


8-1-1998

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Recommended Citation

Jennifer A. Mencken, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. Int'l & Comp. L. Rev. 461 (1998), <http://lawdigitalcommons.bc.edu/iclr/vol21/iss2/5>

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Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems

INTRODUCTION

At the tender age of 16, Jacob Friedman travelled alone to Zurich, smuggling his father's earnings from the runaway inflation of Romania to the safety of the Swiss banking system.¹ Jacob's father believed that the Swiss franc was stable and that his numbered account was protected from disclosure to civil authorities.² Jacob was the only member of his family to escape Auschwitz.³ In the 1970s, he travelled from his new home in New York to Zurich in search of his father's life savings.⁴ The Swiss banks told him that if he could not remember the secret account number, the account would not be released to him.⁵

Estelle Sapir's father was a wealthy investment banker from Warsaw who often deposited large sums with Cr dit Suisse.⁶ Like Jacob and millions of others, Estelle lost her entire family in the Holocaust.⁷ In 1947, Estelle travelled to Geneva carrying with her a deposit slip from 1938.⁸ When she arrived at the main branch of Cr dit Suisse, the bankers told her that without a death certificate they would not release her father's bank account.⁹ Even though she told the bankers that Nazi Germany did not issue death certificates after they killed people in gas chambers, the bankers remained adamant: without proof that her father was dead, the bank would keep the money.¹⁰ Jacob and Estelle

¹ See Sean MacCarthaigh, *Swiss Held to Account*, IRISH TIMES, Mar. 8, 1997, available in LEXIS, Nexis Library, Curnws File.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See MacCarthaigh, *supra* note 1; see also *Newshour: Breaking the Code* (PBS television broadcast, Nov. 19, 1996), <http://www1.pbs.org/newshour/bb/europe/november96/swiss_accounts_11-19.html> [hereinafter *Breaking the Code*].

⁷ See *Breaking the Code*, *supra* note 6.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

have joined almost 10,000 others in a class action suit on behalf of American individuals seeking answers surrounding these long dormant accounts.¹¹

Immediately following World War II and the Holocaust, people and nations commenced a process of returning their lives to order. Survivors began the search for lost loved ones and lost assets that had been seized by Nazi Germany to finance its war effort. For some assets the task was easy: everyone knew that the *Mona Lisa* belonged to the Louvre and it would be impossible to ferret away such a recognizable painting.¹² But for many survivors and their families, their entire lives were bound in a single bookkeeping entry in a bank, and that bank would not come forth with information. By 1996, allegations against the Swiss banking industry had reached a fever pitch.¹³ Decades of research into missing assets had culminated in thousands of claims that Swiss banks were withholding millions of stolen or dormant accounts from their rightful owners and heirs.¹⁴

In a different system, these claims could be evaluated quickly by a review of bank records.¹⁵ But the banks in question are Swiss, and under Swiss law, bank records are not turned over to anyone regardless of the allegations made.¹⁶ In this instance, Switzerland was not about to grant full access to the claimants.¹⁷

This refusal, approved by the Swiss government, sparked renewed questions concerning the appropriateness of bank secrecy laws.¹⁸ In this instance, the same laws that were enacted to provide protection to individuals against the seizure of assets by the Nazi Gestapo were now being used against these same individuals to deny them answers to long unresolved questions.¹⁹

¹¹ See MacCarthaigh, *supra* note 1.

¹² The ownership of artwork and artifacts is maintained in the work's provenance. The provenance of a particular piece is, by virtue of scholars and attention to collecting, effectively a matter of public record; thus, the withholding of ownership information by one entity may have little or no effect on reparation efforts.

¹³ See Marcus Kabel, *Swiss Hit Back at D'Amato's Holocaust Charges*, REUTERS N. AM. WIRE, Nov. 8, 1996, available in LEXIS, Nexis Library, Curnws File [hereinafter *Swiss Hit Back*].

¹⁴ See Marcus Kabel, *Swiss Banks Greet U.S. List of Holocaust Accounts*, REUTERS EUR. BUS. REP., Oct. 16, 1996, available in LEXIS, Nexis Library, Curnws File [hereinafter *Swiss Banks Greet*].

¹⁵ See *infra* notes 105–35 and accompanying text.

¹⁶ See *infra* notes 82–104 and accompanying text.

¹⁷ See *Swiss See No Need for New Wartime Probe by Jews*, REUTERS WORLD SERV., Jan. 21, 1997, available in LEXIS, Nexis Library, Curnws File.

¹⁸ See *infra* notes 19–29 and accompanying text.

¹⁹ See *Newshour: Accounts Due* (PBS television broadcast, Dec. 11, 1996) (statement of Senator

This Note will discuss the nature of the allegations made against Switzerland and the actions of the Swiss banks both during and after World War II. The alleged conduct will be reviewed in the context of international human rights standards and developing theories of crimes against humanity. Further, this Note, using the Swiss system as a model, will offer potential solutions to the inherent problems of bank secrecy laws in general. Part I examines the allegations that have been made against Switzerland and the efforts that have been undertaken to solve this crisis. Part II will seek to outline the causes for the allegations against the Swiss banks, focusing on the evolution and doctrine of bank secrecy and financial privacy laws. Part III details the traditional methods of overcoming bank secrecy laws, focusing on the treatment of financial privacy in the United States and the cooperation and procedures that have arisen for circumventing secrecy laws. Part IV proposes allowing the relaxation of financial privacy laws in instances of universal human rights violations and crimes against humanity. Part V analyzes the inherent problems of bank secrecy with regards to maintaining the protection of customer rights and the integrity of the banking system. Part VI proposes the possibility of maintaining an oversight committee, by establishing a new committee and expanding the authority of an existing body, to serve as a point of redress and arbiter of discovery disputes and to establish and maintain general supervising standards. The Note concludes that while banking secrecy does not need to be eliminated, the international banking community must establish feasible and responsive methods for individuals seeking access to financial records.

I. THE ALLEGATIONS

The evidence uncovered to date points to active and systematic Swiss collaboration with the Third Reich.²⁰ There are three parts to the Swiss problem. First, several hundred tons of gold bullion were accepted from Hitler's central bank in exchange for Swiss francs.²¹ These "neutral" francs were then used to purchase, among other items, steel from

D'Amato) <http://www1.pbs.org/newshour/bb/europe/december96/swiss_12-11.html> [hereinafter *Accounts Due*]; Cathryn J. Prince, *Gold Rush on Swiss Banks: Story of Nazi Loot Unfolds*, CHRISTIAN SCI. MONITOR, Sept. 27, 1996, at 8 (Bus. & Mon. Sec.).

²⁰ See MacCarthaigh, *supra* note 1. Other allegations of collusion levied against the Swiss include the creation of the notorious "Jew stamp" for passports and allowing German forces and weapons shortcuts by train through the Alps. See *id.*

²¹ See *id.*

Switzerland and Sweden, and tungsten from Portugal.²² Second, the accounts held by Jewish individuals were either seized by the Third Reich in contravention of the Swiss secrecy laws or new Third Reich accounts were funded with assets seized from the conquered territories.²³ Lastly, the banks have refused all access to dormant accounts, claiming the tenets of Swiss law and banking practice prohibit such disclosure.²⁴

A. *Reactions Immediately Following the End of World War II*

In 1939, Europe's central bankers and Swiss officials reportedly knew exactly how much gold Germany had in reserves.²⁵ By 1945, the Swiss had bought vast sums of bullion from the Nazis, without stopping to question from where the surplus was coming.²⁶ Historians now believe that the extra gold was plundered from the national treasuries of the eleven Nazi-occupied territories and from the teeth and fingers of prisoners before they were put to death.²⁷

Almost twenty years after World War II, Swiss Federal Archive officials finally conducted a sweep of Swiss bank records for accounts dormant since the Holocaust.²⁸ In connection with this search, a decree was passed by the Swiss government on December 20, 1962, as a compromise between bank secrecy and the obvious injustice to those who were disadvantaged by the maintenance of strict secrecy.²⁹ The decree became effective on September 1, 1963, and remained valid for ten years.³⁰ The decree applied to the "forgotten" accounts belonging

²² See *id.*; Batsheva Tsur, *Burg Asks for Details of Swedish Steel for Nazi Gold*, JERUSALEM POST, Jan. 22, 1997, available in LEXIS, Nexis Library, Curnws File.

²³ See MacCarthaigh, *supra* note 1. High-ranking German officials often kept some of the seized assets for their own personal use. See *id.*; see also LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

²⁴ See MacCarthaigh, *supra* note 1; *Accounts Due*, *supra* note 19.

²⁵ See MacCarthaigh, *supra* note 1.

²⁶ See *id.*

²⁷ See *id.*; *Newshour: Righting Past Wrongs* (PBS television broadcast, Feb. 4, 1997) (statement of Paul Volcker), <http://www1.pgs.org/newshour/bb/europe/janjune97/gold_2-4.html> [hereinafter *Righting Past Wrongs*].

²⁸ See Michael Shields, *Swiss Give Poland List of Wartime Bank Accounts*, REUTERS FIN. SERV., Jan. 17, 1997, available in LEXIS, Nexis Library, Curnws File.

²⁹ See EDOUARD CHAMBOST, *BANK ACCOUNTS: A WORLD GUIDE TO CONFIDENTIALITY* 7-8 (1983). Other professionals, such as lawyers and accountants, were subject to the decree. See *id.*; see generally, LE SECRET BANCAIRE SUISSE (Maurice Aubert, Jean-Philippe Kernén, & Herbert Schönle eds., 1995) [hereinafter AUBERT, SECRET BANCAIRE].

³⁰ See CHAMBOST, *supra* note 29, at 7.

to foreign or stateless owners with whom there had been no positive contact since May 9, 1945.³¹ Pursuant to the decree, the "forgotten" assets were to be declared to the Missing Persons' Asset Bureau.³² After the ten years, the funds were distributed to the Swiss Federation of Israeli Communities in Zurich and to the Central Office for helping refugees.³³

B. *Modern Investigations and Discoveries*

Until the end of 1995, the World Jewish Congress, through the efforts of president Edgar Bronfman,³⁴ had been seeking answers and redress behind the scenes.³⁵ Just like Jacob Freidman and Estelle Sapir when they tried to find answers about their lost family fortunes, Bronfman reached a dead-end when he requested that access be granted to Swiss bank records.³⁶ Faced with a complete denial by Swiss bankers, Bronfman turned to Senator Alfonse D'Amato of New York, who as Chairman of the Senate Banking Committee launched a U.S. Senate investigation into Switzerland's role during the war.³⁷

Initially, the Swiss government argued that full disclosure was made during the reparations negotiations of 1946, and that the treaty enacted was still valid and enforceable.³⁸ According to that agreement, Switzerland paid 371 million Swiss francs (SwF) (about 90 million U.S. dollars at the time) to settle Allied claims for reparations.³⁹

In May of 1996, an independent panel was created to investigate the allegations levied by the World Jewish Congress.⁴⁰ Former U.S. Federal Reserve Chairman Paul Volcker was appointed head of the investigative commission, which also featured representatives from Swiss banks and Jewish lobbies.⁴¹ The Volcker Commission is currently reviewing all

³¹ See *id.* at 8.

³² See *id.*; AUBERT, *SECRET BANCAIRE*, *supra* note 29.

³³ See CHAMBOST, *supra* note 29, at 8.

³⁴ Mr. Bronfman is also the chief executive of Seagram Inc.

³⁵ See MacCarthaigh, *supra* note 1.

³⁶ See *id.*

³⁷ Much of the initial investigation centered on newly declassified wartime documents. See *id.*; *Swiss Banks Greet*, *supra* note 14.

³⁸ See Marcus Kabel, *Swiss Say 1946 Nazi Wealth Accord Remains Valid*, REUTERS EUR. BUS. REP., Sept. 25, 1996, available in LEXIS, Nexis Library, Curnws file [hereinafter *Wealth Accord*].

³⁹ The treaty was signed in the name of all the Allied countries, not solely the United States. See *id.*

⁴⁰ See *id.*

⁴¹ See *Righting Past Wrongs*, *supra* note 27.

bank accounts opened by financial institutions between 1933 and 1945 which have remained inactive for more than one decade.⁴² There is also a concurrent Swiss investigation, headed by Thomas Borer, a diplomat charged with examining all aspects of Swiss conduct during the war.⁴³ Pending a full Swiss investigation, the banks agreed to establish a limited fund for Holocaust victims.⁴⁴

The three largest Swiss banks, Union Bank of Switzerland, Swiss Bank and Crédit Suisse, became the target of an organized boycott by New York City and New York State.⁴⁵ The boycott came after a leak of an internal cable by Carlo Jagmetti, the Swiss Ambassador to Washington, urging the Swiss Minister of Foreign Affairs to “wage war against those making allegations that Swiss banks had acted improperly.”⁴⁶ Moreover, on the night of January 9, 1997, a security guard for Union Bank of Switzerland, while making his rounds, discovered two cartloads of documents dating back to World War II in the bank’s shredding room, awaiting destruction.⁴⁷ The Swiss government had recently passed a law prohibiting the destruction of any document relating to the war.⁴⁸ The security guard was promptly fired after he removed some documents from the carts and turned them over to the World Jewish Congress.⁴⁹ Faced with these allegations, the three largest banks and the Swiss government established a fund for Holocaust survivors living in need.⁵⁰

The walls of bank secrecy are also beginning to crack in the face of international outcry.⁵¹ On January 17, 1997, Switzerland released the

⁴² See *U.S. Says Swiss Moving Appropriately on Nazi Gold*, REUTERS WORLD SERV., Jan. 13, 1997, available in LEXIS, Nexis Library, Curnws File.

⁴³ Under the authority of the Foreign Ministry, the Swiss Commission was created in October 1996. *Id.*

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ See Marcus Kabel, *Swiss Apologize to Jews*, REUTERS N. AM. WIRE, Jan. 15, 1997, available in LEXIS, Nexis Library, Curnws File [hereinafter *Swiss Apologize*]. Switzerland’s Economic Minister, Jean-Pascal Delamuraz, called the Jewish demands for restitution “extortion and blackmail.” See *id.*

⁴⁷ See MacCarthaigh, *supra* note 1.

⁴⁸ *Id.*

⁴⁹ *Id.* Later, a historian working for Union Bank claimed that none of the documents which were ultimately destroyed had any relation to the ongoing investigation. See Greg Calhoun, *Suspicious Swiss Guard Gives Jews Bank Documents*, Jan. 14, 1997, REUTERS N. AM. WIRE, available in LEXIS, Nexis Library, Curnws File.

⁵⁰ See *Newshour: Swiss Accounting* (PBS television broadcast, Feb. 28, 1997) (statement of Thomas Borer), <http://www1.pbs.org/newshour/bb/europe/janjune97/nazi_2.28.html>. It is not known if any disbursements have actually been made.

⁵¹ The Swiss Parliament gave final approval in December 1996, to a panel of historians and

names of 53 Polish citizens whose accounts have been dormant since before the war.⁵² According to a Swiss report, the Swiss government paid Warsaw 464,000 SwF in 1975, under a pact that settled Swiss claims for property seized by communist Poland after the war.⁵³ At the time of the settlement, however, Switzerland would not divulge the account holders' names, thus Poland placed the fund into its national budget, but was never able to search for possible heirs.⁵⁴ The money to fund the payout came from a pool of 10 million SwF found in the 1960s search for ownerless accounts.⁵⁵ While answers to all the allegations may never be known, the questions being raised attack the heart of the financial privacy system and the international banking community.

II. HISTORY AND EVOLUTION OF BANK SECRECY LAWS

A. *History of Laws*

While the desire to keep personal financial transactions out of the public eye has always been inherent to a money-changing civilization, systematic practice and codification of bank secrecy laws did not occur until after World War I.⁵⁶ The hyperinflation and exchange controls caused by World War I compelled financially prudent individuals to place assets in banks and other financial institutions outside their home nations.⁵⁷ Each time a nation restricted the interest and exchange rates in attempts to control chaotic post-war economies, the appeal of stable and friendly economic environments was enhanced.⁵⁸ Against this backdrop of capital flight, Nazi Germany enacted swift and deadly penalties to stem the new bank secrecy order.⁵⁹ After coming to power in 1933, the Nazi government enacted a regulation requiring

experts empowered to lift the strict secrecy laws and conduct searches into bank archives. See Marcus Kabel, *Swiss Banks Hail Government's Help on Holocaust Funds*, REUTERS N. AM. WIRE, Oct. 28, 1996, available in LEXIS, Nexis Library, Curnws File [hereinafter *Government Help*].

⁵² See Shields, *supra* note 28.

⁵³ Polish-owned bank accounts held in Swiss banks were used to offset Swiss claims. See *id*; *Righting Past Wrongs*, *supra* note 27.

⁵⁴ See Shields, *supra* note 28. A similar problem exists with a 1975 payoff to Hungary of 325,000 SwF.

⁵⁵ See *id*.

⁵⁶ See C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 Nw. J. INT'L L. BUS. 454, 455 (1992); CHAMBOST, *supra* note 29, at 5.

⁵⁷ See Jones, *supra* note 56, at 455.

⁵⁸ See *id*.

⁵⁹ See *id*.

all German nationals to declare assets held outside of Germany, with non-compliance punishable by death.⁶⁰ When three Germans were executed the following year, the Swiss government codified the secrecy customs of Swiss bankers.⁶¹

In the early days of World War II, the Swiss, fearing a German invasion after the fall of Poland and France, physically moved their national supply of gold bullion to New York.⁶² Although the United States had not yet officially declared war against Germany in mid-1941, U.S. government officials attempted to gain access to the names of accounts held in the American branches of Swiss banks.⁶³ The officials were looking to block Nazi controlled assets from being hidden in the United States.⁶⁴ After learning the accounts were held only in the names of the banks and not the clients, the United States banned the expatriation of all Swiss assets and gold reserves.⁶⁵

Just as bank secrecy expanded in the economic chaos after World War I, the necessity and desire for improved bank secrecy and financial protections also increased after World War II.⁶⁶ The economic controls imposed by governments during the war remained in effect, but capital flight continued as socialism and burdensome income taxes rose.⁶⁷ The growth of banking centers that protected bank customer identities and assets were also facilitated by the desire to hide assets from government investigation for taxation, the rise in international crime, and the

⁶⁰ The statute stated: "Any German national who, deliberately or otherwise, activated by a base selfishness or other vile motive, has amassed his wealth abroad or left capital outside the country, shall be punished by death." See CHAMBOST, *supra* note 29, at 5; see generally NICHOLAS, *supra* note 23 (discussing "reallocation" of assets and the exploitation of *Entartete Kunst* [degenerate art] belonging to conquered peoples and other "undesirables" accomplished under the Nazi regime).

⁶¹ See Jones, *supra* note 56, at 455; see also STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, CRIME AND SECRECY, 98th Cong., 1st Sess., THE USE OF OFFSHORE BANKS AND COMPANIES 5-6 (Comm. Print 1983) [hereinafter STAFF REPORT].

⁶² The Swiss had moved the bank assets to U.S. financial institutions after the invasion of Poland. See Jones, *supra* note 56, at 455; see also *Righting Past Wrongs*, *supra* note 27 (68 million U.S. dollars in gold still remains in the U.S. and Britain).

⁶³ See Jones, *supra* note 56, at 455.

⁶⁴ See *id.*

⁶⁵ See *id.*; CHAMBOST, *supra* note 29, at 6-7.

⁶⁶ See Jones, *supra* note 56, at 456.

⁶⁷ See *id.*; see also *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983).

efforts of many small nations⁶⁸ to keep hard currency within their borders.⁶⁹

After World War II, an additional secrecy device known as "blocking laws" emerged.⁷⁰ These laws were designed to prevent individuals and other entities from divulging financial information to foreign tribunals and governments.⁷¹ In 1947, Canada became the first nation to enact this type of secrecy law, after a U.S. grand jury investigation of the Canadian paper industry.⁷² These types of laws have spread throughout the world since 1947.⁷³ Nations, reacting to countries with aggressive trade litigation,⁷⁴ have attempted to use blocking laws to protect domestic interests from foreign legal interference and infringements on national sovereignty.⁷⁵ The controversy over investigative reach spawned the broadest international response when the United States conducted probes into the international shipping industry and the world uranium cartel.⁷⁶ Many of the nations which enacted blocking laws in response to U.S. government investigations viewed the antitrust litigation and discovery procedures as protecting U.S. industries a-

⁶⁸ Secrecy jurisdictions are not limited to only small or non-democratic nations. Many of the Pacific Rim's industrialized countries, such as Hong Kong and Singapore, attract capital by offering secrecy practices for tax purposes. See STAFF REPORT, *supra* note 61, at 10-11; Jones, *supra* note 56, at 456 n.8.

The Staff Report lists the following countries as secrecy or tax havens: Anguilla, Antigua, Austria, Bahamas, Barbados, Bahrain, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Channel Islands, Cook Islands, Costa Rica, Dominica, Falkland Islands, Gibraltar, Grenada, Guam, Hong Kong, Isle of Man, Ireland, Liberia, Liechtenstein, Luxembourg, Maldives, Mariana Islands, Mexico, Monaco, Montserrat, Nauru, Netherlands and Netherlands Antilles, Nevis, New Hebrides (Vanuatu), Panama, Seychelles, Singapore, St. Lucia, St. Kitts, St. Vincent, Switzerland, and Turks and Caicos Islands. See STAFF REPORT, *supra* note 61, at 10-11.

⁶⁹ Donald M. Fleming, the former Canadian Minister of Finance and former President of the International Monetary Fund, now president of a Bahamian bank, voiced the typical view of the necessity of bank secrecy laws: "The secrecy attached to relations and transactions between financial institutions and their clients has been another factor essential in the attraction of financial business." CHAMBOST, *supra* note 29, at 196.

⁷⁰ See Jones, *supra* note 56, at 458.

⁷¹ See *id.*

⁷² See *In re Grand Jury, Subpoena Duces Tecum Addressed to Canadian International Paper Company*, 73 F. Supp. 1013 (S.D.N.Y. 1947); see also Ontario, Canada's Business Records Protection Act, 1974 ONT. REV. STAT. ch. 54; RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES, § 442 reporters' note 4 (1987) [hereinafter RESTATEMENT THIRD].

⁷³ See Jones, *supra* note 56, at 458.

⁷⁴ The United States is the most likely target of blocking laws, as it is the most aggressive in pursuing international antitrust and competition investigations. See *id.*

⁷⁵ See *id.*, citing A. LOWE, EXTRATERRITORIAL JURISDICTION 79-225 (1983).

⁷⁶ See *id.* at 458, citing LOWE, *supra* note 75, at 98-100, 123, 128, 129-31, 134, 138-43 (Australia,

gainst foreign competition by requiring the foreign industries to divulge their secrets during the litigation.⁷⁷

B. *Structure of Laws*

The core of bank secrecy and financial privacy laws is the non-disclosure of personal and transactional information.⁷⁸ One form of these laws, such as blocking laws, operates to forbid external disclosure,⁷⁹ while secrecy laws discourage mainly internal disclosure.⁸⁰ As each nation develops and faces differing financial circumstances, the financial privacy practices employed vary to effectuate both the goals sought and the economic relationships.⁸¹

1. Structural Bank Forms and Impediments to Disclosure

The two main forms of bank secrecy relationships that can exist between the financial institution and the bank customer are anonymous or numbered accounts and accounts held under false names.⁸² The account holder signs an agreement with a personal bank agent agreeing to the terms and conditions of the relationship, then receives a number or pseudonym.⁸³ Under this agreement, the structure or nature of the relationship between bank and client changes, from a human identity to solely a numeric identity, so as to provide the protection of privacy and inaccessibility.⁸⁴

Belgium, Canada, Denmark, Finland, France, Netherlands, Norway, South Africa, Sweden, the United Kingdom, and West Germany enacted blocking laws in response to the probes); *see also In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977); *In Re Investigations of World Arrangements with Relation to the Production, Transportation, Refining, and Distribution of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979); STAFF REPORT, *supra* note 61, at 13–14 (Congressional recognition of the connection between U.S. government action and foreign government reaction); RESTATEMENT THIRD, *supra* note 72, § 442 reporters' note 4.

⁷⁷ *See* Jones, *supra* note 56, at 458–59; STAFF REPORT, *supra* note 61, at 13–14; *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) (Romanian interest in secrecy outweighed by U.S. interests).

⁷⁸ "Personal" includes the activities of business associations.

⁷⁹ *See infra* notes 94–104 and accompanying text.

⁸⁰ *See infra* notes 82–93 and accompanying text.

⁸¹ *See* Jones, *supra* note 56, at 459.

⁸² *See id.*

⁸³ *See* CHAMBOST, *supra* note 29, at 41–54. To avoid alerting home government authorities, the client will normally receive a pseudonym account, with all bank correspondence appearing to be between actual persons. *See id.*

⁸⁴ *See infra* notes 90–104 and accompanying text.

Prior to the creation of numbered accounts by Swiss bankers, the Gestapo would routinely target low level Swiss bank employees for asset information concerning certain individuals.⁸⁵ The slightest hesitation would give the Gestapo officer "cause" to investigate and prosecute the Swiss bank's customer under the foreign holdings law.⁸⁶ Anonymous accounts eliminated the ability of third parties to coerce secret bank and client information, because the majority of lower level bank employees had no access to the names corresponding to the numbered accounts.⁸⁷

With the addition of a trust or corporate structure, a triple level of protection is available.⁸⁸ Here, a trust is drafted with either an individual or corporate fiduciary holding assets in their own name for a beneficiary.⁸⁹

2. Bank Secrecy Laws

The underlying foundation to the various structural forms of protection available in secrecy jurisdictions is a separate system of laws which protect the relationship between the banker and the client.⁹⁰ In Switzerland, there is a special privilege between the banker and the client.⁹¹ A violation, such as information disclosure, is strictly criminalized.⁹² The codification of the informal banking custom in Swiss Bank-

⁸⁵ See Jones, *supra* note 56, at 459.

⁸⁶ See CHAMBOST, *supra* note 29, at 5.

⁸⁷ See *id.* at 40. The secret accounts also limited the ability for unscrupulous employees to access client information. See *id.*

⁸⁸ See Jones, *supra* note 56, at 459-60; see generally Beat Kleiner, *Banking Law*, in INTRODUCTION TO SWISS LAW 175-86 (Tugrul Ansay & Don Wallace, Jr. eds., 1995). The identities of the actual settlor and beneficiary are replaced by the trust identity, which is itself numbered or otherwise held secret, adding another layer on to the secrecy.

⁸⁹ See Kleiner, *supra* note 88, at 182-83. Under Swiss law, banks as institutions are covered under public legislation, while banking transactions are regulated under the Civil Code and Code of Obligations. See *id.*

⁹⁰ See Jones, *supra* note 56, at 460-61.

⁹¹ See *id.*

⁹² See *id.* at 461; Bundesgesetz uber die Banken und Sparkassen of Nov. 8, 1934 (Banking Law of 1934), implemented in Verordnung of May 17, 1972 (Ordinance), and Vollziehungsverordnung of Aug. 30, 1961 (Implementing Ordinance). Article 47 of the 1934 Banking Law states:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank, as representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by

ing Law, establishes specific duties for the bankers, their employees, and the government inspectors.⁹³

3. Blocking Laws

As noted earlier, blocking laws were enacted to stem the tide of foreign investigations into the business practices of foreign-based associations and individuals.⁹⁴ They are designed to “prohibit the disclosure, copying, inspection or removal of documents located in the host country in compliance with orders of foreign authorities,”⁹⁵ and to take advantage of the foreign government compulsion defense.⁹⁶ There are two categories of blocking laws. The first prohibits the production of documents; the second, testimony before a foreign tribunal.⁹⁷ The block can be either a general protection of business and commercial documents or particular to an industry.⁹⁸

The first blocking statute, enacted by Canada in 1947, to combat a U.S. probe of the paper industry, has been expanded to prevent the disclosure of all business records, including bank records.⁹⁹ Like the Canadian law, the Swiss Penal Code, Article 273, also prohibits disclo-

a fine not exceeding 50,000 SwF [approximately 35,000 USD (1997 rates)].

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 SwF [approximately 21,000 USD].

3. The violation of professional secrecy remains punishable even after termination of the official employment relationship of the exercise of the profession.

See id. at n.37, citing R. KINSMAN, *YOUR NEW SWISS BANK BOOK* 10 n.2 (revised ed. 1979).

⁹³ *See* Jones, *supra* note 56, at 462. Swiss law defines some circumstances, such as crimes, which require banks to furnish financial information because the public or state interest involved is greater than the interest in secrecy. *See id.* citing KINSMAN, *supra* note 92, at 11.

⁹⁴ *See* Jones, *supra* note 56, at 462–63.

⁹⁵ *See* STAFF REPORT, *supra* note 61, at 13; RESTATEMENT THIRD, *supra* note 72, § 442 reporters' note 4.

⁹⁶ *See* RESTATEMENT THIRD, *supra* note 72, § 442 reporters' note 4. “[A] state may not require a person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national.” *See id.* § 441(1)(a).

⁹⁷ *See* Jones, *supra* note 56, at 463.

⁹⁸ *See id.*

⁹⁹ *See id.* at 463–64 n.50, citing LOWE, *supra* note 75, at 100–02. That Canadian statute states:

1. No person shall, pursuant to or under or in a manner that would be consistent with compliance with any . . . order . . . or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take . . . , send . . . or remove . . . from a point in Ontario to a point outside Ontario, any . . . material in any way relating to any business carried on in Ontario, unless such taking, sending, or removal,
a) is consistent with and forms a part of a regular practice of furnishing to a head office or parent company or organization . . . ; is provided for by or under any law of Ontario or of the Parliament of Canada.

sure of "manufacturing or business secret[s]" for any reason or purpose.¹⁰⁰ The second category of blocking laws prohibits substantive compliance with the orders of foreign government officials.¹⁰¹

Blocking laws provide a greater level of protection of financial privacy than structural forms and bank secrecy laws.¹⁰² Under a blocking statute, individuals, business entities, and government actors can refuse to disclose financial information, even though they may be under subpoena or government order.¹⁰³ Bank secrecy laws protect the actual privileged relationship between banker and customer, while blocking laws prevent the actual divulgence of banking and transactional documents.¹⁰⁴

III. THE TREATMENT OF FINANCIAL PRIVACY IN THE UNITED STATES AND THE CREATION OF COOPERATION IN CRIMINAL ACTIVITIES

A. *Secrecy in the United States*

Historically, the United States has been at odds with the blocking laws and secrecy statutes enacted in countries around the world.¹⁰⁵ Perceiving foreign bank secrecy as facilitating and promoting illegal activity, the United States has continued its efforts to enforce its national laws regardless of the possible effect on foreign economic regu-

1974 ONT. REV. STAT. ch. 54, § 1. The Minister of Justice, Attorney General and any party in interest may request an injunction to ensure that document production will be blocked. *See id.* § 2(1). Production made after notice that an application for an injunction has been made is punishable by up to one year in prison. *See id.* §§ 2(2), (3); Jones, *supra* note 56, at 463 n.50, citing LOWE, *supra* note 75, at 101-02.

¹⁰⁰ Article 273 of the Swiss Penal Code reads:

Whoever explores a manufacturing or business secret to make it accessible to a foreign authority or a foreign organization or a foreign private business enterprise, or their agents, shall be punished with imprisonment, insolvency serious cases with penitentiary confinement. The deprivation of liberty can be combined with a fine.

Moreover, Article 271 forbids Swiss citizens from cooperating with a foreign state without authorization from the Swiss government. *See* Christopher D. Liguori, *Yossarian's Nightmare: A "Catch-22" Between American Grand Jury Powers and Swiss Nondisclosure Laws—A New Solution*, 2 AM. U.J. INT'L L. & POL'Y 229, 232-33 n.14 (1987).

¹⁰¹ *See* Jones, *supra* note 56, at 464, citing LOWE, *supra* note 75, at xviii, 98-100, 104-105, 123, 138-43, 186-93.

¹⁰² *See supra* notes 82-93 and accompanying text.

¹⁰³ *See supra* notes 94-101 and accompanying text.

¹⁰⁴ *See supra* notes 90-101 and accompanying text.

¹⁰⁵ *See supra* notes 71-74 and accompanying text.

lation and banking practice.¹⁰⁶ In 1970, the House Committee on Banking and Currency declared:

[s]ecret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of "white collar" crimes; have served as the financial underpinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for stock acquisitions, mergers and takeovers; have covered conspiracy to steal from the U.S. defense and foreign aid funds; and have served as the cleaning agent for "hot" or illegally obtained monies. . . . The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost.¹⁰⁷

This is not to suggest that U.S. law allows open access to financial information.¹⁰⁸ Individuals and other entities are given limited protection from undesired and unwarranted disclosure by the common law, specific statutes, and the U.S. Constitution.¹⁰⁹

¹⁰⁶ See H. Rep. No. 975, 91st Cong., 2d Sess. 12 (1970).

¹⁰⁷ See *id.*; see also *In re Grand Jury Proceedings, Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (*Nova Scotia II*); *In re Grand Jury Proceedings, Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (*Nova Scotia I*); *United States v. Vetco*, 644 F.2d 1324 (9th Cir. 1981); STAFF OF SENATE SUBCOMM. ON NARCOTICS, TERRORISM AND INTERNATIONAL OPERATIONS, 101st Cong., 2d Sess., DRUG MONEY LAUNDERING, BANKS AND FOREIGN POLICY 32 (Comm. Print 1990) (report recommended "aggressively pursu[ing] international negotiations backed up by the threat of sanctions against banks and countries that do not cooperate" with the U.S.); James Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 GEO. WASH. J. INT'L L. & ECON. 277, 330 (1988); Hon. John Conyers, Jr., *Corporate and White Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980), *reprinted in* *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988). *But see* CHAMBOST, *supra* note 29, at 101 (responding to the 1970 Congressional report by commenting that the United States seemed to be out for scapegoats more than bank secrecy).

¹⁰⁸ See *infra* notes 110-35 and accompanying text.

¹⁰⁹ See *id.*

1. Common Law Protections

Under U.S. common law, bankers and their customers may agree to a contractual relationship providing for a limited degree of customer privacy.¹¹⁰ This common law relationship was established in Great Britain in 1924, by the landmark decision of *Tournier v. National Provincial and Union Bank of England*.¹¹¹ *Tournier* determined in which circumstances the contractual relationship between the client and his banker would be superseded.¹¹² Courts in the United States have followed this decision to provide for the termination of the contractual banking duties when: a) disclosures are compelled by law; b) there is a duty to the public to disclose; c) the interests of the bank require disclosure; or d) when disclosure is made with the express or implied consent of the customer.¹¹³

U.S. legal doctrine has also protected banking information under agency law theory by imposing a duty on the banking institution as the agent for the depositor-principal to safeguard financial information from disclosure.¹¹⁴ Doctrine has also allowed state constitutions to create a privacy interest in bank records.¹¹⁵ The protections afforded by the common law, however, have been circumvented by government investigators and private parties utilizing the exceptions listed in *Tournier*.¹¹⁶

¹¹⁰ See Jones, *supra* note 56, at 464–65; *Tournier v. National Provincial and Union Bank of England*, 1924 K.B. 461 (Eng. C.A.).

¹¹¹ See *Tournier*, 1924 K.B. 461.

¹¹² In light of widespread money laundering and other abuses in recent years, the European Union (EU) has begun a process of scaling back the secrecy protections available in some Member States. See DENNIS CAMPBELL, *INTERNATIONAL BANK SECRECY* 727–28 (1992). On June 28, 1991, the EU adopted Directive 91/308 to prevent money laundering in the European financial markets. See EC Council Directive 91/308, art. 1, 1991 O.J. (L 166) 77. The general policy for banking supervision, however, is dealt with under the “mutual trust” principle. See *CASES AND MATERIALS ON EUROPEAN COMMUNITY* 621 (George A. Bermann et al. eds., 1993). Under this principle, professional secrecy between the bank and the client remains generally undisturbed, with each state entrusted with protecting the stability and integrity of the common financial market. See *id.*; EC Council Directive 89/646, art. 16(1), 1989 O.J. (L 386) 1. However harmonized the system becomes, the principle of bank secrecy will not likely disappear, because it is beneficial to the financial markets. See CAMPBELL, *supra*, at 744.

¹¹³ See Jones, *supra* note 56, at 464–66; Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT’L LAW. 69, 69 (1988).

¹¹⁴ See Peterson v. Idaho First Nat’l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

¹¹⁵ See Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974); James E. Eldridge, *The Bank Secrecy Act: Privacy, Comity, and the Politics of Contraband*, 11 N.C.J. INT’L L. & COM. REG. 667, 682 (1986).

¹¹⁶ See Jones, *supra* note 56, at 465. Courts have also examined the idea of a privacy right

2. Statutory Protections

With the enactment of the Bank Secrecy Act (BSA) in 1970, Congress provided government agencies with access to bank records of individuals in order to facilitate investigations in the criminal, tax, and regulatory arenas.¹¹⁷ The BSA mandated record-keeping of major currency and international transactions and listing of account holders' names and financial instruments by all banks and financial institutions, but provided little in the way of procedural safeguards for individuals.¹¹⁸

In 1978, the passage of the Right to Financial Privacy Act (RFPA) was intended to remedy the lack of safeguards available in the BSA.¹¹⁹ The RFPA restricts the access granted under the BSA to federal agencies for financial information belonging to individuals and small partnerships without consent, judicial or administrative subpoena, search warrant, or a special RFPA formal written request for records.¹²⁰ The RFPA does not, however, curtail the access of private parties or state and local authorities, nor does it abridge the gathering of financial information for entities other than individuals and partnerships of five members or less.¹²¹

Even the restrictions imposed by the RFPA may be widely circumvented because of the broad discretion given to governmental authority (at all levels) and private parties during the course of a criminal or civil investigation.¹²² Subpoenas issued under the broad discretionary

emanating from property law. *See* *FTC v. American Tobacco*, 264 U.S. 298 (1924); *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (N.J. Ch. 1929) (citing *In re Pacific Ry. Comm'n*, 32 F. 241 (C.C.N.D. Cal. 1887)). Tort law theories of invasion of privacy and defamation were also reviewed. *See* Plombeck, *supra* note 113, at 69 n.3, citing L. FISCHER, *THE LAW OF FINANCIAL PRIVACY* ¶ 5.04 (1983).

¹¹⁷ *See* Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-59 (1991)).

¹¹⁸ *See infra* notes 110-35 and accompanying text.

¹¹⁹ *See* Right to Financial Privacy Act, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified as amended at 12 U.S.C. §§ 3401-22 (1991)).

¹²⁰ *See* 12 U.S.C. §§ 3402, 3408 (1991).

¹²¹ *See* Eldridge, *supra* note 115, at 681; *but see* notes 114-16 and accompanying text (legal protections available under agency theory and express state constitutional authority to maintain privacy interest in bank records).

¹²² *See* Jones, *supra* note 56, at 466. Under the most controversial power, subpoenas issued during a grand jury investigation carry the threat of contempt of court for non-compliance and subject banks and other corporations to stiff fines and individuals to imprisonment. *See* Fed. R. Crim. P. 17. For foreign service, document production and personal appearance may be required if the court finds that either "... is in the interest of justice ..." *See* 28 U.S.C. § 1783(a) (1991).

power of administrative agencies also carry with them a low evidentiary need threshold similar to that of the grand jury.¹²³ Moreover, state subpoenas are not subject to RFPA restrictions, and therefore, not subject to the procedural safeguards of due process contained in the Act.¹²⁴

Private parties wishing to obtain financial information and banking records similarly have few boundaries during the course of civil discovery investigations. The Federal Rules confine discovery to matters “. . . not privileged, which is relevant to the subject matter involved in the pending action,” which need not be admissible as evidence at trial.¹²⁵ The banker-client relationship is not contained within the traditional privilege categories, and the federal courts have shown scant inclination to entertain new categories of privilege.¹²⁶

3. Constitutional Protections

The interest of the United States in enforcing its laws has consistently outweighed any interest of the depositor.¹²⁷ Even the Fourth Amendment's Search and Seizure Clause was held not to prohibit access to financial information under the BSA.¹²⁸ In *United States v. Miller*, the Supreme Court stated, “[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”¹²⁹ In addition, the Court suggested that the checks and deposit slips were negotiable instruments voluntarily conveyed to the bank, thus, there was no legitimate expectation of privacy in their contents.¹³⁰ Moreover, banks and bank employees may not invoke the

¹²³ Agencies do not need probable cause to issue their subpoenas. See *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) (The “power to [administrative] inquisition . . . is more analogous to a Grand Jury, which . . . can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.”) (emphasis added). See, e.g., 15 U.S.C. § 78u(b) (1991) (“For the purpose of any such investigation, . . . any . . . officer designated by [the Securities and Exchange Commission] is empowered to . . . require the production of any . . . records which the Commission deems relevant or material to the inquiry.”) (emphasis added).

¹²⁴ See Eldridge, *supra* note 115, at 681.

¹²⁵ See Fed. R. Civ. P. 26(b)(1).

¹²⁶ See *id.*; Jones, *supra* note 56, at 468.

¹²⁷ See *United States v. Field*, 532 F.2d 404, 408–09 (5th Cir.) cert. denied 429 U.S. 940 (1976); *Nova Scotia I*, 691 F.2d at 1391; *Nova Scotia II*, 740 F.2d at 829; G. Philip Rutledge, *Bank Secrecy Laws: An American Perspective*, 14 DICK. J. INT'L L. 601, 606–08 (1996).

¹²⁸ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated”); *United States v. Miller*, 425 U.S. 435, 443 (1976).

¹²⁹ See *Miller*, 425 U.S. at 443.

¹³⁰ See *id.* at 442. Later decisions similarly upheld this reasoning even in cases dealing with

Fifth Amendment right against self-incrimination even though disclosure would be a violation of their national laws.¹³¹

The banking system of the United System is best classified as contractual: the government will seek to maintain a safe banking system for the citizen-customer, who in return for this benefit, implicitly authorizes the government to obtain all necessary information to ensure criminal laws are being upheld.¹³² The same implicit contract exists between the financial institutions and the government as well.¹³³ In the United States, privacy in financial affairs is allowed only to the extent that there is no reasonable governmental or public interest requiring disclosure.¹³⁴ In contrast, the Swiss view financial privacy as the most important public interest.¹³⁵

B. *Traditional Efforts to Resolve Conflicts Between the Secrecy Jurisdiction and the Need for Access*

There are two inherent facets of bank secrecy laws which confound the tracing of dormant accounts: inefficient and inadequate procedures for obtaining access to records and lack of supervision of banking institutions.¹³⁶ Although circumstances have forced secrecy jurisdictions to ease their secrecy laws in particular instances, there remains arguably no viable procedures for individuals seeking information. While no one would argue that the actual account holder could not easily obtain information based on the bank's duties and obligations to its customer, access to accounts becomes insurmountably difficult when the individual requesting information is one step removed.¹³⁷

"protected bank records." See *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980) (Bahamian account was not protected by the [Bahamian] statute or the Fourth Amendment because no legitimate expectation of privacy interest); see also *United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987).

¹³¹ See U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). Most circuits have, to their credit, adopted a "case-by case" approach to determining whether real fear of home state prosecution exists, thus allowing Fifth Amendment protection. See Craig Depew, *Sidestepping Foreign Bank Secrecy Laws: No Sanctuary in the Fifth Amendment and Little in the Interest of Comity*, 10 Hous. J. INT'L L. 57, 77-85 (1987). Corporate custodians of records have no Fifth Amendment protection because they are acting in a representative capacity. See *Braswell v. United States*, 487 U.S. 99, 102 (1988); *Bellis v. United States*, 417 U.S. 85, 89-90 (1974).

¹³² See *supra* notes 105-31 and accompanying text.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *supra* notes 78-93 and accompanying text.

¹³⁶ See *infra* notes 142-79 and accompanying text.

¹³⁷ Swiss law does accord heirs the rights and obligations of the deceased under the principle

In general, a delicate balance of cooperation has been struck between countries whose national laws, policies, and procedures inherently conflict. Treaties, informal agreements, and multilateral cooperation have served to facilitate exchanges and resolution between nations when a particular issue arises.¹³⁸ These joint actions or special grants of authority are based upon international comity.¹³⁹ Comity was defined by the U.S. Supreme Court in *Hilton v. Guyot* as:

. . . neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws.¹⁴⁰

By comity, the nations seek not to infringe upon the sovereignty of the other, but to act voluntarily in cooperation in furtherance of individual rights and common justice, in areas not regulated by formal treaties.¹⁴¹

1. Comity

The use of comity and other more formal acts of cooperation between nations that allow bank secrecy and those that do not, have been most successful in the area of criminal investigations.¹⁴² The traditional method for obtaining information for private or government actions from foreign nations is the letter rogatory.¹⁴³ The primary basis for a

of direct and immediate succession. See CAMPBELL, *supra* note 112, at 675. The right of secrecy, including the correlative rights to release the bank from its secrecy obligation and to obtain information, is a right of the property holder. See *id.* The only exception is for "highly personal rights." See *id.* Whether the nature of information is highly personal is judged by objective criteria. See *id.* If the information is highly personal, it may not be disclosed to the heirs or executor by the bank. See *id.* The Swiss Bankers' Association holds that the bank must only disclose the status of the account at the time of decedent's death, but not any transactions performed prior to death. See CAMPBELL, *supra* note 112, at 675. This practice is discouraged by critics and many courts. See *id.*

¹³⁸ See Jones, *supra* note 56, at 471.

¹³⁹ See *Soci t  Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

¹⁴⁰ *Hilton*, 159 U.S. at 163-64.

¹⁴¹ See *id.* at 164-66.

¹⁴² The only treaty concerning letters rogatory is the European Convention on Mutual Assistance in Criminal Matters, *opened for signature* Apr. 20, 1959, 472 U.N.T.S. 185.

¹⁴³ See *The Signe*, 37 F. Supp. 819, 820 (E.D. La. 1941) ("Letters rogatory are the medium . . .

letter rogatory rests with comity.¹⁴⁴ Although a request for information via a letter rogatory is usually granted, there are procedural and practical defects in the system such that, for individual actors, any benefit received is essentially relegated.¹⁴⁵

Lack of explicit procedures in formulating the letters rogatory and the requirement of some countries of proceeding through formal diplomatic channels incurs extensive time and money costs for individual actors.¹⁴⁶ In addition, the letter must be sufficiently complete and understandable to a foreign judge in order to secure approval.¹⁴⁷ While a government may have the resources to complete all the procedural requirements, the current system could force private citizens to abandon their claims.¹⁴⁸ Another potentially damaging hurdle is that the foreign judge may defer to national laws and procedures and refuse certain types of investigations, typically fiscal offenses.¹⁴⁹ Lastly, many countries will not recognize certain investigatory procedures as valid reasons to approve a letter rogatory or will refuse to compel the home entity to incur the expense of producing records without substantial belief that the search is purposeful or will be successful.¹⁵⁰ This presents a tremendous problem for individuals seeking access to confidential records unless they have explicit proof that accounts exist and that they

whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country . . ."). See also *In re Westinghouse Electric Corp. and Duquesne Light Co.*, 16 O.R. 2d 273, 290 (1977) (Ont.) (*Duquesne Light*).

¹⁴⁴ See *id.*

¹⁴⁵ See *The Signe*, 37 F. Supp. at 820.

¹⁴⁶ See James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 406 n.4 (1988). See also *Nova Scotia I*, 691 F.2d at 1390; RESTATEMENT THIRD, *supra* note 72, § 473 reporters' note 1.

¹⁴⁷ See Knapp, *supra* note 146, at 409.

¹⁴⁸ The possible use of the Hague Evidence Convention procedures for obtaining information in civil matters is similarly limited in scope and effectiveness. See Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, (implemented in 28 U.S.C. §§ 1781-82 (1991)) [hereinafter Hague Evidence Convention]. Because of the formal channels required, the process is extremely slow and expensive, and thus, unhelpful to most individuals.

¹⁴⁹ See Knapp, *supra* note 146, at 409-10; *Vetco*, 644 F.2d at 1333 (distinguishing investigations for tax violations from tax fraud, "[t]he Swiss Federal Attorney has stated that tax [violation] investigations are fiscal matters, and that it would be unable to respond favorably to a letter rogatory."); *Duquesne Light*, 16 O.R. 2d at 286-87 ("The Court is entitled to go behind letters rogatory, to examine precisely what it is the foreign Court is seeking to do, and to give effect to them only if they satisfy the requirements of the law of this jurisdiction.").

¹⁵⁰ See RESTATEMENT THIRD, *supra* note 72, § 442 reporters' note 1; Jones, *supra* note 56, at 472.

are entitled under Swiss law to obtain information pertaining to the accounts.¹⁵¹ In the case of the Holocaust survivors, this requirement proved especially tragic since almost all documentation the individuals might have had was destroyed by the Nazis.¹⁵²

2. Treaties and Agreements

Switzerland and other bank secrecy jurisdictions have begun to relax their privacy laws in recognition of criminal abuses of their banking systems.¹⁵³ Several treaties, agreements, and resolutions promulgated by the United Nations have allowed government officials to gain access to the actual customer names of suspect accounts and to the nature of the suspect transactions.¹⁵⁴

In 1973, the United States and Switzerland agreed to a Mutual Legal Assistance Treaty (Swiss MLAT), which was enacted to combat organized crime.¹⁵⁵ Under the Swiss MLAT, a Swiss bank may grant access to private banking records in certain circumstances.¹⁵⁶ The U.S. officials, however, must be investigating a serious crime and have made a reasonable but unsuccessful attempt to obtain the information by other means.¹⁵⁷ It was hoped that the Swiss MLAT would be as comprehensive as the European Convention on Mutual Assistance in Criminal Matters.¹⁵⁸

¹⁵¹ Under most secrecy jurisdictions accounts are held under numbers or pseudonyms and thus locating accounts is additionally difficult for individuals. *See supra* note 137 and accompanying text.

¹⁵² The Swiss banks have also allegedly destroyed potential documentation. *See MacCarthaigh, supra* note 1.

¹⁵³ *See infra* notes 155–68 and accompanying text.

¹⁵⁴ *See id.*

¹⁵⁵ *See* Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019 (entered into force Jan. 23, 1977) [hereinafter Swiss MLAT]; Frank C. Razzano, *American Money Laundering Statutes: The Case for a Worldwide System of Banking Compliance Programs*, 3 J. INT'L L. & PRAC. 277, 302 (1994); Robert Louis Stauter, *Swiss Bank Secrecy Laws and the U.S. Internal Revenue Service*, 20 CASE W. RES. J. INT'L L. 623, 629 (1988).

¹⁵⁶ *See* Swiss MLAT, *supra* note 155; Stauter, *supra* note 155, at 629.

¹⁵⁷ *See* Swiss MLAT, *supra* note 155; Stauter, *supra* note 155, at 629; Eldridge, *supra* note 115, at 690.

¹⁵⁸ *See* European Convention on Mutual Assistance in Criminal Matters, *opened for signature* Dec. 13, 1957, 84 U.N.T.S. 231 [hereinafter Criminal Convention]; Stauter, *supra* note 155, at 629. Originally the Members could refuse to cooperate if the request concerned a "political offence, . . . or a fiscal offence." *See* Criminal Convention, *supra* at art. 2(a). The "fiscal offence" provision was later repealed. *See* Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 1978 Eur. T.S. No. 99.

In response to the Swiss MLAT's ineffectiveness in pursuing insider trading violations,¹⁵⁹ (and to protect its reputation), the Swiss Bankers' Association, the Swiss National Bank, and other banks of Switzerland, enacted a private agreement for assistance with economic crimes.¹⁶⁰ The pact was entitled the Agreement on the Observance of Care in Accepting Funds and the Practice of Banking Secrecy (Agreement).¹⁶¹ Nearly every bank voluntarily signed the Agreement in July of 1977, and its updated version of October 1982.¹⁶²

In 1981, a U.S. district court declared sanctions against a Swiss bank for not providing the Securities and Exchange Commission with the names of its customers who were being investigated for an insider trading scheme.¹⁶³ The court balanced the interest of the Swiss bank in maintaining secrecy and upholding its privacy laws, against the U.S. interest in having integrity in its securities markets.¹⁶⁴ The judge found the U.S. interest to be compelling.¹⁶⁵

Faced with this increasing pressure, the Swiss invited U.S. officials to Bern in March of 1982.¹⁶⁶ Using the Agreement as a foundation, the United States and Switzerland signed the Memorandum of Understanding (Swiss MOU), in August, 1982.¹⁶⁷ Although it has never been approved by either nation's legislative body, and as such is not binding, it promises cooperation in insider trading investigations.¹⁶⁸

Although the Swiss government and other secrecy jurisdictions have executed treaties and agreements providing for mutual legal assistance,

¹⁵⁹ See Stauter, *supra* note 155, at 629; Eldridge, *supra* note 115, at 690. The Swiss MLAT only provided for cooperation in criminal investigations that were considered a crime in both countries; insider trading is not a crime in Switzerland.

¹⁶⁰ See Stauter, *supra* note 155, at 629-30.

¹⁶¹ See *id.*

¹⁶² See *id.*; Maurice Aubert, *The Limits of Swiss Banking Secrecy Under Domestic Law*, 2 INT'L TAX & BUS. LAW 273, 282 (1984) [hereinafter Aubert, *Limits*]. The Agreement had three principal objectives: a) to prevent Swiss bank use for illegally acquired funds by requiring the verification of depositors, b) to prevent illegal use of safe deposit boxes, and c) to prevent tax evasion. Aubert, *Limits*, *supra* at 283. A distinction is made between tax violations and tax evasions (fraud). Switzerland signed on to the amendments of the European Convention and also has a treaty with the United States, the International Judicial Aid in Penal Matters (IJAP). See Stauter, *supra* note 155, at 630.

¹⁶³ See SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (1981).

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* The bank asked its clients to waive the bank's secrecy obligation voluntarily, and when they agreed the sanctions against the bank were dismissed. See Stauter, *supra* note 155, at 630.

¹⁶⁶ See Stauter, *supra* note 155, at 630.

¹⁶⁷ See *id.* at 631.

¹⁶⁸ See *id.*

these agreements are only effective for government actors investigating criminal matters.¹⁶⁹ The criminal requirements of the Swiss MLAT are particularized, mainly because the Swiss MLAT is employed in connection with drug-trafficking and money laundering investigations.¹⁷⁰ Additionally, the treaties generally exclude political, military, and tax offenses.¹⁷¹ As seizure of assets by foreign government action would fall under the political and military exclusions, the investigatory provisions contained within the treaties are outside the realm of individual private citizens seeking information.¹⁷²

Neither comity nor existing formal agreements, such as treaties, have greatly benefited individual actors.¹⁷³ They are both designed for government investigations rather than individual claimants.¹⁷⁴ Even when using the letters rogatory method, individual claimants seeking information must pass the muster of the foreign judge and take their chances that the holder of records will provide the records needed to pursue the claim.¹⁷⁵ As noted, the potential grounds for granting an individual access to secret information are narrow, and even with the backing of a governmental agency, there are strict limitations to a bank's cooperation.¹⁷⁶

Individuals are faced with three distinct problems. First, they have limited resources and have no political influence to coerce a secrecy jurisdiction bank to cooperate.¹⁷⁷ Second, the areas in which they may seek information are strictly regulated.¹⁷⁸ Third, the current banking laws and procedures fail to address the particular problems bank secrecy imparts to the individual.¹⁷⁹

¹⁶⁹ See Swiss MLAT, *supra* note 155; see generally Alan Ellis & Robert Pisani, *The United States Treaties on Mutual Legal Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189 (1985).

¹⁷⁰ See Swiss MLAT, *supra* note 155; The MOU is only aimed at insider trading violations; see also The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493 (1989).

¹⁷¹ See Swiss MLAT, *supra* note 155, art. 2, ¶¶ 1(c)(1)-(3), (5).

¹⁷² Read strictly, these exclusions could also bar government to government investigations.

¹⁷³ See *supra* notes 136-62 and accompanying text.

¹⁷⁴ Notwithstanding their availability to individual actors, the lengthy process and expense make current methods useless. See *id.*

¹⁷⁵ See *supra* notes 142-52 and accompanying text.

¹⁷⁶ See *id.*

¹⁷⁷ Even the efforts of diplomats could not budge the Swiss bankers. See MacCarthaigh, *supra* note 1.

¹⁷⁸ See *supra* notes 148-72 and accompanying text.

¹⁷⁹ See *id.*

IV. THE EXPANSION OF EXISTING AGREEMENTS AND UNDERSTANDINGS FOR INVESTIGATIVE COOPERATION IN RECOGNITION OF UNIVERSAL CRIMES

Bank secrecy jurisdictions such as Switzerland have bowed to the governmental pressure of non-secrecy jurisdictions and established procedures for the relaxing of their financial privacy laws.¹⁸⁰ The individual, however, must resort to discovery techniques and comity unless he can make a claim which an official agency will espouse.¹⁸¹ Although expanding the concept of a crime against humanity to encompass this type of economic harm would not improve the individuals ability to gain access, its mere recognition would provide a sense of redress.¹⁸²

A. *History of "Crimes Against Humanity"*

In November of 1945, representatives from the victorious Allied powers began to sit in judgment of the defeated Nazi regime.¹⁸³ These Nuremberg Trials, which would last for several years, charged the Nazi defendants with:

[c]rimes against humanity, namely murder, extermination, enslavement, deportation and other inhumane acts, committed against any civilian population before or during the war or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country who had perpetrated it.¹⁸⁴

The concept of a "crime against humanity" has never been conclusively defined, save the established theory that crimes against humanity were separate and distinct from war crimes.¹⁸⁵ Except for the willful destruc-

¹⁸⁰ See *id.*

¹⁸¹ See *supra* notes 153-62 and accompanying text.

¹⁸² See *infra* notes 189-200 and accompanying text.

¹⁸³ See Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 *DICK. J. INT'L L.* 223, 226. (1992).

¹⁸⁴ See Agreement: Prosecution and Punishment of Major War Criminals of the European Axis (including the Charter of the International Military Tribunal), Aug. 8, 1945, 82 U.N.T.S. 279.

¹⁸⁵ The French Government interpreted the phrase "crimes against humanity" to include: "Violence to life and person, in particular murder of all crimes and cruel treatment such as torture, mutilation, any kind of corporal punishment. Collective punishment, taking of hostages, outrages upon personal dignity, particularly humiliating and degrading treatment, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." See Larry Johnson, *Remarks from the Symposium held at Pace University*

tion of property, the economic rights of the individual have generally not been incorporated into the human rights statutes.¹⁸⁶

Although the rights created are not self-enforcing, Article 17 of the Universal Declaration of Human Rights (Declaration), states that "[e]veryone has the right to own property No one shall be arbitrarily deprived of his property."¹⁸⁷ This article comports fully with the original intent of the Swiss Banking Law of 1934 which was enacted to protect Jewish depositors from Gestapo seizures.¹⁸⁸

B. *Reasons for Extension*

In 1946, and in subsequent years, Switzerland cooperated with the Nuremberg trials and disclosed the necessary information to the tribunal.¹⁸⁹ Notwithstanding this disclosure however, tens of thousands of accounts went unclaimed, and are only now undergoing a thorough investigation and tracing.¹⁹⁰

The current mutual assistance treaties and other informal agreements maintained between secrecy jurisdictions and non-secrecy jurisdictions, however, provide only for investigations that are not of a political or military nature.¹⁹¹ Expansion of cooperation has rested with governmental aid in the investigation of drug trafficking and insider trading activities.¹⁹²

The concept of a crime against humanity was meant to be broad and capable of reflecting changing societal notions of criminal activity.¹⁹³ For this reason, the treatment of the Holocaust survivors by the Swiss banks should also constitute a crime against humanity. Notwithstanding the original intent of the banking law, the secrecy laws have now been used to prevent all access to funds, which the banks have been able to use for over 50 years.¹⁹⁴ In essence, a second unwarranted

School of Law on October 23, 1993, 6 PACE INT'L L. REV. 87, 89 (1994). Conspiracy to commit a crime against humanity was also a punishable offense. See Cavicchia, *supra* note 183, at 226; Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 426-47 (1995).

¹⁸⁶ See Statute of the International Tribunal, arts. 2(d), 3(e).

¹⁸⁷ G.A. res. 217A (III), at 71 U.N. Doc A/810 (1948).

¹⁸⁸ See *supra* notes 56-61 and accompanying text. The law was also enacted to provide protection from prosecution for those bankers who withheld information. See *id.*

¹⁸⁹ See *supra* notes 38-39 and accompanying text.

¹⁹⁰ See *supra* notes 37, 40-43 and accompanying text.

¹⁹¹ See *supra* notes 153-76 and accompanying text.

¹⁹² See *id.*

¹⁹³ See *supra* notes 184-85 and accompanying text.

¹⁹⁴ See *supra* notes 25-33 and accompanying text.

deprivation of property has occurred under the guise of protecting the customer.¹⁹⁵ And while the allegations of the Holocaust survivors are being painstakingly addressed, some answers will never be known because the traces are lost to the passage of time.¹⁹⁶

For many of the Holocaust survivors making claims, the issue is not one of restitution, but of apologies.¹⁹⁷ It has taken Switzerland over 50 years to acknowledge its conduct during World War II.¹⁹⁸ Like many of the claimants, Estelle and Jacob are well into their seventies.¹⁹⁹ They believe that they will be gone long before any accountings are completed.²⁰⁰ The extension of the "crime against humanity" label would acknowledge this second victimization.

V. THE PROBLEMS OF SUPERVISION AND REDRESS: THE NEED FOR REVISION OF BANK SECRECY LAWS

The facts and experiences relayed from World War II suggest that tracing seized finances and providing reparations will be extremely difficult without diligence and access to objective documentation.²⁰¹ As the recent claims of Holocaust survivors have shown, there is a need for a method of investigation and redress that the laws of bank secrecy jurisdictions do not adequately address.²⁰² The rise of international crime and exploitative use of bank secrecy laws since World War II have caused the U.S. and other foreign governments to work together, as well as, with international organizations to solve mutual problems.²⁰³ Because supervision only exists as to specific areas, such as money-laundering and drug trafficking, there is room within the current structure of cooperation for additional supervision of bank activity.

A. *The Current System of Escheat*

Escheat is the term used to describe the reversion of property to the state upon the death of the owner, where no individual exists who is entitled to inherit the property.²⁰⁴ The doctrine of escheat has its origin

¹⁹⁵ See *id.*

¹⁹⁶ See *supra* notes 47–49 and accompanying text.

¹⁹⁷ See *Breaking the Code*, *supra* note 6.

¹⁹⁸ See *id.*

¹⁹⁹ See MacCarthaigh, *supra* note 1.

²⁰⁰ See *Breaking the Code*, *supra* note 6.

²⁰¹ See *supra* notes 34–50 and accompanying text.

²⁰² See *supra* notes 1–10 and accompanying text.

²⁰³ See STAFF REPORT, *supra* note 61, at 103; Jones, *supra* note 56, at 481.

²⁰⁴ See, e.g., *Board of Education v. Browning*, 635 A.2d 373, 375 (Md. 1994).

in feudal notions of real property rights.²⁰⁵ Escheat was the interest in real property which reverted to the feudal lord upon failure of heirs of the original grantee.²⁰⁶ In the United States, escheated property passes to state governments, which have assumed the role of the sovereign and take the property in trust for the citizens of the state for their ultimate benefit.²⁰⁷ Distinction is made, however, between custodial taking and true escheat.²⁰⁸ Custodial taking only involves the holding of dormant property until it can be returned to a rightful owner, while in true escheat, a final determination is made and the property reverts entirely to the state.²⁰⁹ Each state decides how long property may lie dormant before beginning escheat procedures.²¹⁰ All states require some form of notice to be given to all potentially interested parties, usually by publication notice.²¹¹

Under current Swiss law, however, such escheat procedures would confound the letter of the law, because the identity of the account holder would have to be disclosed to the general public for notice to be effective.²¹² In the 1960s, Swiss banks did effect custodial taking of certain dormant accounts believed to belong to possible Holocaust victims.²¹³ Generally, however, an abandoned or dormant account is retained by the bank without any change in status such that would give potential heirs notice or provide any feasible method of tracing missing accounts.²¹⁴ While this may be read as providing the ultimate protection for the customer's assets, in the immediate case of the Holocaust survivors, the secrecy laws have blocked the rightful heirs without redress.²¹⁵

²⁰⁵ See, e.g., *In re Abrams*, 556 N.Y.S.2d 925, 926–27, *aff'd* 570 N.Y.S.2d 468 (1990).

²⁰⁶ See, e.g., *State v. Phillips Petroleum Co.*, 206 S.W.2d 771 (1947).

²⁰⁷ See *In re Abrams*, 556 N.Y.S.2d at 926–27; *In re Melrose Ave.*, 136 N.E. 235 (1922).

²⁰⁸ See, e.g., *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir.), *cert. denied* 502 U.S. 981 (1991).

²⁰⁹ See, e.g., *Bank of America v. Cory*, 210 Cal. Rptr. 351, 355–59 (1985).

²¹⁰ See generally K. Reed Mayo, *Virginia's Acquisition of Unclaimed and Abandoned Personal Property*, 27 WM. & MARY L. REV. 409 (1986).

²¹¹ See *id.*

²¹² See *supra* note 92 and accompanying text.

²¹³ See *supra* notes 29–33 and accompanying text.

²¹⁴ See generally CHAMBOST, *supra* note 29; AUBERT, *SECRET BANCAIRE*, *supra* note 29.

²¹⁵ See *supra* notes 1–10 and accompanying text.

B. *The Current System of Surveillance and Review*

1. The Bank for International Settlements

In 1930, the Bank for International Settlements (BIS) was created to facilitate financial operations on the international market and to promote cooperation among the central banks.²¹⁶ In 1974, the BIS founded the Committee on Bank Regulations and Supervisory Practices (Basle Committee),²¹⁷ a standing committee whose purpose was to address new international bank supervision issues.²¹⁸ The Basle Committee's purpose is to "strengthen . . . collaboration among national authorities in their prudential supervision of international banking."²¹⁹

In 1975, the Basle Committee established guidelines and non-mandatory recommendations for central banks.²²⁰ The guidelines provided:

1. Surveillance and supervision of foreign banks should be the joint responsibility of parent and host authorities.
2. No foreign bank should be able to evade/avoid supervision.
3. Ideally, international co-operation should be promoted by information exchanges between host and parent authorities.²²¹

Although the BIS and Basle Committee guidelines speak to governmental agencies and prosecution of crimes, they provide for an infor-

²¹⁶ See James Hackney & Kim Leslie Shafer, *The Regulation of International Banking: An Assessment of International Institutions*, 11 N.C.J. INT'L L. & COM. REG. 475, 486. The BIS voluntarily opened its records to an audit in 1997 by the Volcker Commission to examine its dealing with the Central Bank of Germany during World War II. See *Swiss Apologize*, *supra* note 46.

²¹⁷ The Committee is comprised of the central bank and supervisory agency officials from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States. The Committee is known as the "Cooke Committee," after its chairman, Peter Cooke of the Bank of England, or as the "Basle Committee," after the Swiss city where the BIS is headquartered. See Hackney & Shafer, *supra* note 216, at 488.

²¹⁸ See Jones, *supra* note 56, at 481-82.

²¹⁹ See *Money Laundering Control Act of 1986, Regulations Implementing the Bank Secrecy Act, and Insider Fraud on Financial Institutions: Hearings Before the SubComm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st. Sess. 249 n.1 (1987) (statement of Manuel Johnson, Vice-Chairman, Board of Governors of the Federal Reserve System).

²²⁰ With all international bank policy promulgated by the Basle Committee, it was hoped that the establishment of guidelines among the major banking nations would force all other nations into line. See Jones, *supra* note 56, at 482.

²²¹ See Hackney & Shafer, *supra* note 216, at 489.

mal relationship between participating governments to obtain information without strict formal arrangements or procedures.²²²

2. The International Bank for Reconstruction and Development (World Bank) and the International Money Fund

In the aftermath of World War II, the International Bank for Reconstruction and Development (World Bank) was chartered at Bretton Woods under the auspices of the United Nations Charter to finance post-war reconstruction and the economic development of its members.²²³ The purposes of the World Bank are (1) to assist in the reconstruction and development of the member nations, (2) to promote foreign investment, and (3) to provide loans for productive purposes when private capital is not available.²²⁴ Both the World Bank and the International Money Fund (IMF) serve, in essence, to regulate the economies of developing third world nations;²²⁵ the IMF by economic stabilization, the World Bank by providing low interest project loans.²²⁶ In return for the loans, countries are required to follow certain prudent international banking practices and procedures.²²⁷

One of the purported reasons behind bank secrecy and financial privacy laws is the prevention of capital flight from developing and unstable countries.²²⁸ Thus, in many respects, bank secrecy is considered a prudent financial policy. For this reason, the negative aspects of secrecy have not been raised by either the World Bank or the IMF. Currently, the IMF maintains a surveillance system, but it is geared towards maintaining a consistent macro-economic policy, rather than the supervision of individual banking institutions.²²⁹ Likewise, it is unlikely that the World Bank would adopt a policy against secrecy as a requirement for receiving funds, since the goal is to foster foreign economies.²³⁰ Yet, by expanding the authority of the IMF and World

²²² Under this informal relationship, it might be possible for an individual's government to seek access to banking records on behalf of its citizen. *See id.*

²²³ *See* ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 3 (1995). Membership in the IMF is a prerequisite for joining the World Bank. *See id.* at 5.

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See* Hackney & Shafer, *supra* note 216, at 476–78.

²²⁷ *See id.* at 478.

²²⁸ *See supra* notes 56–59 and accompanying text.

²²⁹ *See* JOSEPH JUDE NORTON, *DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS* 269 (1995).

²³⁰ Furthermore, loans are only made available when private capital is not available. Even if the

Bank to include provisions for monitoring secrecy laws and their effects on consumers, a system of supervision and redress could be established. Such an extension would not contravene the policies of either organization, but rather would promote conscientious banking practices, both responsive to institutional and consumer banking needs.

VI. APPRAISING THE BENEFITS OF FINANCIAL PRIVACY LAWS AND THE NEEDS OF INDIVIDUAL JUSTICE: A PROPOSAL

The collapse of BCCI and Daiwa Bank, the mounting occurrences of money laundering and abuses, and the personal upheaval of the Holocaust survivors, have highlighted the need for greater bank supervision and methods of redress.²³¹ While it is unlikely that existing notions and practices of financial privacy will be entirely eliminated, it is clear that both international and internal efforts have been focused on limiting the disadvantages of a secrecy jurisdiction, while attempting to retain the benefits.²³² The most reasonable solution would be to create a permanent independent commission, capable of addressing individual and regulatory concerns, that would exist within the current supervisory structure.²³³

A. *The Creation of a Permanent Independent Review Commission for Regulation and Arbitration*

The existing system for obtaining information and redress rests with using the formal and exasperating methods of requesting disclosure.²³⁴ Both individual and government searches for information have been stymied by this process.²³⁵ By creating a permanent independent review committee (PIRC), the inherent problems associated with bank secrecy, such as procedures for dormant accounts and lack of supervision and redress during investigations, could be minimized.

World Bank or IMF adopted such measures, a country wanting to keep its privacy laws could look elsewhere for unrestricted funding.

²³¹ See NORTON, *supra* note 229, at 247-52.

²³² One of named benefits is of customer confidence in secret accounting methods. Such confidence, however, must be taken in light of the current allegations against the Swiss banking industry and others.

²³³ Many international groups are calling for the establishment of a permanent independent investigative committee to sort through the claims of survivors and keep an eye for potential future abuses. See *Israel, Jews Weigh Inquiry Into Swiss Role in WW2*, REUTERS N. AM. WIRE, Jan. 20, 1997, available in LEXIS, Nexis Library, Curnws File.

²³⁴ See *supra* notes 56-58, 66-77 and accompanying text.

²³⁵ See *supra* notes 136-79 and accompanying text.

Currently, the Bank for International Settlements (BIS) reports on macro-state²³⁶ economic international banking activities, although it refrains from taking a specific position or from making formal announcements.²³⁷ The Basle Committee has taken on the task of monitoring bank efforts to combat international crime and has promulgated code of conduct guidelines for bankers and bank employees.²³⁸ The major central banking nations are already represented in the Basle Committee and in the BIS. By voluntarily granting authority to the Basle Committee to create a PIRC for the promulgation of substantive procedures, the Basle Committee could create a unified approach to informational requests and serve as an arbiter of disputes.²³⁹

1. Surveillance of Bank Procedures Regarding the Treatment of Dormant and Misappropriated Accounts

Accounts become dormant for many reasons, including abandonment, imprisonment, war, and death.²⁴⁰ By not allowing public notice when dormancy occurs, the Swiss laws implicitly assume that the estate (or missing customer) is better off with the funds remaining in bank custody and use. Similarly, the estate is better served by escheating to the state than relying on the possibility of finding heirs through notice. The desire for bank secrecy always outweighs an individual's rights. This pre-eminence of financial privacy, however, has been curtailed by the response of financial institutions to the abuses of their secrecy

²³⁶ The BIS has been called the "Central Bank to all other Central Banks," and normally reviews only the actions of the nation-state, as opposed to the individual banks. See NORTON, *supra* note 229, at 270.

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ Because secrecy jurisdictions hold membership in the Committee, their interests will be represented.

²⁴⁰ This list is not meant to be exhaustive. There are two types of imprisonment: pursuant to a criminal violation and as a political prisoner. To the extent the customer is a political prisoner, the divulging of secret accounts could prove dangerous or deadly to the customer. If the home nation is in obvious turmoil, the Swiss bankers might be justified in withholding information even though the account is dormant and may ultimately escheat to the state. Furthermore, Swiss banks could work in tandem with such international human rights organizations as Amnesty International by requesting a list of all known political prisoners within a certain nation, while not divulging the customer's name. To the extent the customer is being held under criminal laws, the problem of abandonment becomes even more remote. There, customer contact might be maintained through the privileged communications with counsel. Similar discretion might be afforded on account of wartime loss of contact.

systems by international crime.²⁴¹ A similar response should be forthcoming in the area of universal crimes.²⁴²

Current Swiss laws protect the privacy of customers even beyond their death or disassociation with a bank.²⁴³ This practice need not be disturbed in cases of known death.²⁴⁴ Where there has been a voluntary disassociation from the bank by the customer, there is also no concern of overreaching bank secrecy. The practice of unrelenting secrecy, however, fails to continue the underlying rationale of secrecy laws when an account is dormant for unknown reasons.²⁴⁵ In such a case, public disclosure, by name and not by number, is the only possible and reasonable solution.²⁴⁶

In cases of dormancy due to death, there are two possibilities: the bank knows the customer is dead (with or without heirs) or the bank does not know the customer is dead. When there is the possibility of heirs, Swiss law provides an elaborate ritual for protecting the customer and passing on the secrecy obligations.²⁴⁷ To the extent that the customer dies intestate, there may still be heirs who can pursue a claim under the Swiss succession laws.²⁴⁸ If there are no heirs, there may be an executor who could search for relatives without breaking the secrecy requirements.²⁴⁹

When an account becomes dormant for unknown reasons, the need for providing public notice is great, as the claims of the Holocaust survivors tragically illustrate. Without public notice and reasonable access to information, the cycle of potential injustice continues.

²⁴¹ See *supra* notes 153–68 and accompanying text.

²⁴² See *supra* notes 180–200 and accompanying text.

²⁴³ See *supra* note 92 and accompanying text.

²⁴⁴ In other words, bankers know the customer is dead and the succession process is underway.

²⁴⁵ Under the Decree of 1963, Swiss bankers implicitly understood that this practice would do further injustice to Jewish account holders believed to be victims of the Holocaust. See *supra* notes 28–33 and accompanying text.

²⁴⁶ This author agrees that requiring notice in Swiss and last known location may not reach relocated survivors. This should not, however, preclude adoption of the plan since it has the real chance of mitigating damages to those meant to be protected.

²⁴⁷ See CAMPBELL, *supra* note 112, at 675.

²⁴⁸ See *id.*

²⁴⁹ See *id.*

2. Promulgation of Dormancy Requirements and Procedures for Public Notice

The independent commission should first address the definition of dormancy and then establish procedures for reporting dormant accounts. To the extent there are no local escheat procedures, such as diligent search, custodial taking, and public notice,²⁵⁰ the PIRC could recommend appropriate ones and seek to standardize existing procedures. The PIRC should require banks to notify it of accounts dormant for five years or more. Notice to the PIRC would not require the customer's actual identity,²⁵¹ but only the account number and the country of last known origin.²⁵² If the account remains dormant without explanation for more than ten years, the bank would then be obliged to provide public notice. For secrecy jurisdictions, this presents particular problems. If the bank fails to contact the bank customer directly, notice to the general public would create an inherent conflict with the nation's secrecy laws.

The Swiss law, however, was codified to provide protection of customer assets from unlawful seizure by the Gestapo.²⁵³ This original intent of the secrecy laws and the integrity of the Swiss banking system, including modifications to the secrecy laws during criminal investigations, warrant the creation of disclosure provisions. The few grants of access made by Swiss banks since the enactment of the secrecy laws have been in reaction to allegations of a general lack of integrity of the banking system.²⁵⁴ These specialized notice requirements would not compromise customer expectations of bank secrecy, because banks will not be required to disclose any *active* accounts. Only accounts that have been dormant for more than ten years, where the bank has failed

²⁵⁰ Notice would require publication in the Swiss journal and in a major newspaper of the last known country of customer's residence. This may be problematic given that relocation could give rise to the dormancy itself, but it would be unreasonable to require the Swiss banks to publish in every known newspaper. The hope is that even if the customer or the heirs have relocated, friends or relatives may be available to pass along the notice.

²⁵¹ Customers are not anonymous to a limited number of bankers with full access to the accounts, only to the general public and to the world at large. Criminal laws and a heavy sense of moral fiduciary duty keep the bankers from divulging. *See supra* note 92 and accompanying text.

²⁵² While technically still a violation of the secrecy laws, the withholding of a customer's identity maintains the primary goal of bank secrecy. *See supra* notes 59–61 and accompanying text.

²⁵³ The law was also designed to protect the bank's employees from harassment by Gestapo officials. *See supra* notes 59–61, 85–87 and accompanying text.

²⁵⁴ *See supra* notes 159–63 and accompanying text.

to establish any positive contact with the customer and cannot otherwise explain the dormancy, would be disclosed.²⁵⁵ The PIRC would merely serve to monitor a bank's procedures.

3. Arbitration of Information Request Disputes

Traditional methods have proven to be an ineffective means of gaining access to records in a secrecy jurisdiction.²⁵⁶ The existing methods of comity, letters rogatory, and use of formal agreements have been ineffective, when requesting parties are faced with bank refusal.²⁵⁷ In the case of the Holocaust survivors, all diplomatic and traditional efforts of obtaining information failed.²⁵⁸ The Swiss banks did not relent until faced with outcries from the "court of public opinion."²⁵⁹

Part of the authority of the PIRC would be to oversee the discretion used by secrecy jurisdictions in connection with information requests. Normal bank procedures would be followed, but where there is a refusal, the requesting party could ask for review by the PIRC to ensure that the bank's refusal was not arbitrary. In the case of dormant accounts, the PIRC would already be notified of an account's existence, thus minimizing the potential for an intrusive violation of secrecy laws.

CONCLUSION

The original intent of Swiss bankers in codifying their secrecy practices was to protect bank customers from unwarranted asset seizure and criminal punishment for holding assets outside their home state. Unfortunately, as the facts of late have shown, secrecy laws have provided a harbor for illicit activities such as money laundering and drug trafficking and have kept rightful heirs and owners from their savings.

The best authorities to undertake the mantle of supervisor are the BIS and Basle Committee. While the BIS has traditionally served as a clearing house for central bankers, the BIS, along with the Basle

²⁵⁵ Additionally, discretion is to be provided to the bankers when there is a reasonable belief that disclosure of identity will harm or further endanger the customer.

²⁵⁶ See *supra* notes 142-79 and accompanying text.

²⁵⁷ See *supra* notes 142-52 and accompanying text.

²⁵⁸ See *supra* notes 1-11, 34-37 and accompanying text.

²⁵⁹ See *supra* notes 40-55 and accompanying text.

Committee, has the appropriate background and the support of the banking community needed to effect meaningful supervision. A permanent independent review committee would provide the responsiveness and dispute resolution system needed to safeguard fully customer rights when there is a dormant account.

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