement campaign asking consumers to not use the name "Xerox" as a verb).

167. *Elliott,* 860 F.3d at 1159.

168. *Id.*

169. *Id.* at 1158.

170. *See id.*

171. *See id.* (quoting S. REP. No. 98-627, at 5 (1984)) ("Admittedly, if a product is

Consequently, although the Xerox Corporation's founders Joseph C. Wilson and Chester Carlson invented the photocopier and introduced this unique product to public consumers, it is still not conclusive to the mark's genericness when the consumers began to use the word "Xerox" to refer to photocopiers.[172] The Xerox Corporation and Google are similar in the sense that they are both corporations who were known for their new or relatively new technology.[173] Both corporations had services dealing with technology that were conceptually new to the public, and the public tended to refer to these services with the affiliated marks "Xerox" and "Google."[174] Applying the explanation in the amended Lanham Act alone, shows that this is not enough to deem a trademark as generic.[175]

ii. Definition, Verb Usage, and the "Who-Are-You/What-Are-You" Test

In addition, similar to "google" mark, the dictionary defines "Xerox" as a the company's trademark first: "a brand name for a copying machine for reproducing printed, written, or pictorial matter by xerography."[176] Its noun and verb meaning only serves as secondary definitions: (1) a copy made on a xerographic copying machine; and (2) to print or reproduce by xerography.[177] The existence of these secondary definitions, under the *Elliott* decision, are irrelevant to the finding of genericide.[178] These

unique, it is more likely that the trademark adopted and used to identify that product will be used as if it were the identifying name of that product. But this is not conclusive of whether the mark is generic.").

172. *See The Story of Xerography* 10, XEROX CORP. (Aug. 9, 1999), https://www.xerox.com/downloads/usa/en/innovation/innovation_storyofxerography.pdf (narrating the invention of xerography by Chester Carlson, a patent attorney, in 1959).

173. *See Our Story*, GOOGLE, https://www.google.com/intl/en/about/our-story/ (last visited Feb. 9, 2018) (chronicling the creation of a search engine "Backrub," which eventually evolved into the popular search engine "Google").

174. *See* Elliott, 860 F.3d at 1155 (stating the plaintiffs' claim that the relevant public use the word "google" to refer to search engines); *The Story of Xerography*, *supra* note 172 (describing story of the first xerographic machine); *Our Story*, *supra* note 173 (describing the creation of the popular search engine Google); Lockhart, *supra* note 1 (describing Xerox's efforts to combat genericide through policing use of its mark as a generic verb).

175. S. REP. No. 98-627, at 5 (1984).

176. *See Xerox*, DICTIONARY.COM, http://www.dictionary.com/browse/xerox?s=t (last visited Feb. 9, 2018) (defining Xerox as "a copy made on a xerographic copying machine," or "to print or reproduce by xerography").

177. *Id.*

178. *See* Elliott v. Google, Inc., 860 F.3d 1151, 1162 (9th Cir. 2017) (concluding that the dictionary evidence, which only has secondary definitions where google is defined as a verb, can only support the favorable inference already drawn by the court and does not support a finding of genericide on its own).

secondary definitions only support a favorable inference already drawn by the court: that the public uses the mark in an indiscriminate sense.[179] The first definition is a better representation of how the public primarily sees the mark and is another route to the "Who-Are-You/What-Are-You" test.[180]

The Ninth Circuit Court states that instead of presenting examples where "google" is primarily defined as a generic name for an Internet search engine, *Elliott* simply gave secondary definitions.[181] It can be inferred from the court's phrasing and language when discussing the dictionary evidence that the order of the definitions made a difference.[182] If the first definition of the word google had in fact just been a grammatical generic use of the mark, it would serve as better evidence that the public primarily views the mark as generic term.[183]

With the removal of the verb usage as evidence of genericide, the Xerox Corporation has a straightforward path to defeat genericide claims. Therefore, the Xerox brand is more like the company in *Yellow Cab Co.*[184]

None of the All-in-One printers[185], including Xerox, lists "Xerox" or "Xeroxing" in their product description of the machine's functionality: universally, the word "copy" is used.[186] In addition, none of the companies who create the printers mention the words "Xerox" or "Xeroxing" on their websites.[187] In *Filipino Yellow Pages*, when asked the question "What are

179. *Id.* (explaining that the lower court had assumed that the majority of the public used the mark google in an indiscriminate sense and, even with this assumption, the lower court found it could not support a finding of genericide).

180. *Id.* (suggesting that the fact a trademark is primarily defined as a brand in a dictionary entry defeats the secondary entry that supports generic usage of the word).

181. *Id.*

182. *See id.* at 1161 (emphasis added) ("Elliott does not present any examples where 'google' is defined as a generic name for Internet search engines. *Instead*, Elliott presents secondary definitions where google is defined as a verb.").

183. *See id.*

184. Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 929 (9th Cir. 2005) (reversing summary judgment for a finding of genericness because there was an expectation that cab companies' answers to the "Who-Are-You/What-Are-You" test would not be "Yellow Cab" which indicates the mark is seen as brand); *All-In-One Printers*, *supra* note 104 (showing that All-in-One manufacturers do not use mention the word "xerox", supporting the assertion that these companies would not identify as "Xerox companies").

185. *All-In-One Printers*, *supra* note 104 (showing multiple brands of photocopiers on an office supply retailer website).

186. *Id.*

187. *See, e.g.*, *About Dell,* DELL, http://www.dell.com/learn/us/en/uscorp1/corp-comm (last visited Feb. 9, 2018); *see also About Us,* HP, http://www8.hp.com/us/en/hp-information/index.html (last visited Jan. 4, 2018); *About,* CANON, *supra* note 106; *About,* EPSON, *supra* note 108*; About Us,* BROTHER, *supra* note 109.

you?" the three companies involved would answer "A Filipino yellow pages" because they all dealt with contact books, which are normally referred to as Yellow Pages, that listed Filipino businesses or contacts.[188] Since other competitors responded to "what are you?" using "Filipino yellow pages," the term was found to be generic.[189] As evidenced by the product descriptions of various brand name photocopiers and by the websites of the competitions, it is unlikely that companies that sell photocopiers would answer "a Xerox company" to the question "what are you?"[190] This makes the Xerox Corporation similar to the company in *Yellow Cab Co*, where the response to the "what are you?" question in that case was expected to be "a taxicab company" or "a cab company."[191] The case of Xerox, the response to "what are you?" would be expected to be along the lines of a "photocopier producer" or a "printer manufacturer."[192]

Finally, like in the *Elliott* case, there is an efficient alternative for the word "Xerox."[193] The alternative word can be found in the product descriptions of the various machines offered in the marketplace: printer, photocopier, or copier.[194] Without a showing that there is no available substitute for the word Xerox, a finding of genericness cannot be made because, again, the "claim of genericide must relate to a particular type of good or service."[195] As evidenced by the product descriptions, there is in fact an efficient

188. *See* Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc., 198 F.3d 1143, 1151 (9th Cir. 1999).

189. *See id.* (quoting Surgicenters of Am., Inc. v. Med. Dental Surgeries, 601 F.2d 1011 (9th Cir. 1979)) ("Giving [Filipino Yellow Pages ("FYP")] exclusive rights to the term "Filipino Yellow Pages" might be inappropriate because it would effectively 'grant [FYP as] owner of the mark a monopoly, since a competitor could not describe his goods as what they are.'").

190. *See* Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 929-30 (9th Cir. 2005) ("Posing the question: "Could you refer me to a yellow cab company?", one would expect these same companies to point not to themselves, but to a business operating under the name "Yellow Cab." "Yellow cab" thus appears to answer the "who are you?" rather than the "what are you?" question, demonstrating its nongenericness."); *All-In-One Printers*, *supra* note 104.

191. *See id.* ("Posing the question: "Could you refer me to a yellow cab company?", one would expect these same companies to point not to themselves, but to a business operating under the name "Yellow Cab.").

192. *See id.* (stating the exception of a taxicab company to not answer "what are you" with "a yellow cab company" appears to show that that "Yellow Cab" answers the "who are you" question, thus showing its non-genericness).

193. *See* Elliott v. Google, Inc., 860 F.3d 1151, 1162 (9th Cir. 2017) (citing TY Inc. v. Softbelly's, Inc., 353 F.3d 528, 531 (7th Cir. 2003)) (noting that genericide usually does not occur until there are no efficient alternatives for the mark at issue, and that the word "internet search engine" is an efficient alternative to the mark google).

194. *All-In-One Printers*, *supra* note 104.

195. *Elliott*, 860 F.3d at 1162.

alternative.[196] Additionally, like in the *Elliott* decision, not a single competitor calls its photocopier a "xeroxer."[197] Therefore, like Google, the Xerox Corporation's mark is not generic.[198] The fact that the public uses the word "Xerox" in an indiscriminate sense cannot support a finding that the term has become generic.[199] A claim of genericide for the mark "Xerox" must relate to the type of good – a photocopier – and framing the issue as whether the public uses the mark as a noun or a verb is the incorrect analysis to determine genericide.[200]

IV. THE *ELLIOTT* DECISION, THE INTERNET ERA, AND GOOGLE'S PATH

The *Elliott* decision is a step towards significantly stronger rights for trademark owners everywhere.[201] There are various implications for establishing stronger trademark rights in the Internet Era.

A. The Internet Era: Domain Name Registration and Genericism

Even if there are a number of policy concerns behind creating stronger trademark rights, the nature of the Internet calls for special adjustments in trademark law. Specifically, genericide in domain name registration disputes should involve a stricter primary significance test.[202] As the *Booking.*com complaint mentions, a domain name trademark using two generic terms (i.e. "Booking" and ".com") signifies a single source solely by

196. *See id.* (holding that because there is no evidence that a competitor describes themselves as "a google" and that the public recognizes the alternative word "internet search engine," there is an efficient alternative to the mark "Google"); *All-In-One Printers*, *supra* note 104 (describing photocopying machines using verbs and nouns like "photocopying," and "photocopiers," as opposed to "xeroxing" or "Xerox machines," in product descriptions).

197. *See Elliott*, 860 F.3d at 1162 (holding that because search engine competitors do not call their searches "googles" there is no showing that there is no available substitute for the word "google" as a generic term).

198. *See id.* at 1155.

199. *See id.* at 1158 (holding that neither indiscriminate or discriminate use of a trademark can support a finding of genericide).

200. *See id.* at 1157 (explaining that, because a majority of the evidence of generic use presented to the court at best support favorable inferences drawn by the court, this evidence is irrelevant in determining the genericide of a trademark).

201. *See* Goldman, *supra* note 14 ("The court emphatically endorsed all of its practices (and the significant dollars Google spent preparing this case). . . . Other big brands whose trademarks are often used as verbs or nouns also have a lot of reason to cheer this ruling.").

202. *See* Booking.com B.V. v. Matal, No. 1:16-cv-425 (LMB/IDD), 2017 WL 3425167, at *11, *19 (E.D. Va. Aug. 9, 2017) (recognizing that consumers recognize the domain name "Booking.com" as a brand).

the fact that it is a URL.[203] In analyzing the genericism of a fanciful mark in domain name registration disputes, there must be complete erosion of the connection between the mark's source and the mark itself such that the mark has become the primary way to describe the good or service. Evidence of indiscriminate verb usage should not be used as evidence of genericide in domain name registration disputes like the one in *Elliott.*[204]

Both *Booking.com* and *Elliott* involve domain name trademarks, distinguishing them from prior genericide case law.[205] Despite this notable difference, a monopolization of necessary generic and descriptive terms in domain name registrations will be problematic.[206] The uniqueness of *fanciful* marks used in domain name registrations, however, still calls for a stricter application of the primary significance test because there is a unique single source space on the web identified with the fanciful mark, regardless of casual and grammatical generic use in the public domain.[207] This difference arguably makes claims of genericism of a fanciful mark weaker since the single source of the mark (e.g. "insertfancifulterm.com") has likely already been registered while the mark was still inherently distinctive and the link will still be intact.[208] Unlike pre-Internet terms such as "aspirin" and "cellophane," fanciful marks used in a second level domain in the Internet age are anchored by the link to its website.[209] This stricter test for domain name registration will further the goals of trademark law and protect the consumers surfing the web.[210] An example is The Lego Group's trademark "Lego," which is a children's toy, and operation of a Lego fan site at domain

203. Complaint, *supra* note 88, ¶¶ 69-70 (asserting that a URL trademark signifies a single source and thus cannot be a generic mark by its nature).

204. *See id.* ¶ 55 (stating that the TTAB found the mark Booking.com could not be used to refer to generically to anything while being grammatically coherent (e.g. "a Booking.com," "Booking.com-ing")).

205. *Elliott*, 860 F.3d at 1151-52; *Booking.com*, 2017 WL 3425167, at *9-13.

206. *See* Akhtar & Cumbow, *supra* note 134, at 234 (stating that the mark "PETSTORE.COM" is "arguably generic" because no consumer can identify a source looking solely at the second level domain mark "PETSTORE").

207. *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976) (explaining that arbitrary and fanciful marks are afforded the strongest protection).

208. *See* Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q (BNA) 80, 80 (Dec. Comm'r Pat. 1950) (citing evidence of generic and descriptive use without any indication of the good's origins as one of the reasons the mark "Elevator" was now generic).

209. King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 577 (2d Cir. 1963); DuPont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75, 81 (2d Cir. 1936); *Haughton Elevator Co.*, 85 U.S.P.Q (BNA) at 80; Bayer Co. v. United Drug Co., 272 F. 505, 512 (S.D.N.Y. 1921).

210. *See* GIBSON & LALONDE, *supra* note 3 (stating that protecting trademarks is important because it help authenticates the source).

names such as "ratemylego.com."[211] The fear of the Lego Group is that use of their mark in another domain name will cause consumers to think that they sponsor or own the website in operation.[212]

By restricting the ability for others to use a trademark in the domain name, consumers are better able to go to the site they intend to visit, rather than a website that has nothing to do with the source at all. There is room for fair use of the mark, however: there are arguably good free speech claims in domain name registrations.[213]

B. Google's Next Steps

The increased protections for Google's mark are not foolproof. Google, like any trademark owner, should continue to watch out for genericism. Under this proposed change, if the Google mark should ever lose its association with either the subsidiary or the parent company Alphabet in the public understanding, then the mark cannot be protected, even in domain name registrations.[214] Some linguistic experts estimate that the mark Google is heading toward genericization.[215] Alphabet should continue to diversify the brand Google with different products under the Alphabet holding corporation[216] and utilizing brand content strategies[217] in light of the structural changes of Google's corporate structure and its other upcoming

211. *See* Deven R.Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1840-41 (2007) (describing The Lego Group's letter to a website operator that claims the use of their trademark "Lego" in the domain name registration constitutes trademark infringement).

212. *Id.*

213. *See* Darryl C. Wilson, *Battle Galactica: Recent Advances and Retreats in the Struggle for the Preservation of Trademark Rights on the Internet*, 12 J. HIGH TECH. L. 1, 54 (2011) (describing a case involving a gripe site using the trademark name in the domain name that found in favor of the domain name usage).

214. *See* Elliott v. Google, Inc., 860 F.3d 1151, 1157 (9th Cir. 2017) (suggesting that if the primary dictionary definition of "google" was "an Internet search engine," the dictionary evidence would be sufficient to find for genericide).

215. *See* James B. Stewart, *Even in the New Alphabet, Google Keeps Its Capital G*, N.Y. TIMES (Aug. 13, 2015), https://www.nytimes.com/2015/08/14/business/even-in-the-new-alphabet-google-keeps-its-capital-g.html?_r=0 (describing the generic use of the word "google" in publications about dating, in the media, in the American Dialect Society, and in dictionaries).

216. *See* Bernard Cova, *Re-branding Brand Genericide*, 57 BUS. HORIZONS 359, 362 (2014) (describing the strategy of a company producing different categories of products bearing the same brand name in order to combat the risk of genericide of a particular good or service).

217. *See id.* at 363 (explaining that a wide range brand content strategies from radio to social media networks can allow companies to act as editors and guide conversations and interactions relating to the brand).

ventures into new markets.[218] These strategies will likely become more and more important as Alphabet continues to grow other businesses under its Alphabet brand, as opposed to its subsidiary brand, Google.[219]

V. CONCLUSION

The *Elliott* decision is a change of direction arguably facilitated by the Internet Era. The Ninth Circuit decision to devalue the evidence of generic use will change the way claims of genericness are viewed and how the inherent distinctiveness of a mark is defended. It will also significantly strengthen a company's defense to genericism and will likely decrease the number of challenges pertaining to an arbitrary mark's distinctiveness. The inherently distinctive requirement calls for claims of genericism to relate to the good or service, and according to the Ninth Circuit articulation, that all but eliminates the usefulness of evidence of indiscriminate use and creates a stricter primary significance test and stronger rights for trademark owners.

218. *See* Stewart, *supra* note 215 (discussing Google's threat of genericism in light of the company transitioning to alphabet, specifically stating that "[v]entures like Nest, which makes home thermostats and alarms, and Calico, a life sciences company focused on longevity, are not Google-branded, and will be separate companies free to develop their own brands operating under the Alphabet holding company").

219. *See id.* ("If the day comes when Google is deemed a generic term, the Alphabet holding company and these companies — and any new trademarks they develop — will be unaffected. In the meantime, 'Alphabet' is all but immune from genericization. Google may pervade much of our lives, but one thing it will surely never control is the letters of the English language.").

* * *

FAKE NEWS AND FINANCIAL MARKETS: A 21ST CENTURY TWIST ON MARKET MANIPULATION

BIANCA PETCU*

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I. INTRODUCTION

There are a few things that the United States prides itself on: liberty, democracy, and a free market system.[1] Since its inception, the financial

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1. *See* Bob Cohn, *21 Charts That Explain American Values Today*, ATLANTIC (June

market has defined the United States' position as a global leader.[2] Therefore, balancing issues involving both the First Amendment and the free market system can be complex.[3]

On April 10, 2017, the Securities Exchange Commission ("SEC") filed twenty-seven complaints for fraudulent promotion of stock against stock promotion firms and holding companies.[4] The holding companies paid writers to generate hundreds of optimistic articles about public company clients while concealing from investors that these were paid promotions.[5] Out of the twenty-seven complaints, one company, Lidingo Holdings LLC ("Lidingo Holdings"), has garnered the most publicity.[6]

Beginning in 2010, Lidingo Holdings allegedly disseminated fake or hyperbolic information[7] about stock options to either inflate or denigrate buyers' interest.[8] The SEC mandates that stock promoters disclose their relationship with holding companies.[9] Failure to disclose leads stockholders

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27, 2012), https://www.theatlantic.com/national/archive/2012/06/21-charts-that-explain-american-values-today/258990/ (stating that freedom of speech and freedom of religion are the top examples of America's values compared to other places in the world).

2. *See* Mark Penn, *Americans Are Losing Confidence in the Nation but Still Believe in Themselves*, ATLANTIC (June 27, 2012), https://www.theatlantic.com/national/archive/2012/06/americans-are-losing-confidence-in-the-nation-but-still-believe-in-themselves/259039/ (showing that two-thirds of Americans believe freedom of speech, the free enterprise system, principles of equality, and our Constitution sets America apart from other countries).

3. *See id.* (articulating support for how the values Americans hold can become complex when pitted against one another).

4. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017); *see What We Do,* SEC, https://www.sec.gov/Article/whatwedo.html#create (last updated June 10, 2013) [hereinafter *Creation of the SEC*] (showing that the SEC is the regulatory Agency created to regulate the securities industry).

5. *See Lidingo Holdings*, 2017 WL 2402709, at *1 (clarifying what the holding companies have done to bring about an SEC action).

6. *See* Adam Klasfeld, *In Stock Charges, Fake-News Mill Ran Near Tinseltown*, COURTHOUSE NEWS SERV. (Apr. 11, 2017), https://www.courthousenews.com/stock-charges-fake-news-mill-ran-near-tinseltown/ (directing attention to the fact that a Hollywood actress is a founder of Lidingo Holdings, and therefore, has brought Lidingo the most publicity out of the other twenty-seven complaints). *See generally Lidingo Holdings*, 2017 WL 2402709, at *1-2.

7. *See* Complaint ¶¶ 1, 30, SEC v. Lidingo Holdings, LLC, 1:17-cv-02540, 2017 WL 1321730 (S.D.N.Y. Apr. 10, 2017) (No. 17-2540) (stating that a few examples of investment sites that published stories originating from Lidingo are: SeekingAlpha.com, Benzinga.com, WallStCheatSheet.com, Finance.Yahoo.com, InvestorsHub.com, Investing.com, and Forbes.com).

8. *See id.* ¶ 30 (showing one Lidingo Holdings "author" used multiple pseudonyms to remain anonymous, including A. John Hodge, The Swiss Trader, Amy Baldwin, Trading Maven, Henry Kawabe, Teresa Dawn, and Leopold Epstein).

9. *See* Press Release, SEC, SEC: Payments for Bullish Articles on Stocks Must Be

to believe the source was an independent researcher.[10] This is where the First Amendment intersects with the financial markets.[11]

This Comment will focus on how market manipulation and the First Amendment could affect how the U.S. District Court for the Southern District of New York will decide *SEC* v. *Lidingo Holdings, LLC*[12] "fake news" case.[13] Section II will provide a primer of the history and evolution of market manipulation schemes, describe the SEC and its regulatory powers, look at the historical strength of the First Amendment, and introduce cases that can be used as precedent going forward. Section III will analyze prior cases and apply those rulings to *Lidingo Holdings*, to argue that the SEC should use a similar justification that the Federal Trade Commission ("FTC") uses for disseminating harmful commercial speech. Finally, Section IV will recommend that the court find the speech in *Lidingo Holdings* constitutes commercial speech, and further, that the SEC should implement a whistleblower program to regulate fake news, as well as follow the FTC's enforcement actions when dealing with fake news in the commercial speech context.

II. MARKET MANIPULATION AND FIRST AMENDMENT RAMIFICATIONS

The twenty-seven complaints issued by the SEC on fake news stock promotion shows that market manipulation is ever-present in the financial markets.[14] Some forms of market manipulation predate the creation of a regulatory agency.[15]

Disclosed to Investors (Apr. 10, 2017), https://www.sec.gov/news/press-release/2017-79 (explaining that without disclosure of a relationship stockholders will assume the information is without bias).

10. *See* Complaint, *supra* note 7, ¶ 12 (showing that there was direct communication between the holding company and the scheme, when an email revealed employees within the holding company discussing their "no disclosures policy": "[H]e wants to disclose as he is CFA. No disclosures allowed").

11. *Id.* ¶ 3 (affirming that since writers are involved in the major legal issue there will be an argument made in support of the First Amendment and the freedom to write as one pleases).

12. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017).

13. *Id.* (explaining the particular scheme present as one that involves the creation of fabricated articles to create an illusion of a stock that could provide large returns therefore using fake news stories to promote stocks).

14. *See, e.g.*, Complaint, *supra* note 7, ¶ 1 (acknowledging that the type of market manipulation present in this case is an old type of manipulation taking a new form).

15. *See, e.g.*, Andrew Beattie, *The Pioneers of Financial Fraud*, INVESTOPEDIA, http://www.investopedia.com/articles/financial-theory/09/history-of-fraud.asp (last updated Dec. 13, 2017, 3:22 PM) (explaining how market manipulators have plagued the United States since its creation, from Hamilton having to deal with outstanding bonds in

A. The Big Three: Pyramid Schemes, Insider Trading, and Pump-and-Dumps

The first market manipulation scheme was recorded in ancient Greece in 300 B.C.[16] Since then, people have manipulated financial markets in ways that create harmful effects on investors, buyers, and market participants.[17] While the ancient Greeks manipulated their markets by trying to control supply and demand for certain commodities, today's society has transformed market manipulation such that it involves using the media to disseminate false "facts" to alter consumer practices.[18]

In 1918, Charles Ponzi discovered how to manipulate a relatively new financial market through pyramid schemes.[19] Ponzi would use his own existing funds to pay new "investors" and recycle the same money through the pyramid of people while making a percentage of the profits for himself.[20] Though Ponzi was not the first to implement such a scheme, his name remains forever ascribed to all future attempts to manipulate the market in this way.[21]

Like pyramid schemes, insider trading has impacted the market system

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the newly formed Treasury Department, to Ulysses S. Grant's son falling for a fake investment and losing all the families money).

16. *See* Kaitlyn Kiernan, *From Ancient Greece to Wall Street: A Brief History of the Options Market*, FINRA (May 20, 2015), https://www.finra.org/investors/ancient-greece-wall-street-brief-history-options-market (examining where the first recorded market manipulation schemes began and how early these issues have been penetrating all types of market systems).

17. *See e.g.*, Beattie, *supra* note 15 (showing from pyramid schemes in starting at the beginning of market society, to insider trading starting in 1920s, to pump-and-dump cases increasing in 1980s, market manipulation does not necessarily disappear—it evolves and multiplies).

18. *See* Carmen Germaine, *SEC Signals No Patience for Fake News on Stocks*, LAW360 (Apr. 11, 2017, 9:41 PM), https://www.law360.com/articles/912501/sec-signals-no-patience-for-fake-news-on-stocks (upholding the SEC's decision to act on these twenty-seven complaints and explaining how fake news links them).

19. *See* Alex Altman, *A Brief History of Ponzi Schemes*, TIME (Dec. 15, 2008), http://content.time.com/time/business/article/0,8599,1866680,00.html (describing how Ponzi made a simple promise to his investors; he would make them rich while they made others rich and the cycle would continue); *Fast Answers: Ponzi Schemes*, SEC, https://www.sec.gov/fast-answers/answersponzihtm.html (last modified Oct. 9, 2013) (noting that the SEC defines pyramid schemes as "the payment of purported returns to existing investors from funds contributed by new investors").

20. *See* Altman, *supra* note 19 (explaining the history of Ponzi's 'stamp scheme' and how it was the standard that future pyramid schemes followed).

21. *See generally* Kiernan, *supra* note 16 (showing how even a century after Ponzi effectuated his last scheme people continue to use his name, most recently seen with Bernie Madoff and his Ponzi scheme).

since the beginning of corporate America.[22] The increased usage of insider trading led the Federal Government and Congress to create a regulatory agency to oversee the securities market.[23] The SEC defines insider trading as "buying or selling a security . . . while in possession of material, nonpublic information."[24]

New forms of market manipulation continued to emerge after 1920.[25] Pump-and-dump schemes became extremely popular in the 1980s and 1990s following the advent of the Internet and the prevalence of personal telephones in the United States.[26] The SEC defines a pump-and-dump scheme as "the touting of a company's stock through false and misleading statements to the marketplace."[27] Pump-and-dump schemes do not require extensive financial skill to succeed.[28] For a pump-and-dump scheme to achieve its desired goal, an investor, or market participant, must be easily deceived and made to believe that the penny stock the broker is pushing them to buy in bulk will simply produce large returns.[29]

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22. *See, e.g.*, Strong v. Repide, 213 U.S. 419, 431 (1909) (showing the first insider trading case to be prosecuted was decided in 1909, during the rise of the financial market and industrial revolution).

23. *See Fast Answers: Insider Trading*, SEC, https://www.sec.gov/fast-answers/answersinsiderhtm.html (last modified Jan. 15, 2013) [hereinafter *Insider Trading*] (listing who the SEC needs to look out for, and who regularly commits insider trading schemes); *see also Creation of the SEC*, *supra* note 4 (explaining the ruling in the first insider trading case in 1909, *Strong v. Reptide*, is clear: executives could not use privileged information for profit).

24. *See Insider Trading*, *supra* note 23 (explaining that using nonpublic material information to buy and sell stocks creates an uneven advantage to manipulate the market leaving others not privy to the information on an unequal playing field).

25. *See* Kiernan, *supra* note 16 (showing a timeline of how market manipulation schemes progressed through history).

26. *Simple Scam, Long History*, WALL ST. J. GRAPHICS, http://graphics.wsj.com/embeddable-carousel/?slug=pump-and-dump-history (last visited Jan. 18, 2018) (using a Powerpoint presentation).

27. *Fast Answers: "Pump-and-Dumps" and Market Manipulations*, SEC, https://www.sec.gov/fast-answers/answerspumpdumphtm.html (last modified June 25, 2013) [hereinafter *Pump-and-Dumps*] (highlighting that these schemes start from typically small, so-called "microcap" companies).

28. *See generally* SEC v. Stratton Oakmont, Inc., 878 F. Supp. 250, 251-57 (D.D.C. 1995) (explaining how Belfort created a company specifically to push penny-stocks, before the FBI arrested him and shut down the company); Michael Lewis, *Jonathan Lebed's Extracurricular Activities*, N.Y. TIMES (Feb. 25, 2001), http://www.nytimes.com/2001/02/25/magazine/jonathan-lebed-s-extracurricular-activities.html (showing how a fifteen-year-old could pull off a successful pump-and-dump scheme).

29. *See Pump-and-Dumps*, *supra* note 27 (introducing the "penny stock" which is a stock that is so low in price that anyone can buy it in bulk, hopefully buying enough that when the stock price rises, the stockholder will make high returns).

B. The Creation of Regulation

Due to the increase in market manipulation and the adverse effects of the Great Depression on financial markets, Congress passed the Securities Act of 1933 ("'33 Act") and the Securities Exchange Act ("'34 Act") of 1934.[30] In so doing, Congress enabled the SEC to bring enforcement actions against companies and individuals that manipulate the securities market; however, the types of manipulations subject to SEC enforcement action were left open-ended.[31]

The '33 Act and the '34 Act are used in conjunction with most market manipulation cases because of the similarities that section 17(a) from the '33 Act shares with Rule 10b-5[32] in the '34 Act.[33] In 1942, the newly codified Rule 10b-5 of the '34 Act was expanded to make the fraud provisions applicable to purchases and to the sale of securities.[34] By expanding said provisions, the SEC broadened its jurisdiction over market manipulation; however, the '34 Act still lacked a clear definition of an "insider trader."[35]

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30. *See* 15 U.S.C. § 77b(b) (2012) (ensuring that the Commission will consider disclosures to the public on the interstate sale of securities, so that potential investor may make fully informed buying decisions); *see also* 15 U.S.C. § 78a (2012) (governing the rules for agents, broker dealers and securities that trade in the stock market and determining the laws that regulate the exchanges and their participating broker-dealers).

31. *See Creation of the SEC*, *supra* note 4 (showing that the SEC understood that there would be market manipulation schemes that would evolve and multiply as the financial market manipulators became savvier so therefore having a non-exhaustive list would allow the SEC to cover schemes they could not have imagined when it was first created).

32. *See* 17 C.F.R. § 240.10b-5 (2018) (codifying Rule 10b-5—though both are still used and listed together in complaints—and clarifying that the SEC has specific statutes that were enacted to prevent brokers from using manipulative and deceptive devices and to protect market participants from defrauding schemes).

33. *See* 15 U.S.C. § 77q(a)(2) (stating that it is illegal for any person in the offer or sale of securities to receive money by making an untrue statement of a material fact or omitting to state a material fact); *see also* 17 C.F.R. § 240.10b-5(b) (stating that direct or indirect deceit, fraud, and omission of material facts are unlawful). *See generally* Brook Dooley et al., *Antifraud: Section 17(a) of the Securities Act of 1933: Unanswered Questions*, KEKER VAN NEST & PETERS LLP (July 8, 2013), https://www.keker.com/Templates/media/files/Articles/Section17a_2013.pdf (outlining the difference between section 17a and section 240.10b-5 yet showing how they are both often used together in prosecution).

34. *See* 17 C.F.R. § 240.10b-5 (outlining section 240.10b-5 and Rule 10b-5 as the key provisions to prosecute securities fraud, although neither defines insider trading, and stating that the rule is enforced against any person who defrauds another in the purchase or sale of a security).

35. *See Timeline: A History of Insider Trading,* N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/interactive/2016/12/06/business/dealbook/insider-trading-timeline.html?mcubz=1&_r=0 [hereinafter *History of Insider Trading*] (showing that when the '34 Act was passed the term "insider trading" was not used; then when the term was eventually added to the statute it was not defined, leaving the courts to set a definition

Together, section 17(a), section 240.10b-5, and Rule 10b-5 are used in enforcement actions against the fraudulent sales of securities.[36] To better understand how something can be categorized as "false or misleading," courts closely analyze section 240.10b-5 of the '34 Act for its statutory meaning and interpretation.[37] There are a few words that courts focus on or dissect when deciding market manipulation cases. The courts deciding these market manipulation cases have historically analyzed the following terms: "directly or indirectly," "to make an untrue statement," "course of business would operate as a fraud," "in connection with the sale of any security" to adequately assess the cases before them.[38]

Additionally, section 240.10b-5, and Rule 10b-5, require scienter by the party enacting the fraud; otherwise known as an intent to deceive.[39] This requirement often makes it more difficult to prove actual intentional fraudulent market manipulation schemes.[40] Without the intent requirement,

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through precedent).

36. 15 U.S.C. § 77q(a)(2); *see* 17 C.F.R. 240.10b-5. *See generally Frequently Asked Questions About Rule 10b5-1 Plans*, MORRISON FOERSTER, http://media.mofo.com/files/uploads/Images/FAQ10b51.pdf (last visited Jan. 19, 2018) (clarifying that Rule 10b-5 was codified as section 240.10b-5 in the '34 Act, but Rule 10b-5 is still used in tandem with section 240.10b-5 because of a disparity in interpretation by circuit courts after a United States Supreme Court decision).

37. *See* 17 § C.F.R. 240.10b-5 (stating that it is illegal to use any device or scheme to defraud; to make untrue statements of a material fact or to omit a material fact; or to engage in any act, practice, course of business which operates as a fraud or deceit upon any person, about the purchase or sale of any security).

38. *See id.* (articulating that these phrases are broad enough for a more open interpretation; courts deciding cases based on section 240.10b-5 will focus on these phrases and the facts of each individual case sometimes in drastically different ways than courts before them); *see also History of Insider Trading*, *supra* note 35 (detailing when in the timeline of insider trading cases the Supreme Court began focusing on specific words within the statutes).

39. *See* 17 C.F.R. § 240.10b-5; *see also* 15 U.S.C. § 77q(a) (defining scienter as having the intent or knowledge of wrongdoing, and further, requiring publishers to disclose who paid them, the amount, and the type information about publicly traded securities for compensation).

40. *See* 15 U.S.C § 77q(b) (supporting why the SEC has turned to including section 17(b) and section 17(a) of the '33 Act in its complaints as protection, section 17(b) does not require intent and is therefore easier to prosecute); *see also* Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 3, 5 (2006) (arguing that the requirement to meet scienter for Rule 10b-5 and Section 240.10b-5 is difficult for courts to consistently decided on); Peter J. Henning, *The Difficulty of Proving Financial Crimes*, N.Y. TIMES (Dec. 13, 2010, 2:01 PM), https://dealbook.nytimes.com/2010/12/13/the-difficulty-of-proving-financial-crimes/ (showing that the line between being aggressive or being fraudulent is a thin one that involves the application of unclear rules on intent that courts have a hard time accepting).

fraudulent practices could be easier to prosecute.[41] Collectively, Rule 10b-5, section 240.10b-5, and section 17(a)-(b), focus on the underlying principle of stopping the spread of misleading and fraudulent information within the financial markets.[42]

C. Crossroad Cases: When Free Speech Meets the Financial Markets at an Intersection

Carpenter v. United States[43] proved to be the first case connecting the press and a highly public piece of writing to market manipulation.[44] In 1987, *Wall Street Journal* reporter, R. Foster Winans, was convicted for insider trading, specifically for using advance knowledge of articles about publicly traded stocks to collect illegal profits.[45] The United States Supreme Court ruled that although the victim of the fraud was not a market participant, there need only be a mere fraud "in connection with" the purchase or sale of securities.[46] Thus, the expansion and ambiguity of Rule 10b-5 and section 240.10b-5 subjected journalists to the SEC's jurisdiction and potential conviction for market manipulation.[47] The Court reasoned that Winans' deceit and fraud outweighed any First Amendment argument, thereby preventing it from being presented as a legal issue in the case.[48]

Courts have also ruled on pump-and-dump cases that contain First Amendment challenges.[49] The U.S. Court of Appeals for the Second Circuit,

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41. *See* Henning, *supra* note 40 (supporting the theory that if a prosecutor does not need to find intent, then the market manipulation itself is proof enough).

42. *See* Dooley et al., *supra* note 33 (explaining that the focus within the statutes is on fraud and misleading information).

43. Carpenter v. United States, 484 U.S. 19, 24 (1987).

44. *Id.*

45. *See id.* at 24 (explaining that this use of advance knowledge falls within the definition of fraudulent insider trading).

46. *See id.* at 26 (showing that the victims here are readers and they may not personally be affected by the insider trading happening here, but finding that connection is not necessary).

47. *See id.* at 24 (holding that journalists, separated from the main company still fall under the jurisdiction of the SEC if their actions as journalists affect the market and are "in connection with" the sale of security).

48. *See generally id*. (showing no complete mention of a First Amendment analysis generally throughout the entire opinion even though Winans was writing this information in the opinion section of the *Wall Street Journal*, and attempted to make the defense that it was his First Amendment right to publish his opinions); *Simple Scam, Long History*, *supra* note 26 (providing examples of pump-and-dump schemes).

49. *See* United States v. Downing, 297 F.3d 52, 55 (2d Cir. 2002) (holding that the defendants conspired to create a pump-and-dump scheme that involved fraudulent off-shore companies, unqualified audit reports and false financial statements to deceive potential investors into trusting their business).

in *United States v. Downing*,[50] defined a pump-and-dump scheme as a stock market manipulation tactic where schemers artificially inflate the price of a stock by selling large numbers of penny stocks and then "dumping" the stock when the price increases.[51] The court held that the government was not required to establish the defendant's knowledge of the scheme's details, but rather that it was sufficient that he solely understood its nature.[52] The increase in pump-and-dump cases has compelled courts to expand the definitions of fraud provided in Rule 10b-5 and section 240.10b-5.[53]

This expansion, however, has not reduced the volume of market manipulation schemes in the twenty-first century.[54] *United States v. Gordon*[55] also illustrates a pump-and-dump case involving advertising campaigns to promote "penny stocks" that would inevitably produce little to no returns.[56] The use of an advertising campaign signaled to both the SEC and the legal community that speech, or more precisely different types of speech involved in each case, can, and should be litigated.[57]

Since the 2016 election, "fake news" stories have appeared more frequently throughout society.[58] The more the stories spread, the harder they become to control.[59] False statements, however, are protected speech under

50. *Id.*

51. *Id.*

52. *See id*. at 57; *see also* Lewis, *supra* note 28 (stating that "all it takes" to run a successful pump-and-dump scheme is a good sales man with the yellow pages and some financial market knowledge); *Simple Scam, Long History*, *supra* note 26 (showing by examples how it has historically been accepted by courts that defendants understand the nature of the scheme and not necessarily all of the details involved).

53. *See* Jay V. Prabhu, *Criminalizing from the Bench: The Expansion of Section 10(b) in* United States v. O'Hagan, FEDERALIST SOC'Y (May 1, 1998), https://www.fed-soc.org/publications/detail/criminalizing-from-the-bench-the-expansion-of-section-10b-in-united-states-v-ohagan (stating that after *United States v. O'Hagan* the Court criminalized conduct that was never explicitly made a crime by the federal securities statutes and accepted much of the government's misappropriation theory of liability).

54. *See generally* United States v. Gordon, 710 F.3d 1128-1129 (10th Cir. 2013) (showing that even in 2013, more than 100 years after the first recorded case of market manipulation, schemes continue to penetrate the financial market).

55. *Id.*

56. *Id.* at 1128, 1142.

57. *See id*. at 1141 (describing how it is unlawful to publicize a stock that contains material omissions without disclosing the fact and amount of the payment each writer has been given to advertise the stock in this way).

58. *See* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 23089, 2017) (explaining how social media made the dissemination of fake information easier during the 2016 election with 62% of U.S. adults getting their news from Facebook or social media).

59. *See id.* at 2 (stating that content can be spread among social media users with no

the First Amendment.[60] The Supreme Court acknowledged this recently in *United States v. Alvarez*,[61] which questioned the constitutionality of the Stolen Valor Act.[62] This claim falls under the "false statement" category of First Amendment law.[63] The Stolen Valor Act criminalizes falsely claiming receipt of military honors or medals—in *Alvarez* at a local board meeting, the defendant did just that.[64] The Court ruled that the Stolen Valor Act was unconstitutional and determined that "general false statements" are not unconstitutional and should be protected by the First Amendment.[65]

Like the SEC, the FTC also brings many actions against companies that post false advertisements and mislead consumers, as well as clients.[66] In *FTC v. LeadClick Media, LLC*,[67] the Second Circuit upheld a recent FTC enforcement action involving false and deceptive advertising practices where commercial speech was used to deceive consumers.[68] In *LeadClick Media*, similar to the alleged scheme in *Lidingo Holdings*, the "main company" knew that some or most of the information being posted on its site, whether through advertisements or an advisory article, was false and misleading.[69]

The now ever-present "fake news" schemes utilize technology to quickly disseminate information and spread it across the public market, negatively

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significant third-party filtering, fact-checking, or editorial judgment).

60. *See* United States v. Alvarez, 567 U.S. 713, 716 (2012) (overturning a statute passed by Congress that said making false statements about military service was illegal; the Supreme Court did not find false information like this to be illegal).

61. *Id.* at 716.

62. *See id*. at 714 (explaining that the Stolen Valor Act was passed to protect the credibility of those who served; making it illegal to claim Medal of Honor status if someone did not receive a Medal of Honor).

63. *Id.* at 715.

64. *Id.* at 713 (describing how at a local water board meeting Alvarez introduced himself as a board member and included a false portion about all of the medals he had won while in the military).

65. *Id.* at 730.

66. *See Truth in Advertising*, FTC, https://www.ftc.gov/news-events/media-resources/truth-advertising (last visited Feb. 7, 2018) (showing that it is the job of the FTC to enforce laws against commercial speech that is harmful to society).

67. 838 F.3d 158, 162 (2d. Cir. 2016).

68. *Id.*

69. *See id.* at 164 ("LeadClick employees also affirmatively approved of the use of fake news sites: one LeadClick employee told an affiliate interested in marketing LeanSpa offers that 'News Style landers are totally fine' followed by two punctuation marks commonly united to represent a smiley face."); *see also* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1 (Apr. 12, 2017) (acknowledging that the authors writing the fake news stories were told to withhold their names and that they were being paid to write these stories).

affecting the transparency and efficiency of financial markets for the foreseeable future.[70]

D. The Divisive Role of the First Amendment in Market Manipulation Schemes: A Guide on Dealing with "Fake News"

The phenomenon of "fake news" may seem new and relevant, but false or fake dissemination of information is not new to the financial markets.[71] False and misleading statements have often played a role in market manipulation cases.[72] However, "fake news" market manipulation has taken a new twist.

Previously, when faced with cases involving falsified or exaggerated information disseminated purposefully to affect the buying and selling of stocks, the SEC and the courts mostly avoided deciding on the First Amendment issues present.[73] The increase of fake news cases, including *Lidingo Holdings,* may change the legal approach.[74]

The Investment Advisors Act of 1940 is also at the crux of most "falsified advisory information" cases.[75] Section 80b-2 of the Act defines what it means to be an investment advisor—the definition that courts have historically relied on when making decisions on whether information provided by a person, whether it be through a newspaper or online posting, will be deemed investment advice or a personal opinion.[76]

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70. *See* Complaint, *supra* note 7, ¶¶ 26, 30 (explaining that the fact that the Internet was used to further the spread of the falsified advisory scheme helped expand the scope of the manipulation).

71. *See, e.g.*, James Carson, *What Is Fake News? Its Origins and How It Grew in 2016*, TELEGRAPH (Mar. 16, 2017, 1:57 PM), http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/amp/ (showing that the 2016 presidential campaign pushed fake news to become a focal point in decision making); *see also* Kenneth Rapoza, *Can 'Fake News' Impact the Stock Market?*, FIN. TIMES (Feb. 26, 2017, 9:05 AM), https://www.forbes.com/sites/kenrapoza/2017/02/26/can-fake-news-impact-the-stock-market/#15b8f142fac0 ("Fake news in the financial market has been a problem for a long time, we just didn't call it fake news.").

72. *See generally Pump-and-Dumps, supra* note 27 (showing how lying and using misleading statements to promote stockholders to buy penny stocks in bulk will produce high returns).

73. *See e.g.*, Carpenter v. United States, 484 U.S. 19, 24 (1987) (avoiding any discussion on potential First Amendment issues even though the defense focused on how the defendant was merely writing an opinion piece for a newspaper).

74. *See e.g.*, Cara Mannion, *SEC Says Stock Promoter Should Face 'Fake News' Suit*, LAW360 (July 25, 2017, 6:05 PM), https://www.law360.com/articles/947798/sec-says-stock-promoter-should-face-fake-news-suit (showing how the Lidingo scheme is fundamentally different than any other scheme the courts have resolved before, thereby putting the court in a possible position to make a First Amendment argument).

75. *See* 15 U.S.C. § 80b-2 (2012).

76. *Id.* (defining an investment advisor as "any person who, for compensation, engages in the business of advising others, either directly or through publications or

In *Lowe v. SEC*,[77] the Supreme Court reversed a Second Circuit decision and allowed a previously convicted investment advisor to post investment advice in a non-bona fide newspaper.[78] Regulating the First Amendment in this way, and barring this investment advisor from continuing to write articles, made the Court uncomfortable.[79] The Court reasoned that the SEC's ability to regulate who can (1) give investment advice and (2) register as an investment advisor walks a thin line with the First Amendment.[80] According to the Court, the definition of "investment advisor" must be met before the SEC has jurisdiction to take away First Amendment privileges.[81]

When *Lowe* was decided in 1985, investment advisors had just begun using the Internet and phones to expose market information to a mass group of people.[82] Specifically, more people could write columns while hiding behind their computers, creating an easier haven for market manipulation.[83] The Court hindered the SEC's ability to regulate these faux-advisors by requiring the SEC to define more clearly parts of the '34 Act before restricting First Amendment rights.[84]

More recently in *SEC v. Agora, Inc.*,[85] the defense counsel made the same

writings, as to the value of securities").

77. 472 U.S. 181 (1985).

78. *Id.* at 211 (holding that by the SEC revoking the investment advisor's registration, that this revocation would be considered regulating the First Amendment, and therefore, unconstitutional).

79. *See id.* at 189-91 (showing that instead of ignoring First Amendment arguments the Court would hold the newspaper's writing to a high standard and not allow an independent regulatory agency to restrict its speech).

80. *See* 15 U.S.C. § 80b-2 (stating within the statute who the law applies to); *Regulation of Investment Advisers* 3 (Mar. 2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf [hereinafter *Investment Advisers*] (listing the types of investment advisors that must register with the SEC and showing the limits on advisement, not considering whether the advisement is done via speech within a newspaper or another type of protected speech).

81. *Lowe*, 472 U.S. at 211.

82. *See id.*; *Roundtable on Investment Adviser Regulatory Issues Technology and Investment Adviser Regulation*, INV. COMPANY INST. (May 23, 2000), https://www.ici.org/pubs/white_papers/00_sec_inv_ad_rdtbl_rpt [hereinafter *Roundtable on Investment Advisors*] (explaining the effect the Internet on investment advisors in the 1980s through the early 2000s while more Americans were given access to information at a quicker pace).

83. *See Roundtable on Investment Advisors, supra* note 82 (establishing that technology is changing how investment advisors are viewed and who falls under the definition because of blogs and online columns).

84. *See generally Lowe*, 472 U.S. at 211 (stating that the SEC did not meet the burden described in the Investment Advisory Act to prove that the defendant did in fact meet the definition and, therefore, fall under the law).

85. No. MJG-03-1042 (D. Md. Aug. 3, 2007).

First Amendment claims that the Court identified in *Lowe*.[86] This combination of free expression and market analysis has gone hand-in-hand for a while, but Agora, Inc. ("Agora") attempted to strike down the SEC's effort to overreach into regulating speech and publication by using the Court's analysis in *Lowe*.[87] *Agora* was adjudicated during the rise of mass Internet usage,[88] and the false information in question was disseminated via Internet newsletters, published by Agora itself, or an Agora-owned subsidiary.[89]

Agora highlights the concerns of non-disclosure of origin, dissemination of insider information, and the spreading of falsified information that affects market-making decisions.[90] In the Memorandum of Decision, the judge enjoined the defendants from writing similar investment advisor newsletters.[91] He also decided, unlike the Court in *Lowe*, that the speech used in *Agora* was commercial speech and, therefore, did not warrant a long First Amendment debate.[92]

Political speech, editorial speech, and opinion speech are protected when utilized in newspapers or on Internet sites, but commercial speech or false and misleading speech insinuating fraud is not as clear.[93] The SEC usually has the authority to bring enforcement actions against fraudulent speech without infringing on any First Amendment rights.[94]

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86. *See id.* pt. I, ¶ A (responding, presumably, to the defendant's First Amendment argument: "There is no doubt that each of the Defendants was engaged in the production and distribution of publications entitled to substantial First Amendment protection.").

87. Motion to Dismiss at 8-9, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003).

88. *See id.* (noting that the Internet and the spread of online blogs and columns added to this issue in *Agora*).

89. Complaint ¶ 1, SEC v. Agora, Inc., No. MJG-03-1042, 2003 WL 22331384 (D. Md. Apr. 9, 2003).

90. *Id.* ¶¶ 15-18; *see also* 15 U.S.C. § 77a (2012) (showing how section 17(b) is used for prosecuting non-disclosure; defining a "non-disclosure of origin" as failing to alert investors on where the information you are making your advisory claims on is coming from).

91. SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. Oct. 3, 2007) (order granting preliminary injunction).

92. *See* Memorandum of Decision at 2, SEC v. Agora, Inc., No. MJG-03-1042, pt. II, ¶ B (D. Md. Aug. 3, 2007) ("The instant case involves commercial speech. . . . commercial speech [is] afforded lesser protection than other forms of expression.").

93. *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1169 (2012) (explaining that commercial speech is tied to the public good and economic incentives, therefore giving the government a stronger argument to limit that type of speech versus pure opinion speech that does not affect the public good).

94. *See generally* Roberta S. Karmel, Comm'r, SEC, Remarks to American Friends of the Hebrew University Greater New York Lawyers Division (Sept. 14, 1979) (describing, in her speech, how the First Amendment will only continue to penetrate the

In April of 2017, the SEC filed twenty-seven complaints against holding companies that were hiring writers to disseminate aggressive and fake information about their stocks.[95] The writers did not disclose, per the demands of the holding companies that the holding companies were paying them to publish this information on investment advisory websites.[96] Out of the twenty-seven complaints, the complaint against Lidingo Holdings garnered the most media attention.[97] The decisions made in *Agora* and *Alvarez* will play a significant role in how the court ultimately decides *Lidingo Holdings*.[98] The court will have to look to the type of speech utilized and determine if that speech fits within the interpretation of Rule 10b-5, section 240.10b-5, and section 17(b)'s definitions of "false and misleading" as applied in *Agora* or if it is simply "false statements," as the Court found in *Alvarez*.[99]

III. FAKE NEWS LEAKING INTO THE FINANCIAL MARKETS

When ultimately deciding *Lidingo Holdings*, the court will have to understand previous forms of market manipulation, recognize how these forms of manipulation have evolved, and analyze the decisions made in said cases to determine whether the fact pattern here follows the precedent set by the Supreme Court in *Lowe* or the *Agora* court.[100] The type of fake news market manipulation found in *Lidingo Holdings* is new and the intersection between speech and the financial market will be the crux of the court's decision.[101]

A. Market Manipulation Taking on New Forms in the Modern Era

The market manipulation in *Lidingo Holdings* closely resembles previous

SEC's jurisdiction).

95. *See* Germaine, *supra* note 18 (explaining the "whopping" twenty-seven complaints the SEC filed against holding companies).

96. *Id*. (stating that the owner had once stated for an author to "NOT post a disclosure again").

97. *See* Klasfeld, *supra* note 6 (showing that since one of the owners of Lidingo Holdings was a former actress her fame has brought fame to the case).

98. United States v. Alvarez, 567 U.S. 709, 729-30 (2012); SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. June 23, 2003).

99. *Alvarez*, 567 U.S. at 718, 729; *Agora*, No. MJG 03-1042, at 38-39 (explaining that the Defendants' fraudulent conduct does not warrant First Amendment protection).

100. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985) (demonstrating that an investment advisor may not be liable for the words disseminated about a stock); *Agora,* No. MJG-03-1042 (demonstrating that an investment advisor may be liable for fraudulent conduct related to stock); *see also* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1-2 (Apr. 12, 2017).

101. *Lidingo Holdings*, Litigation Release No. 23802, 2017 WL 2402709, at *1.

insider trading and pump-and-dump schemes.[102] In deciding *Carpenter*, an insider trading case, the Court looked to four factors under Rule 10b5 and section 240.10b-5: (1) whether the conspiracy fell within interstate commerce, mail, or wire fraud; (2) whether the *Wall Street Journal* had a property right interest in keeping their information confidential prior to publication; (3) whether the defendant's activities constituted a scheme to defraud; and (4) whether the use of wires and mail was sufficient to satisfy the requirement that mail be used to execute scheme.[103] The Court also found that the defendant's requisite scienter had been proven, which can be notoriously difficult to demonstrate in market manipulation cases.[104]

With the first factor, the *Carpenter* Court's focus on mail fraud within section 10(b) enabled it to disregard the First Amendment issues.[105] The court deciding *Lidingo Holdings* will not have the same luxury since the defendants are likely going to make First Amendment arguments as a defense.[106] While the *Wall Street Journal* was not liable for the fraudulent decisions made by its financial news reporter, Winans was held personally liable.[107] Like *Carpenter*, the *Lidingo Holdings* court will not hold the investment advisory websites liable for the scheme.[108] Per the complaint, the liability remains with the holding companies and the personal writers who acted in tandem to defraud the public with this scheme.[109]

The court deciding *Lidingo Holdings* will recognize a few similarities between its case and *Carpenter*. The first and fourth factors from *Carpenter*

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102. *See* United States v. Gordon, 710 F.3d 1124, 1128 (10th Cir. 2013) (stating that this pump-and-dump scheme which used artificially inflated stock values and then selling them to investors for a substantial profit); *see also* United States v. Downing, 297 F.3d 52, 55 (2d Cir. 2002) (explaining that the schemers here artificially inflated the price of a stock and bribed stock promoters to sell it, and then dumped the stock when the price was sufficiently high).

103. 484 U.S. 19, 24-28 (1987).

104. *Id*. at 27-28; *see* Langevoort, *supra* note 40 at 2-3 (explaining that most market manipulation cases add section 17(b) to their complaint because finding scienter under section 240.10b-5 can be very difficult).

105. *See Carpenter*, 484 U.S. at 23 (contending since there was scienter, and a manipulation "in connection with" the sale of securities over interstate commerce, a First Amendment lens was not necessary).

106. *See* Plaintiff's Memorandum in Opposition to Def's. Motion to Dismiss at 13, SEC v. Lidingo, Case No. 17-2540 (S.D.N.Y 2017) (showing that one of the arguments made by defense counsel on behalf of Lidingo, that the plaintiff is negating. is that the articles being posted are merely speech made by a subsidiary and therefore protected).

107. *Carpenter*, 484 U.S. at 28.

108. *See generally* SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017) (showing a similar fact pattern to the one in *Carpenter*).

109. *See* Complaint, *supra* note 7, ¶ 12.

are met in *Lidingo Holdings* because the alleged scheme was carried out on the Internet and, therefore, through interstate commerce.[110] *Lidingo Holdings* involves the use of the Internet in interstate commerce, rather than mail fraud, but is still subject to the same statute.[111] Unlike *Carpenter*, *Lidingo Holdings* has a stronger First Amendment argument since the writers were specifically hired by the holding company to disseminate the falsified information.[112] The court will thus have to consider how any First Amendment issue will strengthen or weaken the ultimate decision of market manipulation.[113]

Carpenter is similar to *Lidingo Holdings* in another specific sense: Lidingo Holdings, like the *Wall Street Journal*, promotes itself as a financial advisory website.[114] So the second and third factors decided in *Carpenter* will differ in *Lidingo Holdings*.[115] Although the holding company argues that its role was analogous to the *Wall Street Journal*, the holding company allegedly paid writers to post hundreds of articles about public companies on financial websites.[116] Therefore, the holding company directly involved itself within the scheme; knowing that if they did not disclose the relationship between the holding company and the investment advisors the stockholders would not feel that the information was biased.[117] In *Carpenter*, the *Wall Street Journal*, merely hired a writer who created his own scheme to defraud stockholders under the *Wall Street Journal's* name.[118] Pursuant to

110. 17 C.F.R. § 240.10b-5 (2018); *see* Complaint, *supra* note 7, ¶ 2; *see also* United States v. Kieffer, 681 F.3d 1143, 1145 (10th Cir. 2012) (holding that by scheming over the Internet the defendant violated interstate commerce and, therefore, using the Internet falls under the commerce clause).

111. 17 C.F.R. § 240.10b-5 (showing Rule 10b-5 was codified into this statute and it mentions fraud within interstate commerce, the interstate commerce here is the use of the Internet).

112. *See* Complaint, *supra* note 7, ¶ 12 (showing that there was direct communication between the holding company and the scheme: "[H]e wants to disclose as he is CFA. No disclosures allowed").

113. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985); SEC v. Agora, Inc., No. MJG-03-1042 (D. Md. Oct. 3, 2007).

114. Complaint, *supra* note 7, ¶ 2; *see also* Jonathan Stempel, *SEC Targets Fake Stock News on Financial Websites*, REUTERS (Apr. 10, 2017, 4:35 PM), http://www.reuters.com/article/sec-fakenews-idUSL1N1HI1IM (showing how Lidingo Holdings considered themselves advisors with "independent, unbiased information").

115. Carpenter v. United States, 484 U.S. 19, 27 (1987); SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017).

116. Complaint, *supra* note 7, ¶ 12.

117. *See id.* ¶ 14 (admitting that the company was specifically telling writers to hide who was paying them and their identities when writing for Lidingo Holdings so that they could push false information to make more people buy their own stocks).

118. *Carpenter*, 484 U.S. at 23.

Carpenter, individual journalists can be held liable for false dissemination of information and fraud.[119] In *Lidingo Holdings*, however, the SEC is charging the holding companies and the individual bloggers as the manipulators.[120] Thus, despite the different roles played by the *Wall Street Journal* in *Carpenter* and Lidingo Holdings in *Lidingo Holdings*, it is foreseeable that the court can decide the case using the analysis of the four *Carpenter* factors.[121]

The SEC's allegations in *Lidingo Holdings* also closely resemble a pump-and-dump scheme involving deceit of investors and misleading information.[122] However, the case contains issues with the First Amendment that have not been previously litigated by the SEC in pump-and-dump cases.[123]

In *Downing*, the Second Circuit held that the defendants' knowledge of the essential nature of the scheme was sufficient to support fraud convictions.[124] The *Downing* court's focus on the knowledge of the "essential nature" of the scheme could be a key factor in deciding *Lidingo Holdings*.[125] Per Rule 10b-5 and section 240.10b-5, the court will need to find the knowledge requisite within the scheme to defraud stockholders.[126]

By using the *Downing* decision, which allowed knowledge of the "essential nature" of the scheme to be sufficient rather than intent, the SEC in *Lidingo Holdings* would have a lower bar to prove the defendant's fraud.[127] In *Lidingo Holdings*, the knowledge of the scheme was evident through emails sent between the holding companies and the writers they

119. *Id.*

120. *See* Complaint, *supra* note 7, ¶ 3 (noting that the sites themselves are not being charged in the complaint).

121. *Carpenter*, 484 U.S. at 23.

122. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 (Apr. 12, 2017).

123. *See* Germaine, *supra* note 18 (showing that the SEC is set on pushing against any First Amendment claims and will pursue the termination of a "fake news" type of market manipulation).

124. *See* United States v. Downing, 297 F.3d 52, 57 (2d Cir. 2002) (showing that there was no need to find intent to defraud if defrauding and market corruption actually did occur).

125. *Id.* (focusing on the court's acceptance of the knowledge of the "essential nature" of the scheme to satisfy intent, rather than using scienter which is a very high level of intent that would need to be proven).

126. *Id.* at 55 (holding that James Downing, owner of the privately held corporation SearchHispanic.com, Inc. and several others, conspired to perpetrate a pump-and-dump scheme).

127. SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 at *1 (Apr. 12, 2017).

hired.[128] Unlike *Downing*, the knowledge of the scheme relates directly to the First Amendment because hundreds of articles were posted contingent on these discussions.[129]

Like the court in *Carpenter*, the *Downing* court declined to rule on the First Amendment issues because in a classic pump-and-dump case, the broker usually calls the potential stockholder and this one-on-one conversation may manipulate the market, but it does not trigger First Amendment protections.[130] In *Lidingo Holdings*, the use of the Internet and the spreading of information through websites will make it harder for the court to ignore the First Amendment question.[131]

Depending on how the court interprets section 240.10b-5, Rule 10b-5 and section 17b, the writers hired by the holding company in *Lidingo Holdings* may also fall under the SEC's jurisdiction.[132] The scheme in *Lidingo Holdings* only worked if the holding company and the writers both understood what their role was in promoting the scheme.[133] Therefore, the court will have to interpret the provisions in the '33 and '34 Acts, respectively, to find the intent that links the holding company and the writers to the scheme.[134] By including section 17b of the '33 Act, however, which does not require scienter, the court in *Lidingo Holdings* may be able to avoid intent to establish that a fraudulent scheme took place.[135]

A more recent example of a pump-and-dump scheme with a similar fact pattern to *Downing* is *United States v. Gordon*.[136] Specifically, the U.S. Court of Appeals for the Tenth Circuit, in *Gordon*, looked to the variety of media used to disseminate falsified information as evidence of interstate

128. *See* Complaint, *supra* note 7, ¶ 11.

129. *See id.*; *see also Downing*, 297 F.3d at 56.

130. *See Downing*, 297 F.3d at 61 (showing that a phone call from a broker to a stockholder or an advertisement posted online by a broker could be a personal conversation and not actual speech).

131. *See* Complaint, *supra* note 7, ¶ 5 (showing the number of websites and the vast spread and reach the blog posts had on the Internet).

132. *See* 17 C.F.R. § 240.10b-5 (2018); *see also* 15 U.S.C § 77q(b) (2012).

133. *See* Complaint, *supra* note 7, ¶ 2 (describing the scheme as the writers using pseudonyms per the direction of the holding companies to then write stories that the holding companies asked them to write and post on various investment advisor websites).

134. 15 U.S.C. § 77q(a); 17 C.F.R. § 240.10b-5.

135. 15 U.S.C. § 77q(b) (requiring only using interstate commerce and directly or indirectly manipulating the market, even unknowingly doing so).

136. 710 F.3d 1124, 1130 (10th Cir. 2013) (showing how similarly the *Gordon* scheme involved fax blasts, e-mails, and brochures, but the Tenth Circuit again did not use a First Amendment lens for their decision and that the court left the means of manipulation out of the equation).

commerce.[137] Most importantly, the court in utilized section 17b to find that there was no disclosure of the promoter receiving payment for its advertisement, and no disclosure of the amount of the payment by the defendant.[138] In *Lidingo Holdings*, section 17b can be applied in a similar way because there was no disclosure that the writers were hired by the holding company to push falsified information with pseudonyms.[139] Lidingo Holdings' intent to defraud can be found through the email correspondence between the defendants, which discussed why they would not be disclosing names and payments, thereby violating section 17b.[140]

Though the *Lidingo Holdings* court will be able to use section 17b to find fraud, the defense counsel will still raise a free speech argument.[141] Similar to *Gordon*, the court in *Lidingo Holdings* will also have a harder time separating the speech from the manipulation itself. In *Lidingo Holdings*, Internet advisory websites were specifically used to reach a wider base and allegedly to create a large fraudulent scheme.[142] By utilizing the fast-paced qualities of Internet blog posts to disseminate information as quickly as possible, the scheme maximized the number of consumers and potential investors it reached.[143]

The Court in *Lowe* took a different approach than *Carpenter*, *Downing*, or *Gordon*.[144] In *Lowe*, the Court held that publishers could not be permanently enjoined from publishing non-personalized investment advice and commentary in securities newsletters because they were not SEC-registered investment advisors.[145] It is unclear whether the court in *Lidingo Holdings* will analyze the Investment Advisors Act of 1940, but the issue of whether

137. *Id.*

138. *See* 15 U.S.C. § 77q(b) (showing there is no need to prove intent to defraud with this section, just need to show that there was no disclosure).

139. *See* Complaint, *supra* note 7, ¶ 12.

140. *See id.*

141. *See generally* Germaine, *supra* note 18 (declaring that the SEC is aware that the defense counsel in all of these cases will be making a free speech argument).

142. *See* Complaint, *supra* note 7, ¶ 2 (asserting that the speech used by the holding company directly related to the speech being disseminated by the fake news writers).

143. *See id*.

144. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985) (asserting how the court looked closely at the definition of an "investment advisor," rather than to the scheme itself, to analyze whether the actions taken were violating the Investment Advisors Act of 1940). *See generally Investment Advisers*, *supra* note 80 (defining what the regulation of investment advisors is and what the courts should see it as).

145. *Lowe*, 472 U.S. at 211; *see* 15 U.S.C. § 80b-2 (2012) (stating that the newsletters fell within the Investment Advisors Act's exclusion for the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation).

information being published can be seen as "non-personalized" investment advice and "commentary" will change the way the court decides *Lidingo Holdings*.[146] If the court sees the blog posts as "commentary" and not investment advice, there could be a strong argument for First Amendment protections for the writers.[147]

The Supreme Court discusses the First Amendment briefly in *Lowe*, namely to highlight why the petitioners were protected by the First Amendment and were not subject to the statutory definition of an investment advisor.[148] Whether market manipulation regulations supersede First Amendment protections is the main question in *Lidingo Holdings*.[149]

The Court in *Lowe* separated the holding company from the subsidiary and held that the writer was personally liable for the fraudulent speech.[150] That separation will not be as easy in a case like *Lidingo Holdings* because the holding company is intertwined with the subsidiary.[151] It will be difficult for the writers in *Lidingo Holdings* to argue that they merely provided First Amendment protected commentary on financial news since there are emails between the holding company and the writers outlining the scheme.[152]

Rather than looking to the strict definitions of the Investment Advisory Act of 1940, as the Court in *Lowe* did, the court in *Lidingo Holdings* has more information linking the holding company to the writers, making the court's analysis easier comparatively to *Lowe*.[153] The Court in *Lowe* did not

146. *See* 15 U.S.C. § 80b-2. *See generally*, SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709 at *2 (Apr. 12, 2017) (representing the issue of speech as investment advisory speech).

147. *See* Complaint, *supra* note 7, ¶ 10 (mentioning a possible defense as using the blog posts as opinionated "commentary" on investments rather than advisements); *see also Lowe*, 472 U.S. at 210 n.58, 211 (showing the *Lowe* decision may be outdated, but the veracity that the First Amendment is held to has not shifted; since the publishers are held as "bona fide publications" they are rightfully being protected by the First Amendment).

148. *See Lowe*, 472 U.S. at 211 (discussing that in *Lowe*, the petitioners could not be considered investment advisors because they fall within the Act's exclusions for bona fide publications).

149. *See id.* (showing that this decision from 1985 helps to frame how the First Amendment and market manipulation was seen by the courts before technological increases helped to worsen the problem).

150. *Id*.

151. *See* Complaint, *supra* note 7, ¶ 2 (describing how Lidingo Holdings, LLC, the stock promotion firm at the center of this issue, would hire writers as their subsidiaries to publish "ghost-written" pieces on advisory analysis on stocks).

152. *See id.* ¶ 38 (explaining the email conversations between the holding company and the writers).

153. *Lowe*, 472 U.S. at 211.

have the direct connection between the publisher and the writer.[154]

In *Agora*, a relatively similar case,[155] the court held that the SEC proved by clear and convincing evidence that defendants violated section 10(b)5, section 17b, and Rule 10b-5.[156] The court decided that the speech used was commercial speech, which is afforded less protection under the First Amendment.[157] In *Lidingo Holdings*, if the court finds the speech to be commercial speech, it will bar the defendant's First Amendment argument, and the court will be able to decide solely on the fraudulent scheme.[158]

Agora is similar to *Lowe* in that the publisher was separated from liability.[159] Applying a similar level of separation in *Lidingo Holdings* would either separate liability between Lidingo Holdings and the writers who wrote the blog posts, or separate Lidingo Holdings and the writers from the actual investment advisory websites.[160] If the court thus separates the holding company from its subsidiaries the probability that liability be imposed for one over the other is high.[161]

The court in *Lidingo Holdings* could attempt to mirror the *Agora* decision

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154. *Id.* at 215.

155. No. MJG-03-1042 (D. Md. June 23, 2003) (explaining that the case involves the dissemination of falsified information and investment advisers/stock promoters failing to disclose pertinent information before disseminating it).

156. *See* 15 U.S.C. § 78j(b) (2012); *see also* 17 C.F.R. § 240.10b-5 (2018) (explaining why the SEC has not proven that Agora as a company, itself (separate from its subsidiary), violated the securities laws since per section 10b-5 Agora did not meet all of the requirements of the law (false statement, of material fact, with scienter, in connection with purchase or sales of securities, by using interstate commerce; though their subsidiary Stansberry did meet these requirements)).

157. *See Agora*, No. MJG-03-1042, at 8 (discussing how fake information was being spread through fake newsletters published by Agora or other Agora-owned subsidiaries; there was no disclosure that Agora was supporting the publishing, writing, and information being provided to help their own causes).

158. *See* Complaint, *supra* note 7, ¶ 2.

159. *Lowe*, 472 U.S. at 211; *see* Memorandum of Decision at 14-16, *Agora*, No. MJG-03-1042 (confirming that the *Agora* court is not accepting the SEC's argument to hold both Agora and its subsidiaries liable).

160. *See* Memorandum of Decision at 2, *Agora*, No. MJG-03-1042, ¶ 2 (noting that for the court in *Agora* the Defense Counsel's free speech argument did not hold weight); *see also Lowe*, 472 U.S. at 211 (upholding the defense counsel's free speech argument because the articles being written were considered "bona-fide" publications, not containing overt false or misleading information and they were publications of general and regular circulation).

161. Carpenter v. United States, 484 U.S. 19, 24 (1987); *Lowe*, 472 U.S. 181, 211; *Agora*, No. MJG-03-1042, ¶ 2 (showing that in each of these three cases the court decided to split the subsidiary from the main company to apply the statutes to them separately and find different levels of liability for them; usually shielding one from liability when one or more of the prongs in section 240.105b-5 were not met).

and separate the liability of the writers from the holding company.[162] But unlike the facts in *Agora*, the collusion between the holding company and the hired writers, in *Lidingo Holdings*, initiated the fraud.[163] Therefore, following *Agora*, and specifically splitting up the defendants, would not be helpful.[164] The alleged scheme in *Lidingo Holdings* relies on the closely intertwined relationship between the writers and the holding company that directly hired them.[165]

The First Amendment issues in *Lidingo Holdings* are vital to the market manipulation scheme, just as they were essential in *Agora*. In both cases, the speech can be categorized as commercial speech, which, as mentioned earlier, is not fully protected by the First Amendment.[166] The decision in *Lidingo Holdings* will be the first time a court can confront the First Amendment directly.[167] If the court uses a similar argument to *Agora,*[168] however, it can decide the case without directly addressing the First Amendment.[169]

The defense counsel's claims to free speech and the press in *Agora* touched on an inevitable expansion of SEC reign and control over speech.[170]

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162. *See* Memorandum of Decision at 14, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003) (holding Agora distinct from its subsidiary Pirate separating liability between the corporation and its subsidiaries, editors, and writers).

163. *See* Complaint, *supra* note 7, ¶ 11.

164. *See* Motion to Dismiss ¶ 2, *Agora*, No. MJG-03-1042; *see also* Complaint, *supra* note 7, ¶ 2 (explaining how in Lidingo there was more of a connection between many of the writers and the holding company, though the holding company was the one who told the writers not to disclose their names or where they received their information or payment for the information, the writers perpetuated the scheme by agreeing to it).

165. *See* Complaint, *supra* note 7, ¶ 2 (showing against the SEC's overreach into an area that is protected by the First Amendment).

166. *See* Motion to Dismiss at 9, *Agora*, No. MJG-03-1042 (citing Ginsburg v. Agora, Inc., 915 F. Supp. 733, 739-40 (D. Md. 1995)) ("Indeed, *this* very Court has applied First Amendment privileges to *this* very Defendant, Agora, Inc.").

167. *See* Complaint, *supra* note 7, ¶ 12.

168. SEC v. Agora, Inc., No. MJG 03-1042, pt. II, § B, at 8 (D. Md. June 23, 2003) (noting that this case involves commercial speech).

169. *See id.* at 2 (holding that commercial speech is not as protected and, therefore, there should not be an issue of the First Amendment in this case).

170. *See* Motion to Dismiss at 25, SEC v. Agora, Inc., No. MJG-03-1042, 2017 WL 23325429 (D. Md. June 23, 2003) (stating that the SEC is attempting to expand its regulatory reach into an area where the protections of the First Amendment apply in full force).

170. Anthony Page, *Taking Stock of the First Amendment's Application to Securities Regulation,* 58 S.C. L. REV. 789, 790-91, 793, 799-800 (2007) (stating that financial market speech is usually held as commercial speech since the financial markets are affected by the commercial speech doctrine and that First Amendment protections to securities regulation is difficult due to the wide range of speech and persons involved).

The court in *Agora* did not agree with the defense counsel's argument that the investment advisors speech was opinion speech because financial market speech is normally viewed as commercial speech.[171] The court in *Lidingo Holdings* should not follow the *Agora* court in separating the holding company from the writers, but should follow the *Agora* court in holding that the writer's speech is commercial speech.[172] It will be easier for the court in *Lidingo Holdings* to find both the holding company and writers liable for fraud without focusing on free speech issues because speech involving the financial markets is nothing but commercial speech.[173]

B. Commercial Speech or Fully Protected Speech: Where Does "Fake News" Belong?

The Supreme Court has previously decided cases regarding the First Amendment when commercial speech is not at issue.[174] In *Alvarez*, the Court held that the Stolen Valor Act constituted a content-based restriction on free speech (i.e., opinion speech) in violation of the First Amendment.[175] A content-based restriction on free speech is rarely permissible.[176] The Court decided, pursuant to First Amendment jurisprudence, that the proscribed speech specifically did not fall into one of the enumerated categories of unprotected speech.[177] Conversely, the court in *Lidingo Holdings* will not see any restriction on the writers' speech as content-restrictive since they are using commercial speech to promote whether or not to do something in the

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172. *See Agora*, No. MJG-03-1042, at 8 (noting that the case involved commercial speech, which is "afforded lesser [First Amendment] protection than other forms of expression").

173. *See* Page, *supra* note 171, at 790-91, 793, 799-800 (describing the difficulty in applying the First Amendment to speech used within the financial market since the Supreme Court has refused to decide on it and the definitions of the types of speech used within the financial market seems closer linked to commercial speech).

174. *See generally* United States v. Alvarez, 567 U.S. 709, 723 (2012) (noting that the Stolen Valor Act's proscription on speech impinges one's First Amendment rights).

175. *Id*. at 716-17 (stating that content-based restrictions directly violate the protections under the First Amendment since content-based restrictions are the most fundamentally adverse to the First Amendments protections).

176. *See id*. at 717 (explaining that content-based restrictions on speech are permissible to prevent incitement, obscenity, defamation, criminal conduct, "fighting words," child pornography, fraud, true threats, among few others).

177. *See id.* at 716 (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)) ("As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. As a result, the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality.").

financial market.[178] When fraud and the financial markets are involved, what speech is protected becomes less clear than what the Court identified in *Alvarez*.[179]

The speech in *Lidingo Holdings* will likely be deemed commercial speech as opposed to opinion speech, as described in *Alvarez*.[180] The speech disseminated in *Lidingo Holdings* is not opinion speech because the financial market is directly affected by the speech being used on the investment advisory websites that Lidingo holdings posted, whereas the speech used in *Alvarez* was not harmful to an entire sector of the business market.[181] The Court in *Alvarez* removed fraudulent speech from First Amendment protection, and as such, the court in *Lidingo Holdings*, confronted by fraudulent commercial speech, does not need to rule on any First Amendment issues.[182] Alhough the Stolen Valor Act presumably banned fraudulent speech, the Court narrowed the definition of fraudulent speech.[183] In deciding *Lidingo Holdings*, the court therefore will likely distinguish the speech therein from the speech in *Alvarez* because the former is commercial speech and the latter is opinion speech.[184]

On the other hand, the SEC, in *Lidingo Holdings*, could follow the FTC's decisions when dealing with deceptive practices involving speech.[185] The

178. *See* Complaint, *supra* note 7, ¶ 20 (explaining how Seeking Alpha, a site commonly used by Lidingo Holdings and other well-known investment advisors to post advisory blogs on, had changed their disclosure policy; but the commercial aspects of Seeking Alpha's business did not change, and most of the blogs posted on their site fall under a commercial speech definition rather than opinion speech).

179. *See Alvarez*, 567 U.S. at 723 ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment.").

180. *See id.* at 716 (noting that the speech used by Alvarez was "pure speech" which is naturally protected by the First Amendment).

181. *See* Page, *supra* note 171, at 804 (explaining that the SEC considers any writing on the financial market, especially before a major prospectus as having the ability to condition the market and could therefore harm/affect the entire market).

182. *See Alvarez*, 567 U.S. at 716 (acknowledging that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

183. *See id.* at 723 (showing that the Court takes limitations on speech seriously because "free speech, thought, and discourse are to remain a foundation of our freedom").

184. *See id.* at 716 (noting that the speech in *Alvarez* constitutes "pure speech" which is fully protected under the First Amendment); *see also* Complaint, *supra* note 7, ¶ 26 (explaining how vast the speech being used by Lidingo Holding's writers spread and how they were published on serious investment websites with the ability to reach many investors and affect the market).

185. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 169 (2d. Cir. 2016) (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989)) (stating that a defendant may be liable under the Federal Trade Commission Act "for deceptive practices that cause consumer harm if, with knowledge of the deceptive nature of the

court in *LeadClick Media* focused on commercial speech that promoted a fraudulent weight loss product and affected consumers.[186] The FTC avoids First Amendment defenses by directly regulating commercial speech because it is subject to less protections under the First Amendment.[187] If the court in *Lidingo Holdings* finds the speech at issue to be not only fraudulent, but also commercial in nature, First Amendment defenses would be inapplicable.[188] The court in *LeadClick Media* also ruled on the issue of "fake news" and "fake news sites."[189] The issue of fake news websites intertwining with speech in a financial marketplace that can affect consumers is an issue that the court in *Lidingo Holdings* will need to resolve.[190] The court in *LeadClick Media* acknowledged that hiring employees to knowingly push false information into the public sphere is detrimental to consumers; therefore, the court in *Lidingo Holdings* should come to the same conclusion after it determines that the speech is in fact commercial speech.[191]

Even if LeadClick Media, LLC did not intentionally deceive consumers, the court held that representations likely to mislead consumers must be subject to the same standard.[192] If the court in *Lidingo Holdings* takes a

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scheme, he either 'participate[s] directly in the practices . . . or ha[s] authority to control them'"); *see also About the FTC: What We Do*, FTC, https://www.ftc.gov/about-ftc/what-we-do (last visited Jan. 19, 2018) (explaining that the FTC focuses on protecting consumers from deceptive promotions).

186. *See LeadClick Media*, 838 F.3d at 163 (discussing advertisements posted on websites run by LeadClick that were promoting weight loss supplements and claiming that they had superb effects that they did not actually have).

187. *Id*.

188. *Id.* at 164 (showing the knowledge requirement being met and the amount of business being affected by the fraudulent speech); SEC v. Lidingo Holdings, LLC, Litigation Release No. 23802, 2017 WL 2402709, at *1-2 (Apr. 12, 2017) (revealing similar facts to *LeadClick Media*, potentially leading to a similar outcome in *Lidingo Holdings*).

189. *See LeadClick Media*, 838 F.3d at 164 (noting that the type of false information at issue was not only harmful to the public, LeadClick Media, LLC knew the fraudulent nature of the information and still allowed for the advertisements to be posted on their site); *see also* Mannion, *supra* note 74 (showing that the SEC has no problem publicly calling the speech at issue here as fake news speech). *See generally* Germaine, *supra* note 18 (showing that the SEC is already calling the speech used in *Lidingo Holdings* as "fake news" speech).

190. *See Lidingo Holdings*, 2017 WL 2402709, at *1 (demonstrating that public companies, including Lidingo Holdings, LLC, were aware of falsified and bullish information posted on various news sites by people hired and instructed by said companies).

191. *See LeadClick Media*, 838 F.3d at 170 (noting that a defendant who implements a deceptive practice or has the ability to control those performing said practices "causes harm to consumers" in doing so).

192. *See id.* at 168 (quoting FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006)) ("FTC must show three elements: '[1] a representation, omission, or practice, that [2] is

similar stance to how the FTC has proceeded to argue similar cases, the issue of the First Amendment may be moot.[193] If *Lidingo Holdings* finds the speech being disseminated as harmful commercial speech then the SEC can follow the FTC's lead for enforcement actions where consumers are harmed by falsified speech.[194] If the court does not find the speech to be fraudulent and/or commercial in nature, the SEC will not likely prosecute.[195] Therefore, the court will have to focus on the '34 Act to find intentional fraud or the '33 Act to find a lack of disclosure.[196] By finding intentional fraud, and/or a lack of disclosure the court can decide in a similar fashion to the courts in *Gordon* and *Downing*, where the free speech arguments were moot after fraudulent behavior was found.[197]

IV. CONGRESS, THE SEC, AND WHISTLEBLOWERS . . . OH MY!

Without a change in the regulatory regime, dealing with fake news within the financial markets will only continue to increase.[198] Substantive changes need to be implemented regarding how the SEC brings enforcement actions against fake news.[199] Incentives need to be offered for people to come forward and report anything that seems unusual within their market news.[200] Until these two steps are taken, fraudulent schemes, like the one identified in *Lidingo Holdings*, will continue to occur with no precedent on how to

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likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material.'").

193. *See LeadClick Media*, 838 F.3d at 170 (asserting any use of commercial speech that has an effect on consumers and public markets can be censored and will not concern the First Amendment).

194. *LeadClick Media*, 838 F.3d at 169 (highlighting the three elements necessary to demonstrate deceptive acts or practices).

195. *Lidingo Holdings*, 2017 WL 2402709 (acknowledging that the SEC would be less likely to prosecute a case with clear First Amendment protections imbedded in the defendant's speech).

196. *Id.*; *see* 15 U.S.C. § 77q(a)-(b) (2012); 17 C.F.R. § 240.10b5 (2018).

197. United States v. Gordon, 710 F.3d 1124, 1142 (10th Cir. 2013) (explaining that in a pump-and-dump case, where some speech is used to initiate the scheme, it is not speech that is the crux of the issue so it does not need to be decided on); United States v. Downing, 297 F.3d 52, 58 (2d Cir. 2002) (holding that in a classic pump-and-dump case as this one, free speech arguments can be ignored because each prong in § 240.10b-5 is met and the First Amendment argument does not protect the scheme from that fact).

198. *See* Germaine, *supra* note 18.

199. *See* Michael S. Dicke, *SEC Crackdown on "Fake News" Is Itself Fake News (Perspective)*, FENWICK & WEST LLP (Apr. 21, 2017), https://www.fenwick.com/Publications/Pages/SEC-Crackdown-on-Fake-News-is-Itself-Fake-News.aspx (arguing that the SEC is not taking the correct steps in prosecuting this type of case).

200. *SEC Spotlight: Enforcement Cooperation Program*, SEC, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (last updated Sept. 20, 2016) [hereinafter *Whistleblower*].

prevent it.

Congress, with aid from the SEC, should update section 10(b) of the '34 Act and Rule 10b–5, to include specific language to prevent this type of blatant market manipulation.[201] Many courts deciding securities regulation and market manipulation cases have agreed that it is not the Judiciary's place to legislate[202] and, therefore, the SEC and Congress should begin to use the same form of action against fraudulent or misleading information that the FTC has been using.[203] The FTC has been able to successfully define terms in its statutes and show the effects of commercial speech on the health and welfare of people in society.[204] The SEC needs to show that this type of flagrant abuse of the statutes and dissemination of fake news will affect our markets in a way that will be difficult to overturn if not stopped now.[205] By clearly defining who an investment advisor is, what new forms of market manipulation look like, and what type of speech investment advisory speech falls under (commercial or opinion), the SEC would have an easier time bringing enforcement actions without having to address any First Amendment repercussions.[206] Congress needs to include in the updated regulations clearly defined terms to outline the serious harm the public may face without more protection from fake news.

Additionally, out of the five prongs that must be met for a violation of section 10(b) and Rule 10b-5, there should be a quasi-sixth prong added when applicable for fake news cases.[207] The prong would be, "and if there

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201. 17 C.F.R. § 240.10b–5.

202. Evan Bernick, *Judicial Restraint Cannot Restrain the Administrative State*, HUFFINGTON POST, http://www.huffingtonpost.com/evan-bernick/judicial-restraint-cannot_b_9540812.html (last updated Mar. 25, 2017) (showing that courts who practice self-restraint and defer to Congress with respect to significant statutory decisions can be helpful or problematic depending on Constitutional interpretation).

203. *About the FTC*, FTC, https://www.ftc.gov/about-ftc (last visited Jan. 19, 2018).

204. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d. Cir. 2016) (noting that when defendants satisfy the applicable definitions prescribed by FTC statutes, they are subjected to liability for directly or indirectly disseminating falsified information).

205. Renae Merle, *Scheme Created Fake News Stories to Manipulate Stock Prices, SEC Alleges,* L.A. TIMES (July 5, 2017, 2:50 PM), http://www.latimes.com/business/la-fi-sec-fake-news-20170705-story.html (discussing why the SEC filed twenty-seven complaints on similar cases like Lidingo because of a "worrisome trend" taking over the financial markets and investment advisory field).

206. *See LeadClick Media*, 838 F.3d at 168 (exemplifying how clearly defined the FTC's statute is, and further, how a clearly defined statute can assist courts in drafting quicker, easier, and more understandable decisions).

207. *See* 17 C.F.R. § 240.10b–5 (2018) (stating that to establish a violation of section 10(b) and Rule 10b-5, the Commission must prove: 1) That the Defendants made a false statement or omission; 2) Of material fact; 3) With scienter; 4) In connection with the purchase or sale of securities; 5) By using a means or instrumentality of interstate commerce).

is a dissemination of incorrect, falsified, or fabricated information the defendant must disclaim on each site that they participated in spreading fake news." This would materialize in the form of a register for people who have injunctions on their records and cannot work in the financial markets industry anymore. Those subject to this register must also disclose their register status on the investment websites they are working for, as well to make the public aware of which rules they violated. This "prong" must be met after the first five are clearly satisfied and the defendant is found liable.[208]

To further crack down on the increasing dissemination of fake news, there should be a program where the private sector works together with the public sector. The SEC currently has a program called "SEC Spotlight: Enforcement Cooperation Program," which attempts to create a link between the private and public community and allows businesses to self-report their wrongdoing to potentially avoid enforcement action or receive a lesser penalty.[209] Since this is most likely the case, the SEC can expand their new whistleblower program that was created under Dodd-Frank.[210]

These three recommendations will increase severe measures against people participating in a fake news type of market manipulation. Amending the securities statutes used in these cases to be more closely aligned with the FTC, increasing the shame that comes after being found liable, and by promoting a stronger whistleblower program, fake news schemers will be less successful in manipulating markets and defrauding consumers.[211]

V. CONCLUSION

Although the idea of "fake news" affecting the financial markets is relatively new because of technological advances, false dissemination of information affecting the financial markets is a traditional tool for market manipulation.[212]

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208. *See generally id.* (showing the four prongs that must be met now in a "false and misleading" action taken by the SEC; the fifth prong is my own idea to add to this statute).

209. *See* Whistleblower, *supra* note 200 (outlining how the program works, who needs to be contacted, and what the steps would be).

210. *Office of the Whistleblower*, SEC, https://www.sec.gov/whistleblower (last updated Jan. 17, 2018).

211. Jason Zuckerman and Matt Stock, *One Billion Reasons Why the SEC Whistleblower-Reward Program Is Effective*, FORBES (July 18, 2017, 4:46 PM), https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/#1559a9cb3009 (showing how effective the SEC whistleblower program has been thus far, and their ability to recover nearly one billion dollars in financial penalties from wrongdoers).

212. *See* Kiernan, *supra* note 16.

Filing twenty-seven complaints against holding companies establishes the SEC's will to combat this "fake news" market manipulation.[213]

By using the historical precedence in insider trading cases, pump-and-dump cases, stock promotion cases, and First Amendment within the business lens cases, the court in *Lidingo Holdings* will decide that there is enough evidence to find fraud under section 240.10b-5, Rule 10b-5, and section 17b and that the speech used within the scheme was commercial speech. By following how the FTC brings enforcement actions and amending the `33 Act and the `34 Act to clearly define more terms the SEC may be able to avoid more First Amendment issues with further fake news cases. Also by expanding their whistleblower program and working closely with the private sector the SEC may avoid these major enforcement actions all together. Fake news is not going away, it is time that the SEC take proactive steps to stop this form of market manipulation before it evolves.

213. *See* Complaint, *supra* note 7, ¶ 2.

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RIGGING THE RIG: THE MERITS OF AMERICAN JURISPRUDENCE IN ENHANCING JURISDICTIONAL ARGUMENTS IN NIGERIA'S OIL AND GAS LAW

MOFE OBADINA*

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I. INTRODUCTION

In January 2017, the Technology and Construction Court in London ("TCC") used a duty of care analysis to dismiss *Okpabi v. Royal Dutch Shell Plc*[1] for lack of jurisdiction; exemplifying a trend in which British courts favor a duty of care analyses over clear jurisdictional analyses to find jurisdiction.[2] Small communities in the Nigeria's Niger Delta brought an action against Royal Dutch Shell PLC ("RDS") and Shell Petroleum Development Company of Nigeria ("SPDC"), a subsidiary of RDS, based in Lagos, Nigeria.[3] The communities sought compensation for the oil spills that caused extreme environmental damage, loss of livelihoods and income, and the absence of clean drinking water.[4] The plaintiff represents members of the Bille and Ogale communities, who experienced a decline in their livelihoods as farmers and fishermen because major bodies of water have been contaminated by crude oil.[5] The court ruled that because the parent company, RDS, did not have proper jurisdiction in the English courts, the

1. Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89 (Eng.).

2. *See id.* [122].

3. *See id.* [2]-[4]; ("[Between 'the Billie claims' and 'the Ogale claims'"); Holly Ellyatt, *Shell Faces Further Suit Over Nigeria Oil Spills*, CNBC (Mar. 2, 2016, 4:03 A.M.), http://www.cnbc.com/2016/03/02/shell-faces-further-suit-over-nigeria-oil-spills.html (describing the lawsuit brought by the Bille and Ogale communities against Shell's Nigerian subsidiary for harmful effects resulting in pollution of farmland and water); *see generally Niger River,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Niger-River (last visited Mar. 30, 2018) (describing the Niger River's physiology, including the Niger Delta).

4. *See* Ellyatt, *supra* note 2 (reporting that the residents of the Bille and Ogale communities say they have not had clean drinking water since 1989 because of oil spills).

5. *See id.*; *see also* AMNESTY INT'L, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 27 (Amnesty International Publications 2009), http://www.amnestyusa.org/sites/default/files/afr440172009en.pdf [hereinafter PETROLEUM, POLLUTION AND POVERTY] (summarizing women have reported that the shellfish in the mangroves that they rely on for sale and food, and which are easily destroyed by pollution due to their sedentary nature, are disappearing because of oil pollution).

subsidiary, SPDC, was therefore also not subject to the TCC jurisdiction.[6] The judge asserted a duty of care analysis to find that the plaintiffs could not prove that (1) the harm was foreseeable to RDS, (2) the two defendants were not in close operational proximity to each other, and (3) it would be unreasonable, unfair, and unjust to subject RDS to jurisdiction in England.[7] The plaintiff's appealed the decision and contended that the judge's reading of the facts was too narrow.[8]

This Comment argues that on appeal, the TCC should reverse the lower court for failing to find jurisdiction through a duty of care analysis and, instead, find jurisdiction through a specific personal jurisdiction, derived from American jurisprudence. Specific personal jurisdiction would allow the plaintiff to present facts that highlight the contacts and relationships shared between RDS, SPDC, and the English forum. Part II provides a comprehensive background on the nature and importance of oil and gas operations in Nigeria and gives a brief primer on case similar to *Okpabi*. These cases highlight the problems with a duty of care analysis and illustrate the need for consistency in jurisdictional rulings. Part II further explains how the United States Supreme Court has found jurisdiction over foreign, corporate defendants. Part III argues that the TCC should consider reexamining *Okpabi* solely through a personal jurisdiction analysis, as opposed to a duty of care analysis, to determine TCC jurisdiction. Part IV recommends that the Nigerian legislature create long arm statutes to govern oil and gas disputes and utilize special subject-matter jurisdiction courts. Finally, this Comment concludes that U.S. personal jurisdiction jurisprudence is valuable because it (1) promotes reliance on unique facts; (2) encourages specific personal jurisdiction; and (3) enhances stability and reliability in foreign corporation disputes.

II. THE EVOLUTION OF ENERGY USE AND THE DEVELOPMENT OF NIGERIA'S ENVIRONMENTAL LAW

A. The Early Beginnings of Energy Resources in Nigeria

Nigeria has abundant primary energy resources, such as crude oil and natural gas, coal, and tar sands, as well as renewable energy resources such

6. *See Okpabi* [2017] EWHC (TCC) 89, [122] (holding that no duty of care was owed by the Shell Group and, therefore, not by RDS).

7. *Id.* [113]-[15],[22].

8. Lucas Roorda, Okpabi v. Shell*: A Setback For Business and Human Rights?*, UTRECHT CTR. ACCOUNTABILITY & LIABILITY L. (Feb. 13, 2017), http://blog.ucall.nl/index.php/2017/02/okpabi-v-shell-a-setback-for-business-and-human-rights/(explaining that the defendants appealed "both on jurisdictional and on substantive issues").

as water, fuelwood, solar, wind, and biomass.[9] The Niger Delta, located in the southernmost part of Nigeria, "is among Africa's most densely populated regions, as well as among the world's ten most important wetlands."[10] The Niger Delta is also the location of the crude oil reserves, which are predominantly found in small fields in the coastal areas.[11] Nigerian oil is classified as "light" and "sweet," a quality that makes it particularly sought after because it is less expensive to refine and transport.[12]

Since the late 1960s, the Nigerian economy has been primarily dependent on oil exploitation to meet its development, energy, and power needs.[13] Nigeria began producing oil in 1958, after RDS discovered crude oil in the Niger Delta in 1956.[14] Since 1937, however, when Nigeria granted Shell D'Arcy (SPDC's predecessor) oil exploration rights, RDS has effectively grown and maintained a monopoly over the oil and gas industry in the country.[15] Today, the "oil and gas sector represents 97 percent of Nigeria's foreign exchange revenues and contributes 79.5 percent of government revenues."[16]

B. Shell and Nigeria: A Tumultuous History

SPDC is the Nigerian subsidiary of RDS and is the largest onshore

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9. *See* ENERGY COMM'N OF NIGERIA, NATIONAL ENERGY POLICY 10-34 (2003), http://www.ecowrex.org/system/files/repository/2003_national_energy_policy.pdf.

10. *See* Barisere Rachel Konne, Note, *Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland*, 47 CORNELL INT'L L.J. 181, 181-82 (2014); PETROLEUM, POLLUTION AND POVERTY, *supra* note 5, at 9; *see also* HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 7 (1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf (noting that "[t]he Niger Delta is one of the world's largest wetlands, and the largest in Africa [as it] encompasses over 20,000 square kilometers.").

11. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 25 (statinging that 1997 estimates of Nigeria's oil reserves were between 16 billion and 22 billion barrels, from 159 oil fields and 1,481 wells).

12. *See id.* at 25, 59 (defining "sweet oil" as oil with a low sulphur content and "light oil" as oil with low density that flows freely at room temperature).

13. *See* Konne, *supra* note 9, at 182 (stating that Nigeria began producing oil in 1958, and has since become the largest oil producer in Africa); *see also* ENERGY COMM'N OF NIGERIA, *supra* note 8, at 10 ("The nation is clearly over dependent on crude oil for its foreign exchange, hence the economy is vulnerable to the unstable nature of the international oil market.").

14. *See* PETROLEUM, POLLUTION AND POVERTY, *supra* note 4, at 11.

15. *See* Konne, *supra* note 9, at 182 ("Nigeria has become Africa's largest oil producer, with an estimated 37.2 billion barrels of oil reserves as of January 2013."); *see also* ENERGY COMM'N OF NIGERIA, *supra* note 8, at 10 (stating that it would be beneficial for the country to diversify their energy mix in order to avoid conflict).

16. PETROLEUM, POLLUTION AND POVERTY, *supra* note 5, at 11.

producer of crude oil in the Nigera.[17] SPDC's operations are primarily conducted in the Niger Delta, with much of the infrastructure located near local communities' homes, farms, and water sources.[18] The first commercially producing oil field was discovered in Oloibiri, Bayelsa State in 1956 and RDS commenced drilling.[19] Since that time, additional high producing oil fields have been discovered in the Niger Delta area, leading to the creation of, for example, the Bonny, Forcados, and Qua Ibo wells.[20] After discovering these new fields, SPDC's production capacity increased dramatically, and now has "over 6,000 kilometers of pipelines, 87 flow stations, eight gas plants, and more than 1,000 producing oil wells," making SPDC the largest private-sector oil and gas company in Nigeria.[21]

SPDC is also party to the largest joint oil venture in Nigeria, covering over 31, 000 square kilometers of land and producing an estimated forty percent of Nigeria's crude oil output.[22] SPDC currently produces over 200,000 barrels of oil a day through its joint venture agreement with the Nigerian National Petroleum Corporation ("NNPC"),[23] National Agip Oil Company Limited ("NAOC"),[24] and Total Petroleum Nigeria Limited ("TPNL").[25] Through this collaboration, SPDC discovered more oil fields and natural gas

17. *Id*.; *see also* HUMAN RIGHTS WATCH, *supra* note 9, at 27-28 (noting that SPDC, originally Shell D'Arcy, was the first company to obtain rights to Nigerian oil).

18. *Id.*at 62-64 (describing the effects of the infrastructure on the land and livelihood of the local communities).

19. *See* Kairn A. Klieman, *U.S. Oil Companies, the Nigerian Civil War, and the Origins of Opacity in the Nigerian Oil Industry,* 99 J. AM. HIST. 155*,* 157 (2012); *see also* HUMAN RIGHTS WATCH, *supra* note 9, at 25; *see also* William Wallis & Anjli Raval, *Shell Proves Test Case for Oil Majors' Environmental Records*, FIN. TIMES (Mar. 1, 2016), http://www.ft.com/content/90b2a612-dfc4-11e5-b072-006d8d362ba3.

20. David Thomas, *Niger Delta Oil Production Reserves, Field Sizes Assessed*, OIL & GAS J., Nov. 13, 1995, https://www.ogj.com/articles/print/volume-93/issue-46/in-this-issue/exploration/niger-delta-oil-production-reserves-field-sizes-assessed.html.

21. Konne, *supra* note 10, at 182; PETROLEUM, POLLUTION AND POVERTY, *supra* note 5, at 88 n.27; *see also WHO WE ARE*, SHELL NIGERIA, http://www.shell.com.ng/about shell/who-we-are.html (last visited Mar. 31, 2018).

22. *See* PETROLEUM, POLLUTION AND POVERTY*, supra* note 5, at 11-12; HUMAN RIGHTS WATCH, NIGERIA, THE OGONI CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA 7 (1995), https://www.hrw.org/reports/1995/Nigeria.htm [hereinafter THE OGONI CRISIS]; Wallis & Raval, *supra* note 19.

23. *See* HUMAN RIGHTS WATCH, *supra* note 9, at 28 (stating that SPDC is the operator of a joint venture between NNPC and two other corporations, and that SPDC accounts for 30% of that venture and NNPC accounts for 55%).

24. *See id*. at 29 (explaining that NAOCA a small joint venture run by Agip, NNPC, and Phillips Petroleum and stating that NAOC produces oil mainly from small, onshore fields).

25. *See generally WHO WE ARE*, *supra* note 21 (emphasizing that Total E&P has a 10% stake in the joint venture).

reserves.[26] As of September 2017, Nigeria is among the top ten largest crude oil producers in the world.[27]

C. The Slippery Slope of Oil Activities

The integrated system of oil and gas production has not translated into economic prosperity and social growth for many in the Niger Delta region because the oil operations caused severe environmental degradation to the fragile biodiverse region.[28] The Niger Delta suffers from a series of problems: the area has poor infrastructure, some members of its communities live on less than one dollar per day, SPDC's local employees face rampant discrimination, access to clean drinking water is poor as a result of oil spills, and many citizens suffer from health issues as a result of the pollution and gas flaring.[29] Furthermore, the environmental damage has led to the degradation of the health and livelihood of the Ogoni people, whose homeland is in the Niger Delta.[30] These social, environmental, and health issues are evidence of the oil and gas industry's devastating impact on the Niger Delta.

D. A Spud-In at Local Cases in International Places: How the TCC Decided Okpabi v. SPDC

Alleging negligence and seeking redress for the lack of clean water sources in Ogoniland, plaintiffs from the Bille and Ogale communities sued

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26. *See id.*

27. Anjli Raval, *Nigeria To Resist Cuts To Its Oil Output, Minister Says*, FIN. TIMES fig.1 (Sep. 12, 2017), https://www.ft.com/content/09e6c764-979a-11e7-a652-cde3f882dd7b.

28. *See generally* W. Corbett Dabbs, *Oil Production and Environmental Damage*, ENVIRONMENT AND ECOLOGY (Dec. 1996), http://environment-ecology.com/environment-writings/759-oil-production-and-environmental-damage.html (describing how some countries do not benefit from oil production because of the detrimental environmental impact of oil production on the country's environment).

29. *See* THE OGONI CRISIS, *supra* note 22 (explaining that the Oil Mineral Producing Areas Development Commission was established in 1992 to address the oil and gas industry's damage to the region); PETROLEUM, POLLUTION AND POVERTY, *supra* note 54, at 18 (defining gas flaring as the burning of the "associated gas" produced when oil is pumped from the ground); s*ee also* HUMAN RIGHTS WATCH, *supra* note 9, at 85-86 (stating that Niger Delta populations remain poor and without access to clean water).

30. *See* THE OGONI CRISIS, *supra* note 22; PETROLEUM, POLLUTION AND POVERTY, *supra* note 4, at 4 (noting that SPDC withdrew from Ogoniland in 1993 during local protests and military activity, has never been able to resume operations in that area); Elena Keates, *After Decades of Death and Destruction, Shell Pays Just $83 Million for Recent Oil Spills*, GREENPEACE (Jan. 11, 2015 https://www.greenpeace.org/usa/shell-oil-settlement-ogoniland/ (explaining that Shell's equipment is still in Ogoniland despite not having operated there since 1993).

both RDS and SPDC in the TCC.[31] Typically, when suing a corporation, plaintiffs must sue where the corporation is incorporated.[32] Therefore, the plaintiffs chose forum in England, where RDS is incorporated.[33] In January 2017, the *Okpabi* court found for the defendants in the preliminary jurisdiction hearing.[34] It held that the parent company, RDS, was not subject to jurisdiction in England because there was no duty of care imposed on RDS through its associations with its subsidiary, SPDC.[35] The court applied the three-pronged duty of care analysis: (1) foreseeability, (2) proximity, and (3) reasonability.[36] It concluded that all three prongs were absent and, thus, RDS owed no duty of care to the plaintiffs or to SPDC.[37] To discuss the foreseeability and proximity requirements,[38] the court cited *Caparo v. Dickman*[39] which originally put forth the three-part foreseeability test used to determine whether there is sufficient proximity between a parent and its subsidiary for a duty of care to attach. In *Chandler v. Cape Plc*,[40] the court reinforced and elaborated on the foreseeability test, asking whether (1) the parent and subsidiaries operate the same businesses; (2) the parent has, or should have, relevant superior or special knowledge compared to the subsidiary; (3) the parent had, or should have had, knowledge of the subsidiary's systems of work; and (4) the parent knew, or should have foreseen, that the subsidiary or its employees would rely on the parent using its superior knowledge to protect the claimants.[41] *Donoghue v. Stevenson*[42] demonstrated that companies "must take reasonable care to avoid acts or omissions" that are reasonably foreseeable to cause injury to those so closely and directly affected by the corporation's actions.[43] Where a duty of care is found to have been present for the parent company, it may also extend to

31. Okpabi v. Royal Dutch Shell Plc, [2017] EWHC (TCC) 89, [2]-[3] (Eng.).

32. *See, e.g., When will the English Courts Have Jurisdiction over a Dispute?*, STEPHENSON HARDWOOD (Oct. 29, 2015), http://www.shlegal.com/news-insights/when-will-the-english-courts-have-jurisdiction-over-a-dispute.

33. *Okpabi* [2017] EWHC (TCC) 89, [4].

34. *Id.* [13], [122] (stating the case was heard from November 22 to November 24, 2016, and the decision was announced on January 26, 2017).

35. *Id.* [122].

36. *Id.* [108].

37. *Id.*

38. *Id.* [72] (promulgating that courts must apply the three-part test of foreseeability, proximity, and reasonableness to find a duty of care).

39. Caparo Indus. Plc v. Dickman [1990] 2 AC 605 (HL) 633 (appeal taken from Eng.).

40. Chandler v. Cape, [2012] EWCA (Civ) 525 (Eng.).

41. *Id.* [80]; see also *Okpabi* [2017] EWHC (TCC) 89, [77].

42. Donoghue v. Stevenson [1932] AC 562 (HL) 580 (appeal taken from Scot.).

43. *Id*. at 580.

employees of the subsidiary.[44] For the reasonability requirement, a duty is assessed by weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.[45] In applying *Donoghue* and *Caparo*, the TCC decided that (1) the harm was not foreseeable to RDS, (2) RDS, as the parent corporation, did not have superior knowledge over SPDC, and (3) it was unreasonable to subject RDS to English jurisdiction because it would not be just, fair, or reasonable.[46]

E. Opening a Vee-Door for Success: How the U.S. Decides Jurisdictional Questions

Jurisdictional cases are more successful in U.S. courts which offer a suitable template for approaching and rectifying the jurisdictional problems in cases like *Okpabi*.[47] *International Shoe v. Washington*,[48] *Daimler AG v. Bauman*,[49] and *Asahi Metal Industry Co. v. Superior Court of California* [50] illustrate the two main theories in U.S. jurisdictional jurisprudence: the minimum contacts test and the stream of commerce tests.[51] A foundational case in U.S. jurisdictional jurisprudence is *International Shoe*, in which the petitioner was a Delaware corporation with its principal place of business in Missouri, and the respondent was the state of Washington who wished to collect on allegedly delinquent state unemployment fees.[52] The petitioner argued that it was improperly served due to a lack of jurisdictional authority over the petitioner because it (1) had no registered agents in the state, (2) was not an employer in the state, and (3) was not a corporation doing business in

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44. Thompson v. Renwick Grp. plc [2014] EWCA (Civ) 635, [37] (Eng.); *see also Chandler* [2012] EWCA (Civ) 525 [80].

45. Chandler [2012] EWCA (Civ) 525 [80].

46. Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89, [113], [118]-[19] (Eng.).

47. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (holding that "[j]urisdiction is proper… where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (summarizing that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (stating that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.").

48. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

49. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

50. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

51. *See Daimler AG*, 134 S. Ct. at 750-51; *Asahi Metal Indus.*, 480 U.S. at 105-06; *Int'l Shoe Co.*, 326 U.S. at 313.

52. *Int'l Shoe*, 326 U.S. at 313.

Washington and, therefore, the Supreme Court should set aside the respondent's notice.[53] However, the Court ruled that the corporation was properly served and subject to personal jurisdiction because it maintained sufficient "minimum contacts" with the forum state, therefore making it reasonable for the corporation to defend a lawsuit in Washington.[54] This standard, known as the "minimum contacts test," instructs that "contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."[55] Similarly, in *Perkins v. Benguet*,[56] a nonresident of Ohio state sued a company based in the Philippines.[57] Here, the Court decided that because Benguet had maintained a "continuous and systematic, but limited, part of its general business [in the forum state, Ohio]" by paying salaries, maintaining bank accounts and business correspondence, and conducting directors' meetings in Ohio, it was fair to subject the foreign company to the Ohio courts.[58]

Furthermore, in *Daimler*, Argentinian respondents sued a California company, alleging that the company's subsidiary committed human rights violations in Argentina.[59] The petitioner was a German company, but the respondents based their claim on the petitioner's subsidiary, Mercedes-Benz USA, LLC ("MBUSA"), which was incorporated in Delaware and had its principal place of business in New Jersey.[60] The respondents based jurisdiction on the fact that MBUSA distributed the petitioner's cars to California and had various facilities and offices in California.[61] However, the petitioner argued that the alleged acts took place outside of California

53. *Id.* at 312-13.

54. *Id.* at 316, 321; *see also* Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State are a prerequisite to its exercise of power over him.").

55. *Int'l Shoe*, 326 U.S. at 320; Edmond R. Anderson Jr., *Personal Jurisdiction Over Outsiders*, 28 MO. L. REV. 336, 345 (1963) ("[The minimum contacts test is] a flexible standard governing state courts' exercise of personal jurisdiction over foreign corporations, i.e., contacts or ties with the state making it reasonable and just according to traditional notions of fair play and substantial justice.").

56. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439 (1952).

57. *See id.* at 439 (reporting that the primary reason for suit was to compel the corporation to issue stock certificated and dividends).

58. *Id.* at 445; Anderson, *supra* note 56, at 346.

59. Daimler AG v. Bauman, 134 S. Ct. 746, 750-51 (2014).

60. *Id.*

61. *Id.* at 752.

and the U.S. so there was no basis for personal jurisdiction.[62] The Court held that the petitioner corporation's contacts with California were minimal and not continuous or systematic, thereby not subjecting it to personal jurisdiction because the corporation's conduct did not occur in or impact the state.[63]

Lastly, in *Asahi*, a California resident brought a products liability claim against a Japanese corporation.[64] The respondent relied on a stream of commerce argument to justify jurisdiction in California because the petitioner allegedly knew that some of its products would end up in California.[65] Rejecting this argument, the Court reasoned that although the petitioner may have known that its product might end up in California, the petitioner took no further action to "purposely avail itself of the California market" evidenced by its lack of agents, property, employees, or offices in the forum state.[66] In deciding *Asahi*, the Court, attempting to clarify the stream of commerce standard for determining whether "minimum contacts" has been established, announced two competing tests:

> Justice O'Connor's stream of commerce plus test [which] require[s] 'additional purposeful actions directed at the forum besides simply putting a product in the stream of commerce with knowledge that the product would be sold in the forum state[,]' . . . [and] Justice Brennan['s] . . . pure stream of commerce test, which require[s] no showing of additional conduct . . . 'to sustain jurisdiction in the forum where that product causes injury.'[67]

Overall, the specific personal jurisdiction cases in the U.S. creates a consistent narrative. The tests identify a level of contact between the parties which, in turn, determines whether a case may be heard in a given forum, prior to any determination of a duty.[68] Likewise, each test must be applied

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62. *Id.* at 751.

63. *Id.* at 761-62.

64. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105-06 (1987).

65. *Id.* at 112.

66. *Id.* at 103, 112; *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011) (reasoning that the three subsidiaries' connections with North Carolina were not continuous and systematic and, thus, the stream of commerce argument was unsuccessful because the respondents were unable to show that the petitioner purposely availed itself of the state).

67. Kaitlyn Findley, Comment, *Paddling Past* Nicastro *in the Stream Of Commerce Doctrine: Interpreting Justice Breyer's Concurrence as Implicitly Inviting Lower Courts to Develop Alternative Jurisdictional Standards*, 63 EMORY L.J. 695, 710-712 (2014) (explaining that the two tests were each supported by four justices).

68. *See Asahi Metal Indus*., 480 U.S. at 108-09 (stating the rule for establishing whether or not a court has jurisdiction to hear a case).

to the specific facts of each case.[69]

F. The Jurisdiction Question: Determination, Purpose, and Utility

Proper adjudication requires that all issues pertinent to the merits of a suit be raised and answered at the beginning stages of litigation.[70] The goal of addressing jurisdiction is to ensure that the case is brought in the appropriate forum and to guarantee that the court has the proper authority to hear the case.[71] Another goal is efficiency; it would be counterproductive to the judicial process to fully try a case on the merits and then move for objections to venue or demurrers.[72] Frequently, duty of care frameworks, rather than specific personal jurisdiction analyses, are used to ascertain adjudicatory authority in oil and gas lawsuits against foreign companies.[73] However, this method of deriving adjudicatory authority in foreign courts over Nigerian oil and gas disputes has resulted in inconsistent rulings and the unavailability of effective precedent.[74]

III. THE IMPACT OF INCONSISTENT RULINGS IN ADDRESSING JURISDICTION QUESTIONS IN NIGERIA

Due to inconsistent applications of the duty of care analysis, preliminary jurisdiction hearings for Nigerian oil and gas cases fail to balance business interests and human rights.[75]

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69. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952) (discussing that the amount and type of activities necessary to exercise specific personal jurisdiction are determined by the facts of each case).

70. *See* Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89, [13] (Eng.) ("It is obviously sensible, and entirely conventional, to have challenges to jurisdiction dealt with at the beginning of any action . . . ."); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 491 (1967).

71. Dobbs, *supra* note 70, at 491.

72. S*ee, e.g.*, Okolo v. Union Bank Ltd. [2004] 3 NWLR 87, 110 (Nigeria) (ruling that when the court finds that it does not have jurisdiction to hear and determine the matter before it, the proper order is to strike out the action so that the court would not carry out an exercise in futility and end up having its proceedings and outcomes amounting to nothing); *see, e.g.*, *Pre-Trial Motions*, DOJ, https://www.justice.gov/usao/justice-101/pretrial-motions (last visited Mar. 31, 2018) (suggesting that other lines of defense are motions to suppress and motions to dismiss).

73. Nicola Jägers et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, 107 AJIL UNBOUND 36, 38-39 (2014), https://pure.uvt.nl/portal/files/1577353/Jagers_et_al_AJIL_Unbound_2014.pdf (describing the *Palestinian Doctor* case).

74. *Id.*

75. *Id.* at 39-40 (noting that prior cases relied on the parent company-subsidiary company liability theory under corporate governance).

A. Using the American Specific Personal Jurisdiction Principles: How Should the Okpabi *Appeal be Tailored?*

To secure the consistency of jurisdiction jurisprudence, the court should reverse the *Okpabi* decision because the TCC improperly relied on a duty of care analysis as a form of ascertaining jurisdiction.[76] The current approach leads to "an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, and what action was taken and not taken."[77] Instead, the analysis should be limited to the substantial connections and relations that create links between the parties and the forum.[78] If U.S. standards are applied, Okpabi should be permitted access to the English court.[79]

i. Specific Personal Jurisdiction Answers the Question of Foreseeability

The *Okpabi* court discussed whether it was foreseeable that, from the parent company's point of view, the parent could be held liable for the acts of the subsidiary.[80] In doing so, the TCC focused on the defendant's knowledge, actions, and role in business operations."[81] Thus, the TCC concluded that (1) there was no evidence that RDS was involved in any oil operations in Nigeria, so it was not better placed than the subsidiary to prevent harm from occurring, and (2) the degree of knowledge that RDS had over SPDC was not comprehensive or high enough for a duty of care to attach.[82]

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76. *See* Lungowe v. Vedanta Res. Plc [2016] EWHC (TCC) 975, [62] (Eng.) (warning that the "court should not embark on a mini-trial" in deciding on a preliminary jurisdiction hearing); Roorda, *supra* note 8 (explaining that the problem with a duty of care analysis for jurisdiction disputes is that it often requires the trier of fact to evaluate the merits of the case).

77. Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89, [74] (Eng.) (quoting Lubbe v. Cape Plc [2000] UKHL 41 [20] (appeal taken from Eng.)).

78. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

79. *See Perkins*, 342 U.S. at 447-48; *Int'l Shoe Co.*, 326 U.S. at 321; Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 314 (2d. Cir. 1980) (listing the inquiries necessary to determine whether the party meets the minimum contacts necessary to fall under the court's jurisdiction).

80. Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89, [70]-[80] (Eng.).

81. *Id.* [74].

82. *See id.* [86], [116]-[17]; *see also* Roorda, *supra* note 8 (emphasizing that the while the plaintiffs focused on the interaction of RDS' policies that influence SPDC operations, the TCC focused on the "particular working relationship between RDS and its subsidiary, SPDC" and ruled that RDS' involvement with SPDC is minimal at best and, thus, RDS could not have prevented the harms from occurring).

However, the foreseeability requirement can instead be articulated through a specific personal jurisdiction argument by using the minimum contacts test derived from *International Shoe*.[83] The main inquiry in the minimum contacts test is whether the interaction between the corporation or its agents and the forum state is systematic and regular.[84] While business operations are not necessarily the focus for the minimum contacts inquiry, the focus should be the "presence of activities that occur within the state that are sufficient to satisfy due process."[85] In this context, RDS is liable for SPDC if: (1) it intervenes in trading operations as it relates to production and funding issues,[86] (2) RDS deals with financial matters, such as holding shares directly in SPDC, disseminating financial statements and updating investors with SPDC's information, all of which are "normal incidents" of a parent and subsidiary relationship,[87] and (3) RDS has some degree of knowledge about how SPDC functions over the continuous years since 2005 that it has served as the parent company.[88]

Under a U.S. personal jurisdiction regime, RDS would be subject to suit in England as it is incorporated there and the choice of location poses no measure of inconvenience for RDS.[89] Incidentally, this could be beneficial to SPDC because the TCC and the parties' lawyers have already "accumulated a body of experience and knowledge in this jurisdiction" from prior cases such as *Bodo v. Shell Petroleum Development Co. of Nigeria*[90]

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83. *See Int'l Shoe*, 326 U.S. at 316.

84. *Id.* at 317.

85. *Id.* at 316-17 (clarifying that "present" or "presence" symbolizes the corporate agent's activities within the state that courts will deem sufficient to satisfy the demands of due process and that those demands may be met by such contacts of the corporation with the forum state as makes it reasonable to require the corporation to defend the particular suit in said form); *see also* Roorda, *supra* note 8.

86. *See* Chandler v. Cape [2012] EWCA (Civ) 525, [80] (Eng.); Okpabi v. Royal Dutch Shell Plc [2017] EWHC (TCC) 89, [76] (Eng.) (satisfying one of the requirements reiterated in the *Chandler* test).

87. *Okpabi* [2017] EWHC (TCC) 89, [75], [85] (summarizing that the *Chandler* court's assertion that it can be difficult to ascertain what is normal incident in a parent-subsidiary relationship because the manner in which groups of companies operated is often very different, and it is possible that a subsidiary is run "purely as a division of a parent company," even though they still maintain a separate legal personality).

88. *Id.* [85], [116] (demonstrating that minimum contacts looks to the cumulative and continuous contacts between both parties and the forum for the years in dispute).

89. *See* Shyam Shanker, Okpabi v. Shell*: Limiting English Jurisdiction Over Human-Rights Abuses Abroad*, COLUM. J. TRANSNAT'L L.: THE BULLETIN, http://jtl.columbia.edu/okpabi-v-shell-limiting-english-jurisdiction-over-human-rights-abuses-abroad/ (last visited Mar. 31, 2018) (explaining that Justice Fraser conceded that England had jurisdiction over RDS because the company's domicile is in England).

90. Bodo v. Shell Petroleum Dev. Co. of Nigeria [2014] EWHC (TCC) 2170 (Eng.).

and *Lungowe v. Resources Plc*.[91] Therefore, by applying the minimum contacts principle, SPDC and RDS have maintained minimum contacts, thereby making SPDC amenable to suit in England.[92] Finally, doing so will not "offend 'traditional notions of fair play and substantial justice.'"[93]

ii. Specific Personal Jurisdiction Rectifies the Question of Proximity

As RDS is already domiciled in England, there was no issue of proximity to the forum for RDS. However, for SPDC, the court's jurisdictional inquiry focused on SPDC's relationship with its parent company, RDS.[94] To determine whether the proximity requirement was met, the court examined: (1) whether the party that committed the act and the person bound to take care of that person are closely related, and (2) who is better placed because of superior knowledge or expertise that they could have prevented the risk of injury.[95] Taking these into account, the court found that RDS is ultimately a holding company because it has no employees, does not participate in any operations or provide any services, and does not involve itself or intervene in its subsidiaries' operations.[96] The court's decision was based on a variety of legal technicalities to further distance the relationship between RDS and SPDC; thereby weakening the chain of liability between the claimants and the forum.[97]

Nevertheless, using a specific personal jurisdiction argument, the principle

91. Lungowe v. Vedanta Res. Plc [2016] EWHC (TCC) 975 (Eng.); *see Int'l Shoe*, 326 U.S. at 317; *Okpabi* [2017] EWHC (TCC) 89, [42] (defining this idea as the Cambridgeshire factor); Shanker, *supra* note 89.

92. *Int'l Shoe*, 326 U.S. at 321 (ruling that because *International Shoe Co.* made "itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state."); Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 314 (2d Cir. 1980) (affirming that necessary contacts must exist before courts can exercise specific personal jurisdiction and the exercise must embody the Constitutional requirements of due process); *Okpabi* [2017] EWHC (TCC) 89, [42].

93. *See Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

94. *See* Shanker, *supra* note 89 (noting that the Court focused so narrowly on the operational relationship between RDS and SPDC and that many factors played a role in the court's ruling that RDS had no duty of care over its subsidiary's actions).

95. Donoghue v. Stevenson [1932] AC 562 (HL) 581 (appeal taken from Scot.); Thompson v. Renwick Grp. plc [2014] EWCA (Civ) 635, [37] (Eng.).

96. *Okpabi* [2017] EWHC (TCC) 89, [85].

97. Roorda, *supra* note 8 (asserting that it is now clear that "bringing claims against parent companies for misconduct of their subsidiaries is fraught with difficulties, even though it may be hypothetically possible," especially now that the court in *Okpabi* court is conservatively approaching the emerging trend of transnational private liability of corporations for human rights violations).

of continuous and systematic affiliations derived from *Perkins* and *Daimler* counters the proximity issue.[98] Similarly, the stream of commerce concepts from *Asahi* serve to illuminate the other contacts and responsibilities that could be made an ingredient of the TCC's jurisdictional analysis, as opposed to the TCC's analysis of RDS' control (or lack thereof) of SPDC's potentially exist outside of the business and operational affairs in *Okpabi*.[99]

The stream of commerce principle derived from *Asahi* can be used to extend jurisdiction to SPDC.[100] RDS, as the ultimate holding company of the Shell Group companies, is (1) responsible for setting the overall strategy and business principles for SPDC, (2) responsible for performance reports from SPDC, and (3) in charge of making the necessary market and investor disclosures.[101] These limited, but continuous and systematic relationships bind SPDC to RDS, and, thereby, jurisdiction should be extended to the TCC.[102] Most importantly, RDS is responsible for changing and amending the corporate structure of its relationship with SPDC and, therefore, even on paper, RDS is automatically better positioned to understand and foresee any risk of injury because of its superior knowledge of and relationship with SPDC.[103] Thus, due to the nature of this relationship, it is fair to infer that the subsidiary will "rely upon the parent deploying its superior knowledge

98. Daimler AG v. Bauman, 134 S. Ct. 746, 756 (2014); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952).

99. *See Okpabi* [2017] EWHC (TCC) 89, [72]-[74] (quoting Lubbe v Cape Plc [2000] UKHL 41, [6]) (discussing whether the parent company "exercised *de facto* control over the [business] operations of a (foreign) subsidiary and knew, through its directors, that those operations involved risks to the health of workers and persons in the vicinity of the factory"); *id.* [4] (describing SPDC as an "exploration and [oil] production company"); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (ruling that, to place a product in the stream of commerce without any further action, does not show that the defendant purposefully directed itself towards the forum).

100. *See Asahi Metal Indus*., 480 U.S. at 112; *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011) (deciding that North Carolina was not a sufficient forum to subject the petitioners to because they were in no way declared at home in the state and their connection fell very short of "'the continuous and systematic general business contacts' [that are] necessary to empower North Carolina to entertain suit against them on claims that unrelated to anything that connects them to the State.").

101. *Okpabi* [2017] EWHC (TCC) 89, [85], [101] (attesting that from an organizational structure, "RDS does exercise significant control over the financial, business and operation affairs of the subsidiaries through the RDS Executive Committee," but dismissing this as an irrelevant consideration to proximity and focusing, instead, solely on the business and operational affairs of the relationship).

102. *See, e.g., Perkins*, 342 U.S. at 438, 447-48 (describing a company that devoted personal attention to policy making and dispatching funds for the company during wartime as sufficiently limited activities which were continuous for a period of time).

103. *See Okpabi* [2017] EWHC (TCC) 89, [77], [106] (quoting Thompson v. Renwick Grp. Plc [2014] EWCA (Civ) 635, [37] (Eng.)).

in order to protect its employees from risk of injury."[104] If the entire concept of a holding company is a company that oversees the policies and management of a company it holds shares in, it then follows that the holding company must understand how the subsidiary operates to reap its benefits.[105] Therefore, although RDS does not interfere with SPDC's operations, SPDC's business and financial interactions with RDS can tie SPDC to the TCC.[106]

Unlike the defendants in *Asahi* who did not purposefully avail themselves of the forum state, here, the stream of commerce test is satisfied because SPDC purposely availed itself of the English forum through its relationship with RDS.[107] Additionally, by failing to adequately operate the Nigerian subsidiary's assets, RDS can also be held liable for the claims brought by the plaintiffs.[108] Thus, because SPDC availed itself of the English forum vis-à-vis its connections with RDS, it is reasonable that the court should find that the defendants can be heard before the TCC and, therefore, provide an avenue for the plaintiffs to seek redress.[109] Furthermore, the proximity requirement is better addressed using the personal jurisdiction stream of commerce principle because the totality of the interactions between both defendants are not limited solely to operational activities, but also include the financial and business relationships.[110]

Furthermore, using the continuous and systematic rationale derived from *Daimler* and *Perkins*, the existence of the relationship between RDS and SPDC for almost twelve years gives rise to continuous and systematic

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104. *Id.*; *see generally Parent Company*, INVESTOPEDIA, http://www.investopedia.com/terms/p/parentcompany.asp (last visited Mar. 31, 2018) (noting that the nature of holding companies is such that they are generally in the same industry or a complimentary industry).

105. *See Holding Company*, INVESTOPEDIA, http://www.investopedia.com/terms/h/holdingcompany.asp (last visited Mar. 31, 2018) (holding companies must still "understand how their subsidiaries operate to evaluate the businesses' performance and prospects on an ongoing basis").

106. *See Okpabi* [2017] EWHC (TCC) 89, [85] (detailing the operational extent of the relationship between RDS and SPDC).

107. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987); *Okpabi* [2017] EWHC (TCC) 89, [85].

108. *See Okpabi* [2017] EWHC (TCC) 89, [72] (emphasizing that by looking at the range of factual matters, the court can conclude that there is a claim against the parent company).

109. *But see* Roorda, *supra* note 8 (speculating that if *Okpabi* is decided on appeal similarly, then the "courts of parent companies' home states [may] become inaccessible for victims of extraterritorial human rights violations.").

110. *See Okpabi* [2017] EWHC (TCC) 89, [85]; Roorda, *supra* note 8 (noting that the TCC based a better part of the judgement on the particular working and operational relationship between RDS and SPDC).

affiliations.[111] To the extent that RDS benefits or gains interests from its investments in SPDC's operations, it is enough to link SPDC to RDS, which then subjects SPDC to the TCC's jurisdiction.[112] Accordingly, on appeal, both defendants can be hauled into court in England because SPDC's fiscal activities, business practices, and expertise derive authority from RDS, who is incorporated in the contested forum (England).[113]

The continuous and systematic analysis derived from *Daimler* and *Perkins* also invalidates the argument that RDS is not in an authoritative position over SPDC.[114] It is good public policy for courts to encourage and subsequently permit extraterritorial jurisdiction over corporations that may not otherwise take responsibility for the operations and actions of their subsidiaries.[115] Thus, the plaintiffs were correct in arguing that RDS had superior knowledge of it subsidiary's environmental policies and because of its role as the parent company, "RDS was better placed to prevent harms to others better than SPDC itself, and should have taken certain actions to [both] avoid…" and rectify the harms.[116]

Overall, the court did not appropriately consider RDS' and SPDC's financial and business ties.[117] Therefore, by basing its decision on various legal technicalities, the court separated the relationship between RDS and

111. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952).

112. *See Okpabi* [2017] EWHC (TCC) 89, [85] (providing that RDS was not the holding company until 2005 and it was just a shell company prior to that time)*; see, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) (reiterating that the inquiry into exercising specific personal jurisdiction with single or occasional acts is whether there was some activity that the corporation purposefully availed itself of within the forum state that invoked the benefits and protections of its laws).

113. *See Daimler*, 134 S. Ct. at 758 (upholding that general jurisdiction now occupies a less dominant place in jurisdictional inquiries because specific personal jurisdiction increasingly focuses the inquiry on the relationship between the defendant, the forum, and the litigation claim).

114. *See id.*; *see also Perkins*, 342 U.S. at 445; *Okpabi* [2017] EWHC (TCC) 89, [106].

115. *See generally* Shanker, *supra* note 89 (explaining that the *Okpabi* decision can be read as highly fact-specific inquiry that presents hurdles for potential future suits in English courts, particularly with respect to holding parent companies liable for the actions of the foreign subsidiary).

116. *See also Okpabi* [2017] EWHC (TCC) 89, [87]; Roorda, *supra* note 8; June Rudderdam, *Canada: Understanding Holding Companies*, MONDAQ (July 28, 2011), www.mondaq.com/unitedstates/x/134060/Directors+Officers+Executives+Shareholders/Understanding+Holding+Companies (describing that harm does not necessarily have to be material or tangible but can also be reflected as the loss of a compnay's good will).

117. *See Okpabi* [2017] EWHC (TCC) 89, [88] (finding that "what the defendants said in their evidence should not necessarily be taken at face value" because RDS may not operate its business in the way it demonstrated on paper).

SPDC, which further attenuated the relationship between the defendants and the forum.[118]

iii. Specific Personal Jurisdiction Balances the Question of Reasonableness

The *Okpabi* court used the "three-fold test" to determine whether the imposition of a duty upon the defendants would be "fair, just and reasonable," and, thus, whether it is appropriate to haul the defendants into court in England.[119] In *Goldberg*, the court noted that a duty exists when you weigh "the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[120] Similarly, the court in *McLoughlin* listed "[s]pace, time, distance, the nature of the injuries sustained, and the relationship of the plaintiff to the immediate victim of the accident" when applying the reasonably foreseeable test.[121] However, the *Okpabi* court failed to adequately balance these general fairness interests.[122] The *Okpabi* ruling created a toxic precedent which provides parents companies an incentive to remain detached from the operations of their subsidiaries to lower their chances of being held liable alongside the subsidiary.[123]

Within the U.S. framework, reasonableness is demonstrated in terms of due process rights.[124] Applying similar principles on appeal, the court should acknowledge that (1) the knowledge and expertise of the TCC is beneficial to both parties, (2) the joint nature of the claims against RDS and SPDC can provide the plaintiffs a positive, fair, and reasonable outcome because SPDC's jurisdiction hinges on RDS' claim,[125] and (3) finding jurisdiction in this claim is reasonable, not oppressive to the defendant, and it promotes some socially desirable objective.[126]

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118. *See id.* [75] (concluding that whether SPDC and RDS are separate entities does not preclude the *Okpabi* claimants).

119. *See id.* [113]-[15]; *see also* Caparo Indus. Plc v. Dickman [1990] 2 AC 605 (HL) 633 (appeal taken from Eng.).

120. Goldberg v. Hous. Auth. of Newark, 186 A.2d 291, 293 (N.J. 1962).

121. McLoughlin v O'Brian [1983] 1 AC 410 (HL) 431 (appeal taken from Eng.).

122. *See Okpabi* [2017] EWHC (TCC) 89, [113]-[15].

123. *See id.*; Roorda, *supra* note 8 (deducing that the less involved the parent companies are with health, safety, and environmental policies with their subsidiaries, the further they are from liability).

124. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

125. *See Okpabi* [2017] EWHC (TCC) 89, [89] (lamenting that the judge himself referred to the financial standing and positions of the claimants and the defendants; noting that the former was poor and the latter were rich but failed to adequately weigh these in considering fairness and justice); Roorda, *supra* note 8 (stating that the suit can only proceed against SPDC, because it is anchored if there is a claim for RDS).

126. *See also McLoughlin* [1983] 1 AC 410 (HL) 431.

Furthermore, access to justice should play a role in accessing jurisdiction, as it pertains to traditional notions of fair play and substantial justice.[127] On appeal, the court should consider whether legal aid, such as financial assistance, would be available to the plaintiffs in their home forum, i.e., Nigeria.[128] The availability of legal aid and an access to justice is dependent on a number of factors, such as whether costs are high, whether the time between commencement of the claim and a ruling is reasonable, and whether there are extenuating, unusual, or other relevant circumstances to account for.[129]

Expanding adjudicatory authority beyond duty of care to include personal jurisdiction highlights the flexibility of the U.S. specific personal jurisdiction principles, which can be applied in the TCC.[130] Just as these principles protect the U.S. constitutional right to due process, when these principles are applied within the context of Nigerian oil and gas cases, it can likewise further important principles enshrined in the Nigerian Constitution; dignity for the human person and the right to a fair hearing.[131] Thus, using a specific jurisdiction analysis allows the court to weigh factors such as the defendant's due process interests and the plaintiff's interest in swift adjudication; the public policy implications of extending judicial authority over foreign corporations; and the state's interest in providing a forum for citizens to seek redress for their injuries.[132] In doing so, these factors and considerations

127. *See, e.g.,* Lungowe v. Vedanta Res. Plc [2016] EWHC (TCC) 975, [94] (stating that access to justice in Zambia was almost impossible).

128. *See* Connelly v. R.T.Z. Corp. Plc [1997] UKHL 30, [30] (appeal taken from Eng.) (noting that the availability of financial assistance in the United Kingdom, coupled with the non-availability in the appropriate forum (which was Namibia) was "exceptionally. . . a relevant factor.").

129. *See Lungowe* [2016] EWHC (TCC) 975, [169]-[198] (analyzing whether the claimants had access to justice in their home forum of Zambia); *see also* Hakeem Ijaiya & O.T. Joseph, *Rethinking Environmental Law Enforcement in Nigeria*, 5 BEIJING L. REV. 306, 315 (2014) (describing that corruption, bad governance, and poor enforcement mechanisms can also be considered during inquiries about access to justice).

130. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011); Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

131. U.S. CONST. AMEND. XIV, § 1; CONSTITUTION OF NIGERIA (1999), §§ 34, 36.

132. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011); Hertz Corp. v. Friend, 559 U.S. 77, 80-81 (2010); *see also* Anderson, *supra* note 56, at 337; Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 635 (2009) (noting that a court should look at the following three things: (1) whether the cause of action "'arises out of . . .' the defendant's contact with the forum," (2) whether the "defendant purposefully availed itself of the benefits of the forum," and (3) whether "granting jurisdiction comports with 'fair play and substantial justice.'"); William H. Richman, *Understanding Personal Jurisdiction*, 25 Ariz. St. L.J. 599, 610-611 (1992) (critiquing the Supreme Court's inconsistent use of additional interests in justifying its exercise of specific

allow for a rich and robust inquiry into each individual case, thus providing legal stability and reliability in Nigerian oil and gas disputes.

IV. PERFORMING WORK-OVERS: FEASIBLE MECHANISMS FOR CHANGE

A. Create Long Arm Statutes and Federal Legislation to Govern Oil and Gas Cases

Moving forward, to resolve oil and gas disputes at home, Nigeria should create a consistent framework for approaching jurisdiction issues in oil and gas cases through passing long arm statutes. Long arm statutes allow local courts to exercise jurisdiction over foreign corporations whose actions have caused injury to the plaintiff.[133] In the U.S. these statutes grant authority to a state court to make a defendant corporation amenable to suit in that forum, so long as the basic principles of minimum contacts and fairness are balanced and satisfied.[134]

Similarly, Nigeria could create long arm statutes that would guarantee the courts the power to establish jurisdiction over foreign corporations. These statutes could potentially be effective in the Niger Delta states where many of the lawsuits originate because foreign oil companies could be hauled into court in the local courts. Furthermore, they can grant those states personal jurisdiction over RDS and other oil companies based on the subsidiary's exploration, drilling, and other related activities within the state.[135]

Additionally, due to the Nigerian economy's inherent dependence on oil and gas, a federal mandate should be established along the lines of international law. Such a mandate could be constructed like the Federal Tort Claims Act ("FTCA").[136] The FTCA allows private citizens and parties to sue the U.S. in U.S. federal court for torts committed by an agent of the U.S.[137] Since the FTCA grants federal courts jurisdiction over all claims

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personal jurisdiction, such as territorial sovereignty, defendant's inconvenience, jurisdictional surprise, state interest, and necessity).

133. *Int'l Shoe*, 326 U.S. at 317.

134. *Id.* at 316-17, 323 (noting that a balancing test is necessary when subjecting a corporate defendant to another forum; the factors to consider are the undue burden to the defendant to litigate in an inconvenient forum and the interest of the state in protecting its citizens).

135. *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (holding that Massachusetts, via a long arm statute, may exercise jurisdiction over a Pennsylvania resident from an accident that occurred on a Massachusetts highway because the defendant consented to jurisdiction by merely driving on a Massachusetts state highway); *see, e.g.,* MASS. GEN. LAWS ch. 223A, § 3 (2018); LA. STAT. ANN. § 13:3201 (2017); N.Y. C.P.L.R. § 302 (McKinney 2018).

136. *See* Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2012).

137. *See id.* §§ 1346(b), 2674.

brought under that statute, a Nigerian version of such an act would automatically grant the federal courts jurisdiction over claims against oil and gas companies, but apply the local law of the jurisdiction where the act occurred.[138] Such a statute could be beneficial for Nigeria because it would create more uniform application of the law and forge partnerships among the two levels of government who would resolve these disputes.

V. CONCLUSION

The Court in *Okpabi* court took a very limiting and conservative view of the meaning of operations to prevent the case from being heard by the TCC. Such an approach has potentially harmful business implications because parent corporations are now be incentivized to be less involved with the "direct operations" or actions of their subsidiaries, absolving them of answering to future liability claims. Going forward, this could deny injured plaintiffs the chance to receive adequate and just compensation for their injuries. Creating a legal framework for determining personal jurisdiction in Nigeria would provide a richer and more robust exploration of the merits of these oil and gas cases, thus moving away from the current duty of care framework. If the TCC decided *Okpabi* through a personal jurisdiction analysis, the TCC would likely have jurisdiction to hear the case and, potentially, provide the Bille and Ogale communities some relief.

138. *See id.* § 1346(b).

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