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Bankers, Guns, and Money: Financial Assistance for Terrorism Under the Prevention of Terrorism Act, 1989

INTRODUCTION

August 14, 1989, marked the twentieth anniversary of Great Britain's military presence in Northern Ireland and its seventeenth year of direct rule over the politically troubled province.¹ During the past twenty years, the British government has implemented emergency and anti-terrorist legislation in Northern Ireland and the United Kingdom to combat Northern Irish terrorism and to penalize those who support it.² Recognizing the need to combat financial support for terrorism, Parliament introduced provisions under the Prevention of Terrorism (Temporary Provisions) Act, 1989 (1989 Act) that criminalize money laundering in support of terrorism.³

During parliamentary debates of the 1989 Act, members of both Houses of Parliament encouraged their colleagues to sup-

¹ Magee, Statistical Reminders, *FORTNIGHT*, Sept. 1989, at 13 (twentieth anniversary of British military presence in Northern Ireland); Hadden, Boyle & Campbell, *Emergency Law in Northern Ireland: The Context*, in *JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 2-6* (A. Jennings ed. 1988) (overview of British policy and rule in Northern Ireland since 1969).

² See Northern Ireland (Emergency Provisions) Act, 1987, ch. 30 [hereinafter 1987 Emergency Act]; Northern Ireland (Emergency Provisions) Act, 1978, ch. 5 [hereinafter 1978 Emergency Act]. Emergency legislation has been implemented exclusively in Northern Ireland. These Emergency Acts detail criminal procedures and rights of the accused. See J. Jackson, *The Northern Ireland (Emergency Provisions) Act 1987*, 39 *N. IRL. LEGAL Q.* 235 (1988). Alternatively, anti-terrorist legislation enacted by Parliament applies to Northern Ireland, Great Britain, Wales, and Scotland. See, e.g., Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 6; Interview with John Jackson, Barrister-at-Law, Lecturer in Law in the Queen's University, Belfast, in Newton, MA (Mar. 19, 1990). This Note addresses the Prevention of Terrorism Act, 1989 [hereinafter 1989 Act] and its predecessors, Prevention of Terrorism Act, 1984, ch. 8 [hereinafter 1984 Act], Prevention of Terrorism Act, 1976, ch. 8 [hereinafter 1976 Act], and Prevention of Terrorism Act, 1974, ch. 56 [hereinafter 1974 Act].

³ 1989 Act, *supra* note 2, at pt. III, § 11. The Prevention of Terrorism Act, 1989 came into effect on March 22, 1989. 1989 Act, *supra* note 2, at § 27. Selected provisions including schedule 4 of the 1989 Act came into effect on September 1, 1989. See Cowdry, *Police put Squeeze on IRA Fundraisers*, *The Times* (London), Sept. 2, 1989, at 5, col. a. Section 27, Commencement and Duration, stipulates annual review of the Act's provisions. 1989 Act, *supra* note 2, at pt. VII, § 27. Nonetheless, it remains effective without expiration. 1989 Act, *supra* note 2, at pt. VII, § 27. Sections not addressed in this Note include provisions concerning the remission of prison sentences and licensing of munitions factories under sections 22, 23, and 24 of the 1989 Act.

port legislation criminalizing terrorist money laundering.⁴ They pointed out the illicit sources of terrorist funding, which include fraud, extortion, racketeering, and control of legitimate businesses,⁵ and explained that such funds are subsequently “laundered” through businesses or financial institutions to disguise their sources and their ultimate destinations.⁶ Measures criminalizing third-party financial assistance for terrorism⁷ were enacted by royal assent on March 22, 1989.⁸

⁴ 504 Parl. Deb., H.L. (5th Ser.) 14 (1989). Earl Ferrers admonished his colleagues to grant police extraordinary police powers under the 1989 Act to combat the source and control of terrorist funding in his presentation of the Act during its Second Reading before the House of Lords. Lord Colbrook asserted a similar position when he argued: “[A]nything we can . . . do to deprive [terrorists] of money will be a severe blow to their campaign.” See also 504 Parl. Deb., H.L. (5th Ser.) 30 (1989).

⁵ REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT, 1976, 1983, CMND. SER. —, No. 8803, at 82 [hereinafter JELLCOE REPORT]. Jellicoe cites Sir John Hermon, Chief Constable of the Northern Irish Police, the Royal Ulster Constabulary (RUC):

[M]oney is crucial in the continuance of terrorism Quite simply it finances murder and destruction. Every pound in the coffers of the paramilitary organisations is a nail in the coffin of an innocent victim of their murder gangs.

⁶ Bonner, *Combating Terrorism in the 1990s*, PUB. L. 440, n.3 (1989). David Bonner, writing on the financial provisions of the 1989 Act, provides a definition of money laundering: “Laundering here denotes the process whereby proceeds and profits from criminal enterprises are converted through businesses and financial institutions into respectable funds, properties and accounts.” An American commentator defines money laundering as “a process whereby one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.” Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT’L LAW. 69, 70 n.6 (1988). Lord Colbrook described the practice in layman’s terms:

The terrorists get money in all sorts of other ways . . . some legal but most of it illegal. The difficulty—and it is increasing—is that if they manage to get money illegally they can launder it. I am no financier, but I think that that is the right word. In other words they make it into legal money, and as it has been said, they invest it in enterprises quite properly while hiding the fact that it was improperly come by.

504 Parl. Deb., H.L. (5th Ser.) 30 (1989). Cf. Fialka, *Cleaning Up: How Big Drug Cartel Laundered \$1.2 Billion with Aid of U.S. Firms*, Wall St. J., Mar. 1, 1990 at 1, col. 3.

⁷ 1989 Act, *supra* note 2, at pt. V, § 20. Section 20 defines terrorism broadly as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.” *Id.*; 1984 Act, *supra* note 2, at pt. V, § 14(1); 1976 Act, *supra* note 2, at pt. III, § 14(1); 1974 Act, *supra* note 2, at pt. III, § 9(1). In *McKee v. Chief Constable*, [1988] N. Ir. 164, 183–84, Lord Roskill ruled that an identical provision under the 1978 Emergency Act should be construed broadly. See 1978 Emergency Act, *supra* note 2, at pt. IV, § 31(1). The 1989 Act also broadly defines “terrorist funds.” They are defined as:

- (a) funds which may be applied or used for the commission of or in furtherance of or in connection with, acts of terrorism
- (b) the proceeds of the commission of such acts of terrorism or of activities engaged in furtherance of or in connection with such acts; and
- (c) the resources of a proscribed organisation.

1989 Act, *supra* note 2, at pt. III, § 11(3)–(4).

⁸ *Id.* at pt. VII, § 27.

Unlike other provisions under the 1989 Act, the recent money laundering provisions⁹ are not directed at terrorists themselves, but rather at those third parties who assist them. Bankers from the United Kingdom, as well as international bankers who deal in Great Britain, Northern Ireland, or Scotland, fall within the ambit of the 1989 Act. They face stiff criminal penalties including fines and imprisonment for their financial involvement with terrorist groups.¹⁰

While penalties for money laundering are not new to British law, the 1989 Act uniquely burdens the United Kingdom's banking community.¹¹ The Act shifts the burden of proof to bankers who handle alleged terrorist funds to prove that they are not assisting terrorist activities. The provisions also compel full disclosure of bankers' actions which may assist terrorists¹² even though such disclosure contravenes bankers' duties of confidentiality. As a result, bankers are required to disclose the details of their customers' transactions, relate suspicious transactions to police, and screen new customers to avoid transactions with potential terrorists. How bankers will determine which customers are terrorists is unclear.¹³ Without expert knowledge or investigatory

⁹ 1989 Act, *supra* note 2, at pt. III, § 11. The money laundering provisions, entitled "Financial Assistance for Terrorism," provide in pertinent part:

(1) A person is guilty of an offence if he enters into or is otherwise concerned in an arrangement whereby the retention or control by or on behalf of another person of terrorist funds is facilitated, whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise.

(2) In proceedings against a person for an offence under this section it is a defence to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist funds.

See generally REVIEW OF OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1984 BY THE VISCOUNT COLVILLE OF CULROSS Q.C., 1987, CMND. SER. —, No. 264, at 47–49 [hereinafter COLVILLE REPORT]. Lord Colville prepared a report on the financial provisions of the 1984 Act and provided recommendations for the 1989 Act's financial provisions.

¹⁰ 1989 Act, *supra* note 2, at pt. III, § 13(1)(a)–(b). The 1989 Act provides penalty and forfeiture provisions for those convicted under the Act's money laundering offense. Convictions upon indictment result in a term of imprisonment not exceeding fourteen years or a fine or both while summary convictions result in reduced terms of imprisonment not exceeding six months or a fine or both.

¹¹ *See infra* notes 144–47 and accompanying text.

¹² 1989 Act, *supra* note 2, at pt. III, § 12, pt. V, § § 17–18.

¹³ *See* Hadden, *supra* note 1 (context of emergency and anti-terrorist legislation); P. BISHOP & E. MALLIE, THE PROVISIONAL I.R.A. (1987) (discussion of the Provisional Irish Republican Army (IRA)); C. WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 1–21 (1987) (overview of terrorism and terrorist groups); D. BERESFORD, TEN MEN DEAD (1987); J. HOLLAND, TOO LONG A SACRIFICE 213–20 (1981) (glossary of paramilitaries active in Northern Ireland since 1969). Terrorist groups in Northern Ireland include both Catholic Republican paramilitaries such as the IRA and the Irish National Liberation

experience, bankers are faced with an intractable dilemma—either accept funds of questionable origin and risk fines and imprisonment, or turn down potentially legitimate customers and forego lucrative business opportunities. Until Parliament provides the banking community with an alternative, bankers must choose between these problematic alternatives.

This Note addresses the Prevention of Terrorism Act, 1989—its historical background, provisions, and effectiveness. Part I reviews the political and legislative background of the four Prevention of Terrorism Acts, emphasizing the origins of the 1989 Act and the nature of terrorist funding and money laundering. In addition, Part I discusses the Drug Trafficking Offences Act, 1986 (Drug Act), the predecessor and model for the 1989 Act's money laundering provisions.¹⁴ Part I also contrasts a banker's duty to disclose under the Drug Act with his or her countervailing common law duty of confidentiality. Part II focuses on the money laundering offense under section 11 of the 1989 Act and particularly, the elements of the offense and disclosure requirements. Part III then offers a U.S. regulatory alternative to the 1989 Act's money laundering provisions. Finally, Part IV compares the 1989 Act's provisions with its various alternatives. This Note concludes that the 1989 Act is poorly tailored to its purpose of curtailing terrorist money laundering and unnecessarily burdens the United Kingdom's banking community. In contrast, an approach similar to the U.S. regulatory alternative would provide a less burdensome and ambiguous approach to money laundering prosecution. Such an approach would place banks in the position of cooperating with, rather than being the targets of, terrorist money laundering investigations.

I. POLITICAL BACKGROUND

A. *The Politics of Violence in Northern Ireland and Great Britain*

The original Prevention of Terrorism Act was enacted in 1974 in response to renewed sectarian violence in Northern

Army (INLA) and Protestant Loyalist forces such as the Ulster Freedom Fighters (UFF) and the Ulster Volunteer Force (UVF). For discussions of international terrorism, see 143 Parl. Deb., H.C. (6th Ser.) 214 (1989) (Hurd discussing Abu Nidahl); J. ADAMS, *THE FINANCING OF TERRORISM* 13–130 and 187–252; 143 Parl. Deb., H.C. (6th Ser.) 259 (1989); Bonner, *supra* note 6, at 457 (discussing the Palestine Liberation Organization (PLO) in Great Britain); COLVILLE REPORT, *supra* note 9, at 3–4.

¹⁴ Drug Trafficking Offences Act, 1986, ch. 32 [hereinafter Drug Act]. The Drug Act enumerates the elements of the money laundering offense and a banker's affirmative duty to disclose information concerning narcotics trafficking.

Ireland.¹⁵ Protests which began as peaceful civil rights marches in 1968 quickly deteriorated into riots when Protestants and police confronted Catholic marchers.¹⁶ Beginning in 1968 and continuing through the Act's assent in 1974, Northern Ireland's Catholic minority clashed repeatedly with the province's Protestant majority over issues of discrimination. Eventually, the clashes themselves became a source of continued violence. Paramilitary groups on either side of Northern Ireland's religious and political divide, Protestant Loyalists and Catholic Republicans, took up the cause of sectarian violence.¹⁷

These repeated clashes precipitated British initiatives to end the violence. Parliament deployed troops in Northern Ireland and ordered the reorganization of Northern Ireland's police force in response to Catholic claims that police had sided with and aided Loyalist paramilitaries.¹⁸ Parliament also pressured Northern Irish lawmakers to legislate reforms guaranteeing Catholics equal treatment and freedom from discrimination.¹⁹ In March 1972, it took a further step and suspended Northern Ireland's Parliament.²⁰ Since 1972, Britain has ruled Northern Ireland directly.

Neither the proposed reforms nor direct rule stemmed the violence.²¹ Death tolls peaked in 1972 with 468 deaths attributed

¹⁵ Hadden, *supra* note 1, at 3. The origins of Northern Ireland's sectarian problems in the twentieth century began with Ireland's partition in 1921. Observers have explained the consequences of this division as:

a pragmatic British decision to partition Ireland in response to the fact that while in the whole of Ireland a substantial majority of the population wanted independence, in the six north-eastern counties an equally substantial number wanted to remain British. For the next fifty years, Northern Ireland was governed . . . [by] the exclusive interest of the majority community. From time to time there was a resumption of military activity by the [IRA] . . . Within Northern Ireland there are currently one million Protestants, almost all of whom want to remain British and are passionately opposed to the reunification of Ireland, and more than half a million Catholics, most of whom aspire to eventual reunification.

¹⁶ See P. BISHOP, *supra* note 13, at 1-81.

¹⁷ White, *From Conflict to Violence: The Re-emergence of the IRA and the Loyalist Response*, in *NORTHERN IRELAND: THE BACKGROUND TO THE CONFLICT, 184-85* (J. Darby ed. 1983).

¹⁸ Hadden, *supra* note 1, at 2.

¹⁹ See P. BISHOP, *supra* note 13, at 1-81.

²⁰ Hadden, *supra* note 1, at 2-6.

²¹ N.Y. Times, Sept. 20, 1990, at A6, col. 3 (attempted assassination of former governor of Gibraltar who authorized Special Air Services (SAS) operation in which three IRA members were shot and killed); The Times (London), Mar. 7, 1988, at 1, col. a (British SAS officers shot and killed unarmed IRA bombing suspects); The Times (London), Nov. 9, 1987, at 1, col. 1 (IRA Bomb kills eleven and injures sixty-one in Enniskillen, Northern Ireland); The Times (London), Oct. 13, 1984, at 1, col. a (IRA bomb attack in Brighton

to terrorist acts.²² Between 1973 and November 1974, 175 shootings and bombings occurred on British soil.²³ In response to the violence, Britain's Home Office prepared a draft version of the Prevention of Terrorism Act (1974 Act) and directed its provisions against the Irish Republican Army (IRA).²⁴ The 1974 Act criminalized membership in the IRA and limited the movement of IRA members throughout the United Kingdom.

Continued violence assured the bill's passage. On November 21, 1974, members of the Birmingham Branch of the Provisional IRA detonated bombs in two crowded Birmingham public houses, killing twenty-one and wounding more than 160.²⁵ The morning after the bombings, the Secretary of State for the Home Office, Roy Jenkins, called for emergency legislation.²⁶ During subsequent debates, Birmingham's Member of Parliament, Brian Walden, assured fellow members that no legislation could be more important than the Prevention of Terrorism Act. In his estimation, justification for its passage was overwhelming. The draft legislation affirmed "the very first function of Government [which is] the maintenance of life and property."²⁷ Parliament concurred and passed the bill on November 29, 1974, only seven days after the bombings.²⁸

B. *General Provisions of the Prevention of Terrorism Acts 1974, 1976, 1984, and 1989*

Parliament's intent in enacting the 1974 Act was twofold: first, to assert British control and legitimacy in Northern Ireland; and

at Conservative Party conference—four dead, Prime Minister, Margaret Thatcher unharmed); see also *The Times* (London), Nov. 9, 1987, at 1, col. a (catalogue of IRA bombings since 1978).

²² Magee, *supra* note 1, at 13; see also C. WALKER, *supra* note 13, at 22–31.

²³ C. WALKER, *supra* note 13, at 22–31.

²⁴ 1974 Act, *supra* note 2, at pt. I, Proscribed Organisations, and sched. 1, Proscribed Organisations (IRA only paramilitary group listed).

²⁵ 881 Parl. Deb., H.C. (5th Ser.) 1671–82 (1974); 882 Parl. Deb., H.C. (5th Ser.) 635–70 (1974). Six members were arrested and successfully prosecuted under the 1974 Act for the Birmingham bombings; their convictions have been appealed. See Toolis, *Where British Justice Failed*, N.Y. Times, Feb. 25, 1990 § 6 (Magazine), at 36–38 (review of the Guilford Four and Birmingham Six convictions and appeals). See generally P. BISHOP, *supra* note 13, at 257–61 (Birmingham bombings); C. WALKER, *supra* note 13, at 22–31.

²⁶ 881 Parl. Deb., H.C. (5th Ser.) 1671 (1974).

²⁷ 882 Parl. Deb., H.C. (5th Ser.), 27–31 (1974).

²⁸ 1974 Act, *supra* note 2, at Preamble. Consistent with its legislative purpose, the 1974 Act's preamble explained that the 1974 Act was "[a]n Act to proscribe organisations concerned in terrorism . . . , and to give power to exclude certain persons from Great Britain or the United Kingdom in order to prevent acts of Terrorism, and for connected purposes" 1974 Act, *supra* note 2, at Preamble.

second, to prevent the use of violence to achieve political ends in that province.²⁹ Such was the intent of the three subsequent Prevention of Terrorism Acts. Under each Act, Parliament strengthened police powers in four basic areas: proscription of terrorist groups;³⁰ restrictions on the free movement of suspected terrorists;³¹ extraordinary arrest and detention procedures;³² and immigration or port security checks.³³

Each Prevention of Terrorism Act has outlawed the IRA by declaring it a "proscribed organization."³⁴ Lord Shackleton, the Parliament-appointed reviewer of the 1974 Act, explained that proscription served as an official condemnation of the IRA.³⁵ According to Shackleton, the organization was "highly offensive to the public at large" and those who "professed support in public for [it] or collected money for its activities should [not] do so entirely within the law." Under the 1984 and 1989 Acts, Parliament added to the Acts' list of proscribed organizations a second Republican paramilitary group, the Irish National Liberation Army (INLA).³⁶ Parliament, however, has not

²⁹ Hadden, *supra* note 1, at 2-6; see also 882 Parl. Deb., H.C. (5th Ser.) 630 (1974).

³⁰ See 1989 Act, *supra* note 2, at pt. I, Proscribed Organizations, § § 1-3 and sched. 1. Proscription provisions outlaw membership in paramilitary groups as listed under the 1989 Act. Similar provisions appeared under the three previous Acts. 1984 Act, *supra* note 2, at pt. I, § § 1-2 and sched. 1; 1976 Act, *supra* note 2, at pt. I, § § 1-2 and sched. 1; 1974 Act, *supra* note 2, at pt. I, § § 1-2 and sched. 1. Each of these proscription provisions has outlawed the IRA. In addition, under both the 1984 Act and 1989 Act, Parliament outlawed the INLA. 1989 Act, *supra* note 2, at sched. 1; 1984 Act, *supra* note 2, sched. 1. To date, Parliament has not proscribed any Loyalist paramilitary groups under the Prevention of Terrorism Acts. Parliament has proscribed both Republican and Loyalist paramilitaries under the 1978 Emergency Act, schedule 2 including such Republican paramilitaries as the IRA, Cumann na mBan, Fianna na hEireann, and Saor Eire, and such Loyalist paramilitaries as the Red Hand Commando, the UFF, and the UVF. This proscription, however, only applies to Northern Ireland. 1978 Emergency Act, *supra* note 2, at sched. 2.

³¹ 1989 Act, *supra* note 2, at pt. II, Exclusion Orders, § § 4-8; 1984 Act, *supra* note 2, at pt. II, § § 3-9; 1976 Act, *supra* note 2, at pt. II, § § 3-9; 1974 Act, *supra* note 2, at pt. II, § § 3-6.

³² 1989 Act, *supra* note 2, at pt. IV, § § 14-16; 1984 Act, *supra* note 2, at pt. IV, § § 12-13; 1976 Act, *supra* note 2, at pt. III, § § 7-8; 1974 Act, *supra* note 2, at pt. III, § § 7-8.

³³ 1989 Act, *supra* note 2, at pt. IV, § 16, Port and Border Control, sched. 5, Port and Border Control, and sched. 6, Designated Ports; 1984 Act, *supra* note 2, at pt. IV, § 13; 1976 Act, *supra* note 2, at pt. III, § 13; 1974 Act, *supra* note 2, at pt. III, § 8.

³⁴ See 1989 Act, *supra* note 2, at pt. I, Proscribed Organizations, § § 1-3 and sched. 1.

³⁵ REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1974 BY THE RT. HON. LORD SHACKLETON, KG, OBE, 1978, CMND. SER. —, No. 7324, at 9 (Parliament invited Shackleton to prepare an official review of the 1974 Act in December 1977) [hereinafter SHACKLETON REPORT].

³⁶ See 1974 Act, *supra* note 2, at pt. I and sched. 1. Compare 1974 Act, *supra* note 2, at

proscribed any Loyalist groups under the four Prevention of Terrorism Acts.³⁷

The second police power—exclusion provisions—limits the free movement of suspected terrorists throughout the United Kingdom.³⁸ The provisions authorize Britain's Secretary of State to issue orders against those who enter the United Kingdom for terrorist purposes or who are or have been concerned in the commission of terrorism.³⁹ Such orders prevent the free movement of alleged terrorists into the United Kingdom and between Great Britain and Northern Ireland.⁴⁰ Once issued, individuals served with exclusion orders retain the right to challenge the orders.⁴¹ If the challenge fails, those under orders must comply or face potential fines and prison terms.⁴²

The Parliament-appointed reviewers of the 1974, 1976, and 1984 Acts agreed that exclusion orders were effective in disrupting terrorist activities and ridding Great Britain of terrorists.⁴³ Nevertheless, they also recognized that the success of exclusion orders has been at the expense of citizens' rights of free movement; the orders are considered a unique penalty tantamount to internal exile.⁴⁴ While reviewers acknowledged this extraordinary result, they concluded that terrorism warrants such extreme measures in the interest of public safety.⁴⁵

The Prevention of Terrorism Acts' third police power concerns terrorist investigations. Each Act has provided police with broad powers of arrest and detention.⁴⁶ Under these provisions, police

pt. I and sched. 1. *with* 1989 Act, *supra* note 2, at pt. I and sched. 1, and 1984 Act, *supra* note 2, at pt. I, § 1–2 and sched. 1.

³⁷ 1989 Act, *supra* note 2, sched. 1; 1984 Act, *supra* note 2, at sched. 1; 1976 Act, *supra* note 2, at sched. 1; 1974 Act, *supra* note 2, at sched. 1.

³⁸ *See* 1989 Act, *supra* note 2, at pt. II, §§ 4–8; 1984 Act, *supra* note 2, at pt. II, §§ 3–9; 1976 Act, *supra* note 2, at pt. II, §§ 3–9; 1974 Act, *supra* note 2, at pt. II, §§ 3–6.

³⁹ 1974 Act, *supra* note 2, at pt. II, § 3(3)(a); 1989 Act, *supra* note 2, at pt. II, § 5(1)(a); 1984 Act, *supra* note 2, at pt. II, § 4(1)(a); 1976 Act, *supra* note 2, at pt. II, § 5(1)(a).

⁴⁰ 1974 Act, *supra* note 2, at pt. II, § 3(3)(b); 1989 Act, *supra* note 2, at pt. II, § 5(1)(b); 1984 Act, *supra* note 2, at pt. II, § 4(1)(b); 1976 Act, *supra* note 2, at pt. II, § 5(1)(b).

⁴¹ 1974 Act, *supra* note 2, at pt. II, § 4(1)–(6); 1989 Act, *supra* note 2, at sched. 2, 3; 1984 Act, *supra* note 2, at pt. II, § 7(3)–(8); 1976 Act, *supra* note 2, at pt. II, § 7(3)–(8).

⁴² 1989 Act, *supra* note 2, at pt. II, § 8(4)(a)–(b); 1984 Act, *supra* note 2, at pt. II, § 9(4)(a)–(b); 1976 Act, *supra* note 2, at pt. II, § 9(3)(a)–(b); 1974 Act, *supra* note 2, at pt. II, § 3(8)(c)(i)–(ii).

⁴³ SHACKLETON REPORT, *supra* note 35, at 39–40; JELLCOE REPORT, *supra* note 5, at 94; COLVILLE REPORT, *supra* note 9, at 57–58.

⁴⁴ *See* SHACKLETON REPORT, *supra* note 35, at 11; Bonner, *supra* note 6, at 452–56.

⁴⁵ *See* SHACKLETON REPORT, *supra* note 35, at 11.

⁴⁶ 1989 Act, *supra* note 2, at pt. IV, §§ 14–16; *see also* 1984 Act, *supra* note 2, at pt. IV,

can arrest suspected terrorists upon reasonable suspicion without warrants and detain them up to forty-eight hours without charge.⁴⁷ After forty-eight hours, the Secretary of State can extend this uncharged detention an additional five days.

In November 1988, plaintiffs successfully challenged these arrest and detention provisions before the European Court of Human Rights.⁴⁸ In *Brogan v. United Kingdom*, four suspected IRA and INLA terrorists were arrested under section 12 of the 1984 Act's arrest provisions and held without charge for between four and six days each.⁴⁹ The Court ruled that because the accused were not brought before a judge promptly, their detentions were in violation of the Convention on Human Rights. Nevertheless, while Britain is a signatory to the convention, it has not implemented the convention in domestic legislation. The Court's decision, therefore, was not binding.⁵⁰ In 1989, when Parliament reviewed these challenged provisions, it readopted them without revision in spite of the *Brogan* decision, effectively ignoring the European Court of Human Right's condemnation of anti-terrorist arrest procedures.⁵¹

The fourth power initially adopted under the 1974 Act and maintained in subsequent Acts provides police with special immigration or "port" powers. Such powers authorize security checks on travelers entering and departing Northern Ireland and Great Britain.⁵² The powers provide that all passenger carriers must embark and disembark their passengers at specified ports and airports in the United Kingdom.⁵³ Examining officers are

§ § 12-13; 1976 Act, *supra* note 2, at pt. III, § § 7-8; 1974 Act, *supra* note 2, at pt. III, § § 7-8.

⁴⁷ See 1989 Act, *supra* note 2, at pt. IV, § 14(1)-(5).

⁴⁸ See *Brogan v. United Kingdom*, 145-B Eur. Ct. H.R. 117 (ser.A) (1988). The European Court of Human Rights ruled that detentions of four suspected IRA and INLA terrorists under pt. IV, § 12 of the 1984 Act violated the European Convention of Human Rights. *Id.* at 135-36; see also Barden, *Ministers Detained by Strasbourg Ruling*, FORTNIGHT, Jan. 1989, at 4.

⁴⁹ *Brogan*, 145-B Eur. Ct. H.R. at 120-22.

⁵⁰ 145 Parl. Deb., H.C. (6th Ser.) 698 (1989). Tony Marlow, M.P., challenged his colleague, Frank Dodson, to establish the binding authority of the European Court of Human Rights' ruling in *Brogan* during debate of the 1989 Act. *Id.*; see also S. PAISELY, A GUIDE TO EEC LAW IN NORTHERN IRELAND 203-06 (1986).

⁵¹ See 1989 Act, *supra* note 2, at pt. IV, § 14(1)-(5).

⁵² 1989 Act, *supra* note 2, at pt. IV, § 16, scheds. 5-6. Compare 1989 Act, *supra* note 2, at pt. IV, § 16, scheds. 5-6 with 1984 Act, *supra* note 2, at pt. IV, § 13; 1976 Act, *supra* note 2, at pt. III, § 13; and 1974 Act, *supra* note 2, at pt. III, § 8.

⁵³ See 1989 Act, *supra* note 2, at sched. 6.

stationed at the borders of the Republic of Ireland and Northern Ireland to search baggage and cargo⁵⁴ and may retain items discovered for criminal investigations.⁵⁵

Since 1974, Parliament has expanded on its original extraordinary powers. Under the 1976, 1984, and 1989 Acts, Parliament adopted additional police powers requiring disclosure of information concerning terrorists⁵⁶ and measures prohibiting terrorist fund raising.⁵⁷

These information provisions criminalize the failure to disclose information which parties knew or believed might assist in preventing terrorism or prosecuting terrorists.⁵⁸ Potential defendants can assert a "reasonable excuse" defense for the failure to disclose. The Act, however, does not define "reasonable excuse."⁵⁹ Generally, British criminal case law construes the "reasonable excuse" defense as that which a reasonable person would consider excuses his or her conduct in a particular situation.⁶⁰ For example, where disclosure would result in self-incrimination, the Crown Court of Northern Ireland has held that self-incrimination qualifies as a "reasonable excuse" under section 15 of the 1967 Criminal Law Act.⁶¹ That court, however, cautioned that self-incrimination as a "reasonable excuse" ought to be construed narrowly and allowed only where there is a genuine risk that the

⁵⁴ 1989 Act, *supra* note 2, at sched. 5, 2.; *see also* 1984 Act, *supra* note 2, at pt. IV, § 13(1)(a); 1976 Act, *supra* note 2, at pt. III, § 13(1)(a); 1974 Act, *supra* note 2, at pt. III, § 8(1)(a).

⁵⁵ 1989 Act, *supra* note 2, at sched. 5, 4.(4); 1984 Act, *supra* note 2, at pt. IV, § 13(2)(a)-(b); 1976 Act, *supra* note 2, at pt. III, § 13(2)(a)-(b); 1974 Act, *supra* note 2, at pt. III, § 8(2)(a)-(b).

⁵⁶ 1989 Act, *supra* note 2, at pt. III, § 12(1)-(2) and pt. V, § § 17-18. These disclosure provisions repeal and replace provisions under the 1984 Act, *supra* note 2, at pt. III, § 11(a)-(b). *See also* 1976 Act, *supra* note 2, at pt. III, § 11(a)-(b).

⁵⁷ 1989 Act, *supra* note 2, at pt. I, § 2(1)(b), pt. III, § 9, and pt. III, § 11. These provisions repeal and replace more limited provisions under the 1984 Act, *supra* note 2, at pt. I, § 1(b) and pt. III, § 10. *See also* 1976 Act, *supra* note 2, at pt. I, § 1(b) and pt. III, § 10; 1974 Act, *supra* note 2, at pt. I, § 1(b).

⁵⁸ 1989 Act, *supra* note 2, at pt. III, § 12(1)-(2) and pt. V, § § 17-18; *see also* 1984 Act, *supra* note 2, at pt. III, § 11(a)-(b); 1976 Act, *supra* note 2, at pt. III, § 11(a)-(b).

⁵⁹ *See* 1989 Act, *supra* note 2, at pt. III, § 12(3)(b); 1984 Act, *supra* note 2, at pt. III, § 11(b); 1976 Act, *supra* note 2, at pt. III, § 11(2).

⁶⁰ R. v. Butler, [1988] Crim. L.R. 695.

⁶¹ R. v. Donnelly (Apr. 24, 1986) (LEXIS, NI library, Cases file) (Defendant was charged under section 5 of the Criminal Law Act, 1967, for withholding information concerning concealed explosives on family farm. Northern Ireland's Crown Court allowed the defendant's defense of "reasonable excuse" based on self-incrimination.).

information would incriminate the defendants and subject them to further prosecution.

Parliament has encouraged willing and prompt disclosure by offering those who disclose limited immunity against prosecution for their involvement in criminal activities.⁶² For example, under the financial provisions of the 1989 Act, individuals are not liable to prosecution who have knowledge or suspicion of terrorist financial activities and disclose or demonstrate that they intended to disclose this information to police. Those who remain silent are liable for a term of imprisonment or fine or both.⁶³

According to Earl Jellicoe, the Parliament-appointed reviewer of the Prevention of Terrorism Act, 1976 (1976 Act), the information provisions were effective in eliciting information from reluctant informants.⁶⁴ He cited the provision as particularly effective in previously unreported "hijacking" cases where paramilitaries stole automobiles for the commission of terrorist acts. Prior to the measures, victims were unwilling to report thefts for fear of reprisal. Since their enactment, however, victims faced with a choice between criminal penalty or reprisal have seemingly chosen to come forward with information.

In addition, Parliament stepped up its offensive on illicit fund raising. Under the 1974 Act, Parliament only penalized IRA fund raising.⁶⁵ Thereafter, under the 1976, 1984, and 1989 Acts, Parliament extended the fund raising prohibitions to all who solicit, receive or make available any money or other property to finance acts of terrorism.⁶⁶ Solicitation offenses are punishable by imprisonment or fine or both.⁶⁷ Additionally, Parliament included

⁶² See, e.g., 1989 Act, *supra* note 2, at pt. III, § 12(2). Section 12(2) provides:

A person who enters into or is otherwise concerned in any such transaction or arrangement as is mentioned in section 9 [Contributions toward acts of terrorism], 10 [Contributions to resources of proscribed organizations] or 11 [Assisting in retention or control of terrorist funds] does not commit an offence under this section if he is acting with the express consent of a constable or if —

(a) he discloses to a constable his suspicion or belief . . . and

(b) the disclosure is made after he enters into or otherwise becomes concerned in the transaction or arrangement in question but is made on his own initiative. . . .

⁶³ 1989 Act, *supra* note 2, at pt. III, § 13.

⁶⁴ JELICOE REPORT, *supra* note 5, at 85.

⁶⁵ 1974 Act, *supra* note 2, at pt. I, § 1(b).

⁶⁶ Compare 1974 Act, *supra* note 2, at pt. I, § 1(b) with 1989 Act, *supra* note 2, at pt. III, § 9; 1984 Act, *supra* note 2, at pt. III, § 10; and 1976 Act, *supra* note 2, at pt. III, § 10.

⁶⁷ 1989 Act, *supra* note 2, at pt. III, § 13(1)(a); 1984 Act, *supra* note 2, at pt. III, § 10(3)(a)–(b); 1976 Act, *supra* note 2, at pt. III, § 10(3)(a)–(b); 1974 Act, *supra* note 2, at pt. I, § 1(c)(i)–(ii).

“forfeiture” proceedings under the 1976, 1984, and 1989 Acts that authorize courts to seize money and property held by those convicted of solicitation offenses.⁶⁸ Northern Irish and Scottish prosecutors have used these provisions to proceed against Scottish weapons dealers and Northern Irish sympathizers who store proscribed firearms, munitions, and explosives.⁶⁹

C. *Terrorist Fund Raising, Racketeering, and Money Laundering*

The official reviewers of the 1976 and 1984 Acts, Earl Jellicoe and Lord Colville, noted that Loyalist and Republican paramilitaries not only seek support through contributions, but also through extortion, racketeering, and fraud.⁷⁰ These illicit revenue-raising activities have continued notwithstanding the introduction of the solicitations offense under the 1976 Act. Northern Irish paramilitaries have extorted protection money from public house owners, building contractors, and retailers.⁷¹ They have also raised funds from paramilitary-sponsored smuggling, kidnapping, and gambling operations.⁷² Recent reports note that Northern Irish paramilitaries have taken direct control of legitimate services and businesses. In addition, both Loyalist and Republican paramilitaries have been implicated in European Economic Community subsidy and British Inland Revenue fraud.

Former Home Secretary Douglas Hurd estimates the IRA's annual earnings between £3,000,000–£4,000,000.⁷³ Protestant Loyalist opposition such as the Ulster Defense Association (UDA)

⁶⁸ 1989 Act, *supra* note 2, at sched. 4; 1984 Act, *supra* note 2, at pt. III, § 10(4)(a)–(b); 1976 Act, *supra* note 2, at pt. III, § 10(4)(a)–(b).

⁶⁹ See *Murray v. Ministry of Defence*, [1988] 1 W.L.R. 692 (discussion of section 10 contributions offense under the 1984 Act); *Sayers v. HM Advocate*, 1982 J.C. 17 (discussion of section 10 contributions offense under 1984 Act).

⁷⁰ JELICOE REPORT, *supra* note 5, at 82; COLVILLE REPORT, *supra* note 9, at 47–49.

⁷¹ *Protestant Paramilitaries Better Armed than Ever*, Reuters, Apr. 23, 1989; Valley & Dettmer, *Extortion Rackets Widespread in Ulster*, The Times (London), Sept. 21, 1988, at 2, col. 2; Evans & Webster, *Hurd Declares War Against Racketeers Who Back IRA*, The Times (London), Sept. 21, 1988, at 1, col. 7; *Britain Aims to Choke off Ulster Guerrilla Funds*, Reuters, Sept. 20, 1988; Hunter, *Irish Racket Law*, 138 New L.J. 718 (1988); Hunter, *Ulster Legal Changes*, 138 New L.J. 625 (1988); Moseley, *Lone Stand Against Racketeers*, Chi. Trib., Feb. 16, 1988, at 16, col. 1; Moseley, *Racketeers Hold Ulster in Terror*, Chi. Trib., Feb. 15, 1988, at 1, col. 6; Moseley, *Mafia-like Rackets Fund Ulster Groups*, Chi. Trib., Feb. 15, 1988, at 1, col. 1. See generally J. ADAMS, *supra* note 13, at 156–84; Bonner, *supra* note 6, at 457–58.

⁷² Bonner, *supra* note 6, at 457–58.

⁷³ Valley and Dettmer, *Extortion Rackets Widespread in Ulster*, The Times (London), Sept. 21, 1988, at 2, col. b; 143 Parl. Deb., H.C. (6th Ser.) 212 (1989).

earn substantially less: approximately £2,000,000 annually from protection money and legal drinking establishments. Sources estimate that combined paramilitary income ranges between £18,000,000–£55,000,000.⁷⁴ These funds subsidize acts of terrorism, terrorist cells abroad, and dependents of jailed terrorists.⁷⁵ In order to maintain steady cash flow, Loyalist and Republican paramilitaries have gone so far as to divide up territories in Northern Ireland between themselves and to cooperate in enforcing threats against reluctant “contributors.”⁷⁶ Once collected, terrorist funds are “laundered” through businesses or financial institutions.⁷⁷ The intent is to obscure the illegal source and destination of the funds from police investigations and government prosecutions.

Two recent examples of IRA money laundering illustrate the elaborate schemes employed in the United Kingdom and abroad to thwart British and Northern Irish police in their investigations. Moreover, these examples demonstrate the role of third parties who knowingly or unwittingly assist Northern Irish paramilitaries in laundering their funds. The first example involves the collapse of a cross-border currency exchange business which laundered money for the IRA.⁷⁸ The exchange operator offered higher rates than local banks in the exchange of Irish and British pounds. The IRA participated in the exchange system through individual smugglers and legitimate businessmen. Once the IRA’s tainted funds were exchanged for clean currency, the funds were successfully laundered and beyond detection of police.

The second example illustrates the role of third parties in assisting paramilitaries in international money transfers.⁷⁹ In *Clancy and McCarthy v. Ireland*, officials from the Republic of Ireland seized £1,700,000 in alleged IRA funds deposited under the name of an Irish-American millionaire, Alan Clancy. The

⁷⁴ Moseley, *Lone Stand Against Racketeers*, Chi. Trib., Feb. 15, 1988, at 16, col. 1.

⁷⁵ *Id.* See also Moseley, *Racketeers Hold Ulster in Terror*, Chi. Trib., Feb. 15, 1988, at 1, col. 6; *Mafia-like Rackets Fund Ulster Groups*, Chi. Trib., Feb. 14, 1988, at 1, col. 1.

⁷⁶ Clarke, *Rival Groups “Held Terror Summit,”* The Times (London), Jan. 1, 1988, at A7, col. a; Bonner, *supra* note 6, at 457–58.

⁷⁷ 504 Parl. Deb., H.L. (5th Ser.) 30 (1989).

⁷⁸ Dettmer, *Business Crash May Have Lost IRA Cash*, The Times (London), Oct. 6, 1988, at 2, col. 2.

⁷⁹ *Clancy and McCarthy v. Ireland*, [1989] I.R.L.M. 670 (the Republic of Ireland’s Dublin High Court upholds seizure of funds); J. Hunter, *Irish Racket Law*, 138 NEW L.J. 718 (1988).

funds were the remainder of a £2,000,000 ransom paid to the IRA and were seized by officials of the Republic of Ireland pursuant to anti-terrorist legislation. The IRA had transferred the ransom to a Swiss Bank account, then forwarded it to Clancy's account in a New York branch of the Bank of Ireland, and finally, redeposited the ransom money in the Navan branch of the Bank of Ireland in the Republic of Ireland. Clancy's involvement and the assistance of Swiss and Irish banks in transferring the IRA ransom money funds demonstrates that money laundering depends on the support of sympathizers and the participation of third parties such as banks to obscure the source of the funds and their ultimate destinations.

D. *Drug Trafficking Model*

Until 1989, Parliament had not enacted any terrorist money laundering legislation. Instead, it addressed money laundering only in the context of drug trafficking under the Drug Trafficking Offences Act, 1986 (Drug Act).⁸⁰ Parliament has referred to the Drug Act's provisions as a model for the 1989 Act's money laundering measures.⁸¹ The Drug Act's provisions were the first to criminalize a third party's handling of drug trafficking proceeds.⁸² They also provide prosecutors, upon court application, with orders for the production of materials relevant to drug investigations and the confiscation of drug trafficking proceeds and property.⁸³

To strip traffickers of their profits, government prosecutors must first establish a *prima facie* case of money laundering. Un-

⁸⁰ Drug Act, *supra* note 14, at § 24.

⁸¹ 143 Parl. Deb., H.C. (6th Ser.) 213 (1986) (former Home Secretary Hurd's remarks concerning the 1989 Act and Drug Act); 504 Parl. Deb., H.L. (5th Ser.) 957-66 (1989) (Lord Mishcon's comparison of the 1989 Act and Drug Act).

⁸² Drug Act, *supra* note 14, at § 24. Section 24 provides, in pertinent part, that:

(1) if a person enters into or is otherwise concerned in an arrangement whereby

—
(a) the retention or control by or on behalf of another[s] . . . proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or

(b) [the] proceeds of drug trafficking —

(i) are used to secure that funds are placed at [the trafficker's] disposal, or

(ii) are used for [the trafficker's] benefit to acquire property by way of investment, knowing or suspecting that [the trafficker] is a person who carries on or has carried on drug trafficking, he is guilty of an offence.

See also *A New Kind of Traffic*, 137 NEW L.J. 29-30 (1987); Hiley, *The Drug Trafficking Offences Act 1986*, 84 LAW SOC'Y GAZ. 3557 (1987) (application of the Drug Act).

⁸³ Drug Act, *supra* note 14, at § § 27-28.

der section 24 of the Drug Act, prosecutors must establish specific conduct and intent. According to section 24, the requisite criminal conduct is assisting a drug trafficker's attempts to conceal, transfer, dispose or otherwise arrange drug proceeds for the traffickers' use or benefit.⁸⁴ Knowledge or mere suspicion of the possible drug trafficking source of funds satisfies the intent requirement.⁸⁵ The intent standard here is subjective and is based on a banker's or other third party's actual knowledge or suspicion.

Defenses to the money laundering offense under the Drug Act include failure to satisfy any of the elements of the offense or "reasonable excuse."⁸⁶ If, for example, parties are unaware that they are or may be dealing with drug traffickers, they lack the requisite intent under section 24 to commit the offense.⁸⁷ In addition, parties can avoid liability under the Drug Act by disclosing to authorities their involvement with traffickers.⁸⁸ Even if the parties fail to disclose, they can assert that they intended to disclose to police their suspicions or beliefs but had a "reasonable excuse" barring their disclosure.⁸⁹ If these defenses fail and parties are convicted under the Drug Act, they face imprisonment or fines or both.⁹⁰

In addition to prosecution, the Drug Act requires those who possess relevant materials regarding drug trafficking investigations to produce such materials.⁹¹ The Drug Act empowers circuit judges to issue production orders to those who possess material relevant to drug trafficking investigations. For example, British excise officials have used the production orders to compel the London branch of Luxembourg's Credit and Commerce International SA to hand over all documents relating to accounts held in the names of Manuel Noriega and members of his family.⁹² British police have also used the orders to compel solicitors of a suspected drug trafficker to produce documents regarding prop-

⁸⁴ *Id.* at § 24(1)(a)–(b).

⁸⁵ *Id.* at § 24(1)(b).

⁸⁶ *Id.* at § 24(4).

⁸⁷ *Id.* at § 24(4)(a).

⁸⁸ *Id.* at § 24(4)(c).

⁸⁹ *See supra* notes 60–61 and accompanying text.

⁹⁰ Drug Act, *supra* note 14, at § 24(5).

⁹¹ *Id.* at § 27.

⁹² *R. v. Crown at Southwark, ex parte Customs and Excise Commissioners; R. v. Crown Court at Southwark, ex parte Bank of Credit and Commerce International SA*, [1989] 3 All E.R. 673.

erty purchases made with trafficking proceeds.⁹³ Although the solicitors claimed the documents were protected by attorney-client privilege, the House of Lords ruled that the documents, while innocently held by the solicitors, were not subject to legal professional privilege and had to be produced.

E. Confidentiality Law

The production orders under section 27 of the Drug Act permit bankers to divulge customer information in apparent breach of their common law duty of confidentiality.⁹⁴ This duty of confidentiality requires that bankers refrain from disclosing customer information to protect customers' reputations and creditworthiness. For example, in *Tournier v. National Provincial and Union Bank of England*, the court ruled that the bank breached its duty to its customer when it disclosed to the customer's employer that the plaintiff had issued checks to a bookmaker.⁹⁵ In his opinion, Judge Banks listed four exceptions to a banker's duty of confidentiality: (1) where disclosure is under compulsion by law; (2) where there is a duty to the public to disclose; (3) where the interests of the bank require disclosure; and (4) where the disclosure is made by express or implied consent of the customer.⁹⁶

The first and second exceptions have been the source of considerable litigation since *Tournier*. Under the first exception, banks are empowered to breach their duty of confidentiality under compulsion of statute. Currently, twenty-two statutes, including both the Drug Act and 1989 Act authorize disclosure.⁹⁷ More

⁹³ Francis & Francis v. Central Criminal Court, [1988] 3 All E.R. 775.

⁹⁴ See *Tournier v. Nat'l Provincial & Union Bank*, [1924] 1 K.B. 461; see also 3(1) HALSBURY'S LAWS OF ENGLAND ¶ 240 (4th ed. Reissue 1973). Commentators have described the duty of confidentiality as:

an implied term of the contract between a banker and his customer that the banker will not divulge to a third person, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interest requires it.

See also Newcomb, *United States Litigation and Foreign Bank Secrecy: The Origins of Conflict*, 9 N.Y.L.J. INT'L & COMP. L. 47 (1988); Neate, et al., *Banking Secrecy Financial Privacy and Related Restrictions*, 7 INT'L BUS. LAW. 259, 263-71 (1979).

⁹⁵ *Tournier*, [1924] 1 K.B. 461, [1924] T.L.R. 214.

⁹⁶ *Tournier*, [1924] T.L.R., at 217.

⁹⁷ BANKING SERVICES: LAW AND PRACTICE REPORTED BY THE REVIEW COMMITTEE, 1989 CMND. SER. —NO. 621, at 30 and Appendix Q [hereinafter JACK REPORT]; see also Hallpike, 87 LAW SOC'Y GAZ. 25, July 4, 1990.

recently, courts have held that banks are obliged to comply with statutory disclosure requirements and do not breach their duty of confidentiality when they act in compliance.⁹⁸ They have also concluded that banks are under no obligation to probe disclosed information or to inform customers of disclosures. It reasoned that notice to customers who are under police investigation would only frustrate the investigations.

Beyond the banking context, British courts have applied the second *Tournier* exception to permit breaches of confidentiality where public safety or national security require it.⁹⁹ Courts apply a balancing test in these cases to determine whether public interest outweighs confidentiality.¹⁰⁰ Factors courts consider include: whether the risk to the public is real, immediate and serious; whether the risk will be substantially reduced by disclosure; whether the disclosure is no greater than is reasonably necessary to minimize the risk; and whether the consequent damage to the public interest regarding the duty of confidentiality is outweighed by the public interest in minimizing the risk.¹⁰¹ British courts have extended this analysis to find disclosure admissible where a psychiatrist released a report to government officials concerning a convicted mass murderer's continuing violent behavior. The court ruled on the psychiatrist's behalf, finding full disclosure necessary for the public's safety. Conversely, courts have ruled against disclosure where the countervailing risk to individuals has been greater than that to the community.¹⁰²

British courts have been particularly willing to allow breaches of the duty where nondisclosure would aid in the commission of a wrong.¹⁰³ For example, where parties are innocently involved in a tortious act, British courts have ruled that parties are under

⁹⁸ *Barclays Bank plc (Trading as Barclaycard) v. Taylor*, [1989] 3 W.L.R. 1066; *The Times* (London), May 23, 1989, at 54, col. e.

⁹⁹ The *Tournier* exceptions to a bank's, or more generally, a fiduciary's duty of confidentiality have been applied in other contexts. *See, e.g.*, *X v. Y*, [1988] 1 All E.R. 648 (newspaper may not disclose that doctors carry the AIDS virus on public policy grounds); *A-G v. Guardian Newspapers*, [1988] 3 W.L.R. 766 (ex-intelligence officer prohibited from publishing top secret information on public policy grounds).

¹⁰⁰ *See X v. Y*, [1988] 1 All E.R. 648 (balancing test applied to case where doctors infected with the AIDS virus continued practicing without disclosing their illnesses).

¹⁰¹ *W v. Edgell*, [1989] 1 All E.R. 835.

¹⁰² *In re M & N*, [1989] 3 W.L.R. 1136.

¹⁰³ *Norwich Pharmacal Co. v. Customs and Excise Comm'r*, [1972] 3 W.L.R. 864 (British customs authorities may disclose list of importers who pirate patent holder's drug for civil action against importers).

a duty to assist the party harmed by giving full information and disclosing the identity of the wrongdoers.¹⁰⁴ This duty to disclose has been deemed the “defense of iniquity” which, narrowly stated, predicates that innocent parties cannot be made confidants of crimes or frauds.¹⁰⁵ In light of the case law, bankers must take into account their duty of confidentiality, exceptions to that duty, and common law qualifications to those exceptions.

With so many statutory exceptions and common law qualifications, Parliament appointed a review committee on banking services law in January 1987 (the Jack Committee) to consider streamlining the current state of confidentiality law.¹⁰⁶ The Jack Committee concluded that disclosure under compulsion of statute as under the first *Tournier* exception should be codified while disclosure for public purposes under the second *Tournier* exception ought to be abolished.¹⁰⁷ The Committee viewed the public purposes exception as overly vague and burdensome; it did not “provide the measure of certainty” which bankers need in determining whether they are released from their duty of confidentiality.¹⁰⁸ Conversely, statutes generally provide such certainty. In addition, the Jack Committee viewed the “defense of iniquity” as a necessary exception to confidentiality and supported disclosure when banks are parties to legal actions. It concluded that confusion would increase unless Parliament revised confidentiality law.¹⁰⁹

II. THE 1989 ACT

In 1989, Parliament finally turned its attention to the financing of terrorism and introduced new measures under the Prevention of Terrorism Act that criminalize third-party assistance in the retention or control of terrorist funds.¹¹⁰ The provisions were

¹⁰⁴ *Id.* at 877.

¹⁰⁵ *Guardian Newspapers*, [1988] 3 W.L.R. 776, 794.

¹⁰⁶ JACK REPORT, *supra* note 97, at 1–5.

¹⁰⁷ *Id.* at 37.

¹⁰⁸ *Id.* at 35.

¹⁰⁹ *Id.* at 34–35. The Jack Committee explained that current trends in computerized banking would further erode the duty, making personal account information a tempting target for governmental investigatory agencies. *Id.* at 30.

¹¹⁰ 1989 Act, *supra* note 2, at pt. III, § 11.

adopted in March 22, 1989 against the statutory background of the Drug Act and the continuing political crisis in Northern Ireland. Debate over the 1989 Act's adoption focused on the general effectiveness of the prior Prevention of Terrorism Acts and the effect of such extraordinary, emergency legislation on human rights.¹¹¹

The provisions of the 1989 Act share features in common with their predecessors.¹¹² The current Act, however, finally addresses terrorist money laundering. Measures include a money laundering offense, revised disclosure provisions, procedural safeguards, and forfeiture orders.¹¹³

The elements of a *prima facie* money laundering offense under section 11 of the 1989 Act include both proscribed conduct and specific intent.¹¹⁴ Individuals are guilty of a section 11 offense if they enter into or are concerned with an arrangement to facilitate the retention or control of terrorist funds. In addition, prosecutors must establish that offenders possessed the requisite intent for the offense: offenders must know or have "reasonable cause to suspect" that the financial transaction related to terrorist funds. Section 11 provides an objective intent standard. It requires triers of fact to decide what ordinary persons in similar circumstances would do rather than what individual defendants would do given their particular circumstances.¹¹⁵ Thus, merely negligent third parties who inadvertently handle terrorist funds may be offenders.¹¹⁶

This standard is an onerous burden on section 11 defendants. For example, the defense of lack of intent under the section requires defendants to establish that they "did not know and had no reasonable cause to suspect" that they were involved in terrorist transactions. Thus, potential defendants have the burden of establishing a negative defense.¹¹⁷ Earl Ferrers, during debates

¹¹¹ See *Brogan v. United Kingdom*, 145-B Eur. Ct. H.R. 117, 135-36 (ser. A) (1988); 143 Parl. Deb., H.C. (6th Ser.) 208-14, 238-42, and 249-50 (1989); 145 Parl. Deb., H.C. (6th Ser.) 694-736 (1989).

¹¹² See *supra* notes 30-33, 56-57 and accompanying text.

¹¹³ 1989 Act, *supra* note 2, at pt. III, § 11-13, pt. IV, and pt. V.

¹¹⁴ *Id.* at § 11(1)-(2).

¹¹⁵ *Id.* But see Drug Act, *supra* note 14, at § 24.

¹¹⁶ 1989 Act, *supra* note 2, at pt. III, § 11(1)-(2).

¹¹⁷ *Id.* at pt. III, § 11(2). Section 11(2) provides:

In proceedings against a person for an offence under this section it is a defence

before the House of Lords, explained that while the standard was burdensome, it was justified on public policy grounds and was consistent with current banking policy.¹¹⁸ He assured his colleagues that it would be “relatively easy for [a] defendant, if he is innocent, to show that he had no reason to know or suspect that he was caught in an arrangement which was benefiting terrorists.”¹¹⁹ The burden upon defendants is to establish in a “balance of probabilities” or by a preponderance of the evidence that they had no reasonable cause to suspect that they were arranging transactions for terrorists.¹²⁰ As an additional defense, defendants can assert duress, duress of circumstances, or necessity.¹²¹ Barring a successful defense, handlers of terrorist funds face prison sentences of up to fourteen years.¹²²

Section 12 of the 1989 Act provides additional exemptions from criminal prosecution.¹²³ Potential defendants can argue that

to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist funds.

¹¹⁸ 504 Parl. Deb., H.L. (5th Ser.) 960–65 (1989). In Ferrers’ introduction, he explained that section 11’s intent standard differed from that of both the section 9 “solicitations” offense of the 1984 Act, and section 24 of the Drug Act. He justified the difference on the grounds that terrorism is even more dangerous to the United Kingdom than drug trafficking, and the “reasonable suspicion” standard under section 11 is consistent with banking practices.

¹¹⁹ *Id.* at 960. Ferrers concluded:

With regard to the burden of proof. . . , I realize that the . . . section 11 offence is different The offence here is not that money is being made available to the terrorist which is outlawed under section 9, but is being looked after for him. We commonly use the expression laundering to describe this sort of activity. . . . This is bound to create difficulties for the prosecution in proving that the defendant knew or that he had reasonable cause to suspect that the arrangement related to terrorist funds. But it will be relatively easy for a defendant, if he is innocent, to show that he had no reason to know or suspect that he was caught up in an arrangement which was benefiting terrorists.

¹²⁰ 504 Parl. Deb., H.L. (5th Ser.) 962 (1989).

¹²¹ Bonner, *supra* note 6, at 460.

¹²² 1989 Act, *supra* note 2, at pt. III, § 13.

¹²³ *Id.* at pt. III, § 12. Section 12, Disclosure of Information about terrorist funds, provides:

(1) A person may notwithstanding any restriction on the disclosure of information imposed by contract disclose to a constable a suspicion or belief that any money or other property is or is derived from terrorist funds or any matter on which such a suspicion or belief is based.

(2) A person who enters into or is otherwise concerned in any such transaction or arrangement as is mentioned in § 9, § 10 or § 11 above does not commit an offence under that section if he is acting with the express consent of a constable or if —

(a) he discloses to a constable his suspicion or belief that the money or other

they intended to disclose to police their suspicions or beliefs that certain of the financial arrangements they were involved in were related to terrorist funds. The defendants must also show that they disclosed information at their own initiative within a reasonable time. Barring disclosure, the defendants may also establish a "reasonable excuse" for their failure to disclose.

Section 12 also includes a modified disclosure standard in addition to its exemptions.¹²⁴ Unlike similar provisions under the 1976 and 1984 Acts, section 12 of the 1989 Act specifically addresses the money laundering offense of section 11.¹²⁵ The provisions stipulate that parties who have knowledge or suspicion that money or other property is derived from terrorist funds must disclose such information notwithstanding any contracted restrictions on disclosure.¹²⁶ This provision empowers banks and bankers to breach their duty of confidentiality. If the knowledgeable parties do not disclose, fail to establish the intent to disclose, or provide no reasonable excuse for their failure to disclose, money handlers face imprisonment and fines under a section 11 conviction.¹²⁷

Additional disclosure provisions are set out under sections 17 and 18 of the 1989 Act.¹²⁸ Section 18 reiterates the original provisions of the 1976 and 1984 Acts which criminalized the failure to disclose information concerning the prevention of terrorist acts.¹²⁹ Section 17, however, sets forth a new offense for wrongful disclosures.¹³⁰ Under section 17, individuals are guilty of an of-

property concerned is or is derived from terrorist funds or any matter on which such a suspicion or belief is based; and

(b) the disclosure is made after he enters into or otherwise becomes concerned in the transaction or arrangement in question but is made on his own initiative and as soon as it is reasonable for him to make it.

(3) In proceedings against a person for an offence under . . . § 11 above it is a defence to prove —

(a) that he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in paragraph (a) of subsection (2) above; and

(b) that there is a reasonable excuse for his failure to make the disclosure as mentioned in paragraph (b) of the subsection.

¹²⁴ 1989 Act, *supra* note 2, at pt. III, § 12.

¹²⁵ Compare 1989 Act, *supra* note 2, at pt. III, § 12(1) with 1984 Act, *supra* note 2, pt. III, § 11 and 1976 Act, *supra* note 2, at pt. III, § 11.

¹²⁶ 1989 Act, *supra* note 2, at pt. III, § 12(1).

¹²⁷ *Id.* at pt. III, § 13.

¹²⁸ *Id.* at pt. V, § § 17–18.

¹²⁹ *Id.* at pt. V, § 18(1)(a)–(b).

¹³⁰ *Id.* at pt. V, § 17. Section 17(2) provides, in pertinent part:

Where in relation to a terrorist investigation a warrant or order under Schedule

fense if they know or have reasonable cause to suspect that a terrorist investigation is taking place, and make disclosures which are likely to prejudice the investigation.¹³¹ The section defines "terrorist investigations" to include investigations into terrorist money laundering.¹³² In this context, prejudicial disclosures may include misleading disclosures which obstruct such investigations or information which places investigators at personal risk.¹³³ Those who make wrongful disclosures may raise such defenses as lack of knowledge or "reasonable excuse."¹³⁴ They may also assert that they had "lawful authority" to disclose the information, notwithstanding any possible effects.

Penalties and procedures for the financial assistance of terrorism are provided under schedule 4 and section 13 of the 1989 Act.¹³⁵ Schedule 4 authorizes courts to issue restraint orders, freezing a section 11 defendants' assets and prohibiting their destruction or removal from the court's jurisdiction.¹³⁶ Upon conviction, section 13 provides for imprisonment and fines and authorizes forfeiture proceedings against funds which are in the possession of convicted parties and intended for terrorist purposes.¹³⁷ During the forfeiture proceedings, courts will entertain third party claims to money or title to property subject to forfeiture.¹³⁸ Home Secretary Hurd, in presenting these provisions to the House of Commons, noted that the government would negotiate mutual enforcement agreements with other countries in

7 of this Act has been issued or made or has been applied for and not refused, a person is guilty of an offence if, knowing or having reasonable cause to suspect that the investigation is taking place, he . . . makes any disclosure which is likely to prejudice the investigation . . .

In addition, section 17(2)(b) addresses offenses for the falsification, concealment, destruction, or disposal of material which is relevant to an investigation.

¹³¹ *Id.* at § 17(5).

¹³² *Id.* at § 17(1)(a)(ii).

¹³³ *Cf.* 1989 Act, *supra* note 2, at sched. 7, 8.(2). While section 17 of the 1989 Act does not define prejudicial disclosures, other provisions suggest circumstances in which disclosure would be prejudicial. For example, in schedule 7, the Act allows special warrant application procedures where disclosures to obtain warrants would "prejudice the capability of members of the Royal Ulster Constabulary [RUC] in relation to the investigation . . . or otherwise prejudice [their] safety or . . . [the safety of] persons, in Northern Ireland."

¹³⁴ 1989 Act, *supra* note 2, at pt. V, § 17(3)(a)-(b).

¹³⁵ *Id.* at pt. III, § 13.

¹³⁶ *Id.* at sched. 4, 3.(1).

¹³⁷ *Id.* at sched. 4, 1.(a) and pt. III, § 13(2)-(3).

¹³⁸ *Id.* at pt. III, § 13(6).

an effort to harmonize restraining orders and forfeiture proceedings.¹³⁹

In addition to potential penalties, the 1989 Act provides procedural safeguards for those charged under section 11.¹⁴⁰ First, prosecution is wholly discretionary: under section 19 of the 1989 Act, the government may waive prosecution. Criteria for waiving prosecution, however, have not been established.¹⁴¹ Secondly, if one is accused but not convicted under section 11, the innocent party has a limited cause of action for compensation.¹⁴² The party must prove that "some serious default" was committed by authorities in their investigations.¹⁴³ In addition, the party must demonstrate that he or she suffered loss related to the investigation. Awards are left to the discretion of the court.

As of September 1990, the British courts had not convicted anyone under section 11, but potential defendants, and particularly bankers, have already voiced their opposition to the measures.¹⁴⁴ They contest the "reasonable person" objective intent standard. According to critics in the banking community, the standard implicates innocent bankers and loan officers for the mere handling of what they assume are "clean" funds.¹⁴⁵ Critics also point out that under no other criminal statute must defendants bear so heavy a burden to establish their innocence. For example, bankers must prove the negative defense that bank

¹³⁹ 143 Parl. Deb., H.C. (6th Ser.) 214 (1989).

¹⁴⁰ 1989 Act, *supra* note 2, at pt. V, § 19.

¹⁴¹ *Id.*; see also Bonner, *supra* note 6, at 460. Bonner explains:

Given the extent to which terrorist organisations in Northern Ireland are interlocked with the socio-economic life of the parts of the community, it is clear that the offences [under the 1989 Act] may embrace a much wider range of people than the traditional banking or financial community. . . . Sensitive use of the Attorney-General's role in sanctioning prosecutions will be necessary if these offences are not to prove oppressive in penalising those merely indulging in the normal social intercourse.

¹⁴² 1989 Act, *supra* note 2, at sched. 4, 7.

¹⁴³ *Id.* at sched. 4, 7.(2).

¹⁴⁴ Wheatley, *Guilty* . . . *Said the Red Queen*, 139 New L.J. 499-500 (1989).

¹⁴⁵ 504 Parl. Deb., H.L. (5th Ser.) 966 (1989). Lord Mishcon explained:

The banks in this country. . . do not consist of criminals; nor do they consist of bank clerks who are as wise as the Noble Lord [Earl Ferrers]. . . . What are they supposed to do under the provision . . . ? A perfectly respectable bank clerk is to be told[:] "[Y]ou go into the witness box. You allowed this arrangement to take place. You prove to the satisfaction of the jury that you did not know or did not have reasonable cause to suspect."

employees “did not know and had no reasonable cause to suspect” that they were involved in terrorist transactions.¹⁴⁶ Finally, bankers object to the state of confidentiality and disclosure law and are concerned with their conflicting disclosure duties.¹⁴⁷

III. THE U.S. REGULATORY ALTERNATIVE: THE BANKING SECURITY ACT

As Lord Harris noted during the Drug Act and 1989 Act debates, U.S. federal law offers an alternative to the British money laundering approach.¹⁴⁸ The difference is apparent in the law’s methodology and its substantive provisions. Whereas the 1989 Act focuses on prosecution of potentially unwitting bankers, the U.S. alternative, the Banking Secrecy Act (BSA), provides a uniform filing procedure applied equally to all parties subject to the Act’s provisions.¹⁴⁹ To enforce compliance, the BSA provides concise banking regulations, criminal penalties, and civil causes of action.¹⁵⁰ It requires banks to file standardized transaction reports with the IRS and to retain reports on customer cash transactions.

The underlying policy of the BSA is cited in the Act’s “Declaration of Purpose” which committed the Act “to require certain reports or records where they have a high degree of usefulness

¹⁴⁶ *Id.* at 499; Bonner, *supra* note 6, at 462.

¹⁴⁷ See JACK REPORT, *supra* note 97, at 30; 1989 Act, *supra* note 2, at pt. III, § 12 and pt. V, § 17.

¹⁴⁸ 504 Parl. Deb., H.L. (5th Ser.) 24 (1989); 472 Parl. Deb., H.L. (5th Ser.) 118–22 (1986).

¹⁴⁹ 31 U.S.C. § § 5311–26 (1989). Section 5313 prescribes the following reporting procedures:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. . . .

¹⁵⁰ *Id.* (Reports on domestic coins and currency transactions); 31 U.S.C. § 5314 (Records and reports on foreign financial agency transactions); 31 U.S.C. § 5315 (Reports on foreign currency transactions); 31 U.S.C. § 5316 (Reports on exporting and importing monetary instruments); 31 U.S.C. § 5321 (Civil Penalties, Injunctions); 31 U.S.C. § 5322 (Criminal Penalties).

in criminal, tax, or regulatory investigations or proceedings.”¹⁵¹ Congressional hearings prior to the BSA’s enactment noted that the Act was drafted to facilitate the gathering of information on the banking transactions of petty criminals, organized crime figures, and income tax evaders who utilize financial institutions to carry out their illegal activities.¹⁵² Congressional representatives recognized that criminals deal in cash or its equivalents because it is freely exchangeable and difficult to trace.¹⁵³ They concluded that deposits and withdrawals of large sums of currency may betray criminal activities.¹⁵⁴

Law enforcement representatives also urged Congress to enact legislation which would require banks to maintain records “in a manner designed to facilitate criminal, tax, and regulatory investigations” of national and international cash transactions. According to congressional findings, costs of implementing such regulations would be minimal. The Act, generally viewed as an effective and inexpensive means to address criminal financing, was passed in 1970.

The BSA establishes reporting and recording requirements for domestic financial institutions involved in transactions for the payment, receipt, or transfer of U.S. coins or currency.¹⁵⁵ Financial institutions are defined as commercial, investment, private, or foreign banks operating in the United States, trust companies, currency exchanges, and brokers or dealers in securities or commodities.¹⁵⁶

Once an individual or institution qualifies as a domestic financial institution, it must complete Cash Transaction Reports (CTRs) when involved in domestic transactions of coin or currency.¹⁵⁷ Implementing regulations detail this requirement and mandate that each institution file CTRs describing the transaction with the IRS for each deposit, withdrawal, or exchange of currency in excess of \$10,000.¹⁵⁸ Institutions must also record and

¹⁵¹ 31 U.S.C. § 5311.

¹⁵² H.R. REP. NO. 91-975, 91ST CONG., 2d Sess., —, *reprinted in* 1970 U.S. CODE CONG. & ADMIN., 4394, 4395.

¹⁵³ Rusch, *Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act*, 37 CATH. U.L. REV. 465 (1988).

¹⁵⁴ H.R. REP. NO. 91-975, 91ST CONG., 2d Sess., —, *reprinted in* 1970 U.S. CODE CONG. & ADMIN., 4394, 4396.

¹⁵⁵ 31 U.S.C. § § 5311–5326.

¹⁵⁶ 31 U.S.C. § 5312; 31 C.F.R. § 103.11(i) (1990).

¹⁵⁷ 31 U.S.C. § 5313.

¹⁵⁸ 31 C.F.R. § 103.22(a)(1) (1990).

retain the name, address, and social security or tax identification number of those who transact above the BSA's limits.¹⁵⁹ Banks, in particular, must retain records detailing any extension of credit, transfer of funds, opening of an account, or sale or redemption of a certificate of deposit in excess of the BSA's limits.¹⁶⁰ Finally, the CTRs must be filed with the IRS within fifteen days following the cash transactions.¹⁶¹

Prior to the adoption of amendments to the BSA in 1987, money launderers had been successful in "structuring" their transactions to evade the BSA's reporting requirements.¹⁶² Frequently, launderers employed couriers known as "smurfs" who would make deposits or convert cash into cashier checks in amounts less than \$10,000.¹⁶³ Such schemes exploited the BSA's lack of an aggregation requirement and a split in the circuits concerning whether individuals should be required to file CTRs.¹⁶⁴ Under the Money Laundering Control Act, Congress

¹⁵⁹ 31 C.F.R. § 103.28 (1990).

¹⁶⁰ 31 C.F.R. § 103.33–34 (1990).

¹⁶¹ 31 C.F.R. § 103.27(a)(1) (1990).

¹⁶² See 31 C.F.R. § 103.11(p) (1990). "Structuring" is described under current regulations as any technique employed by an individual or individuals to conduct or attempt to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days in any manner, for the purpose of evading the reporting requirements under the BSA.

¹⁶³ See Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 295–97 (1989). "Smurfing" is one of the techniques used to structure transactions to avoid the BSA's reporting requirements. See, e.g., *United States v. Tobon-Builes*, 706 F.2d 1092, 1094 (11th Cir. 1983) (defendant and companion each purchased cashier's checks for \$9,000 each at ten different Florida banks in a twenty-four hour period).

¹⁶⁴ See, e.g., *Tobon-Builes*, 706 F.2d at 1097–98. Courts did not interpret the BSA to require banks to report transactions under \$10,000, even if they were made by the same individual or individuals on the same day or days and exceeded \$10,000 in the aggregate. The CRT forms, however, provided that banks should report such multiple transactions. See *United States v. Anzalone*, 766 F.2d 676, 679, n.6 (1st Cir. 1985). Nevertheless, whether these instructions could serve as the basis for criminal prosecution was unclear. Welling, *supra* note 163, at 298. Some circuit courts have been reluctant to impose reporting requirements on individuals. See *United States v. Bucey*, 876 F.2d 1297, 1302–06 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 565 (1989); *United States v. Robinson*, 832 F.2d 1165, 1166 (9th Cir. 1987); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *Anzalone*, 766 F.2d at 681. Others, however, have been willing to impose such requirements. See *United States v. Rigdon*, 874 F.2d 774, 777–84 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 374 (1989); *United States v. Mouzin*, 785 F.2d 682, 688–90 (9th Cir. 1986), *cert. denied*, 479 U.S. 985 (1986); *United States v. Goldberg*, 756 F.2d 949, 955–56 (2nd Cir. 1985).

closed this loophole in 1987 with an amendment to the BSA making structuring or “smurfing” a criminal offense.¹⁶⁵

Prosecution of institutions or individuals which evade or attempt to evade the BSA’s provisions requires specific conduct and intent to trigger criminal liability.¹⁶⁶ As for institutions, prosecutors must establish their failure to file or their filing of inaccurate CTRs.¹⁶⁷ In addition, prosecutors must also demonstrate their willful intent to contravene the BSA’s reporting requirements. Such willful intent has been defined as knowledge of the BSA’s requirements or an indifference or conscious avoidance of learning about the duty to file.¹⁶⁸ In this regard, the First Circuit has imposed a “collective knowledge” standard where bank employees severally failed to file CTRs for multiple cash transactions.¹⁶⁹ As for individuals, actionable conduct arises when individuals structure or attempt to structure their transactions to avoid the reporting requirements altogether.¹⁷⁰ Prosecutors need not establish that such defendants were aware of their unlawful structuring but merely that they structured their transactions to evade the BSA’s requirements.¹⁷¹

In addition to BSA violations, defendants are often charged with federal conspiracy¹⁷² or concealment of material fact.¹⁷³ Conspiracy charges arise when individuals act in concert with financial institutions to avoid the filing requirements. Even if defendants

¹⁶⁵ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Title I, Subtitle H, § 1354(a), 100 Stat. 3207-22 (codified under 31 U.S.C. § 5324 (1989)). The Money Laundering Control Act was adopted under the Anti-Drug Abuse Act of 1986. According to its original sponsor, Senator Alfonse D’Amato, the amended provisions “close[d] the loophole in present law used by launderers of money and other criminal profits.” *United States v. Scanio*, 705 F. Supp. 768, 771 (W.D.N.Y. 1988), *aff’d*, 900 F.2d 485 (2nd Cir. 1990).

¹⁶⁶ 31 U.S.C. § § 5313, 5322, 5324.

¹⁶⁷ *See* 31 U.S.C. § 5321(b).

¹⁶⁸ *See* 31 U.S.C. § § 5321(a)(1), 5322(a)–(b); *see also* *United States v. Bank of New England NA*, 821 F.2d 844, 854–55 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987) (conscious avoidance); *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir. 1986); *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984) (knowledge of reporting requirement satisfying intent under BSA); *United States v. Granda*, 565 F.2d 922, 925–26 (5th Cir. 1978).

¹⁶⁹ *Bank of New England*, 821 F.2d at 856.

¹⁷⁰ *See* 31 U.S.C. § 5324.

¹⁷¹ *Scanio*, 900 F.2d at 491.

¹⁷² *See, e.g.*, *United States v. Donahue*, 885 F.2d 45, 46 (3rd Cir. 1989) (defendants successfully prosecuted under BSA and federal conspiracy charges).

¹⁷³ *Bucey*, 876 F.2d 1297, 1307–08 (defendant unsuccessfully prosecuted under federal concealment or falsification provisions pursuant to 18 U.S.C. § § 2(b), 1001).

are not liable under the BSA, they can be prosecuted for conspiring against the federal government and often face additional charges under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁷⁴

Beyond the trial context, the BSA also operates to gather useful information concerning potential targets for money laundering prosecution. For example, the Act provides a “know your customer” standard requiring banks to identify and retain records of all persons maintaining accounts with their institutions.¹⁷⁵ Regulations also provide identification procedures for both customers and noncustomers who transact over the \$10,000 limit.¹⁷⁶ Financial institutions are required to verify and record the name and address of individuals involved in transactions above this limit as well as record their account numbers and social security or tax identification numbers. Upon receipt of this information, the IRS can forward the reports to state and federal investigatory agencies.¹⁷⁷ In turn, such agencies can summon bank officials to testify concerning their reports and can release customer information relevant to possible violations of any statute or amendment.¹⁷⁸

Bankers can also disclose suspicious transactions on their own initiative.¹⁷⁹ Pursuant to the Right to Financial Privacy Act, a financial institution, or any officer, employee, or agent of a financial institution may disclose to a governmental authority the name and any indentifying information concerning the individual, corporation, or account engaged in suspected illegal activity.¹⁸⁰ Institutions or individuals who disclose are free from any liability for their disclosure or their failure to notify customers of the

¹⁷⁴ See 18 U.S.C. § 371 (1989); 18 U.S.C. § § 1956–1957 (1990); 31 U.S.C. § 1001 (1989).

¹⁷⁵ 31 C.F.R. § 103.27 (1990). Advisors to the financial community suggest that actively screening customers may be the most effective means of determining who may be a potential money launderer. Interview with Danforth Newcomb, Attorney, Shearman & Sterling, in New York City (Aug. 10, 1990).

¹⁷⁶ 31 C.F.R. § 103.28 (1990).

¹⁷⁷ 31 U.S.C. § 5319; 31 C.F.R. § 103.43 (1990).

¹⁷⁸ See 31 C.F.R. § 103.61 (1990).

¹⁷⁹ 12 U.S.C. § 3403(c) (1989). Pursuant to the Right to Financial Privacy Act, bankers may reveal suspicious transactions to authorities. Bankers may report their suspicions to the federal government on “criminal referral forms” without liability for making the disclosure or for failing to inform the customer of their disclosures. See Villa, *A Critical View*, 37 CATH. U.L. REV. 489, 507 (1988).

¹⁸⁰ 12 U.S.C. § 3403(c).

disclosure. Such informants may also receive rewards if their information leads to convictions under the BSA.¹⁸¹

IV. COMPARISON OF THE 1989 ACT'S MONEY LAUNDERING PROVISIONS WITH ITS U.S. ALTERNATIVE

The 1989 Act's money laundering provisions under section 11 burden bankers with a broad definition of actionable conduct, an easily satisfied intent standard, draconian penalties, and an additional exception to a banker's duty of confidentiality.¹⁸² The limitations of the 1989 Act are evident in its origins, in comparison with its predecessors, and in contrast with U.S. regulatory legislation.

The Prevention of Terrorism Acts were promulgated in direct response to emergency conditions in Great Britain and Northern Ireland.¹⁸³ The 1974 Act was passed within seven days of a highly publicized IRA bombing incident in Great Britain. The subsequent Prevention of Terrorism Acts have been passed in reaction to continued terrorist violence.¹⁸⁴ Thus, the Prevention of Terrorism Acts can be viewed as summary legislative responses to violence rather than judicious initiatives to resolve the underlying causes of that violence.

The 1989 Act's money laundering provisions are themselves merely a reaction to a well established problem in Great Britain and Northern Ireland: paramilitary-sponsored extortion, racketeering, fraud, and control of legitimate businesses.¹⁸⁵ Parliament failed to address this problem until 1989.¹⁸⁶ Instead, its initial efforts under the proscription provisions of the 1974, 1976, and 1984 Acts criminalized Republican paramilitary fund raising.¹⁸⁷ Such provisions expressed an official government view that terrorist fund raising was primarily a Republican matter.¹⁸⁸ Parliament modified this restricted view under section 10 of the 1976

¹⁸¹ 31 U.S.C. § 5323.

¹⁸² See *supra* notes 9, 114–16, 124, 135–61 and accompanying text.

¹⁸³ See *supra* notes 21–27 and accompanying text.

¹⁸⁴ See *supra* note 21 and accompanying text.

¹⁸⁵ See *supra* notes 71, 76, 78–79 and accompanying text.

¹⁸⁶ 1989 Act, *supra* note 2, at pt. III, § 11.

¹⁸⁷ *Id.* at sched. 1; 1984 Act, *supra* note 2, at sched. 1; 1976 Act, *supra* note 2, at sched. 1; 1974 Act, *supra* note 2, at sched. 1.

¹⁸⁸ See 1974 Act, *supra* note 2, at pt. I, § 1(b).

and 1984 Acts by criminalizing all terrorist fund raising.¹⁸⁹ Nevertheless, section 10 merely addressed fund raising. In reality, terrorists also rely on third parties to launder tainted proceeds of sophisticated fraud, extortion, or racketeering schemes.¹⁹⁰

Parliament finally addressed third-party assistance in 1986, although only in the context of drug trafficking.¹⁹¹ Section 24 of the Drug Act created a standard against which the 1989 Act provisions can be evaluated. The 1989 Act adopts the general format of the Drug Act's money laundering provisions, incorporating the offense under section 11, "Assisting in retention or control of terrorist funds."¹⁹² The 1989 Act, however, differs from its model, the Drug Act, in the specific elements of the money laundering offense. Under the 1989 Act, the government need only establish an objective intent for the commission of the laundering offense.¹⁹³ For example, under a section 11 offense, fact finders must consider what the reasonable bank clerk would do in reviewing transactions with potential terrorists. Conversely, under section 24 of the Drug Act, accused parties have the advantage of a subjective intent standard, which requires finders of fact to determine what the particular clerk understood and did under the given circumstances.¹⁹⁴ This allows defendants to present finders of fact with their own circumstances and abilities.

The subtle differences between the financial assistance provisions of the Drug Act and the 1989 Act are even more dramatic with respect to defenses. First, the defense for failure to meet the intent requirement differs between the Acts. Under section 24 of the Drug Act, defendants can assert lack of knowledge as a defense.¹⁹⁵ Under section 11 of the 1989 Act, however, Parliament limited such a defense by requiring defendants to establish that they "did not know or had no reasonable cause to suspect" that they were involved in terrorist transactions.¹⁹⁶ Thus, defendants under the 1989 Act bear the added burden of demonstrating that they had no reason to believe they were dealing with terrorists. This additional burden on defendants is certainly contrary

¹⁸⁹ See 1984 Act, *supra* note 2, at pt. III, § 10; 1976 Act, *supra* note 2, at pt. III, § 10.

¹⁹⁰ See *supra* notes 78–79 and accompanying text.

¹⁹¹ Drug Act, *supra* note 14, at § 24.

¹⁹² Compare 1989 Act, *supra* note 2, at pt. III, § 11 with Drug Act, *supra* note 14, at § 24.

¹⁹³ 1989 Act, *supra* note 2, at pt. III, § 11(2).

¹⁹⁴ Drug Act, *supra* note 14, at § 24(1)(b).

¹⁹⁵ *Id.* at § 24(4)(a).

¹⁹⁶ 1989 Act, *supra* note 2, at pt. III, § 11(2).

to Earl Ferrers' assurance that "innocent" defendants will find it easy to prove that they had no reason to know or suspect they were assisting terrorists.¹⁹⁷

Earl Ferrers betrays the underlying problem of section 11: its drafters assumed that it would only catch guilty money launders. Section 11's lower standard of culpability, however, implicates all bankers who cannot establish absolute ignorance.¹⁹⁸ This result may be mitigated insofar as defendants can demonstrate against a "balance of probabilities" that they did not know or reasonably suspect they were handling terrorist funds.¹⁹⁹ Nevertheless, the intent standard and limited defenses of section 11 effectively subject bankers to a presumption of guilt rather than innocence.²⁰⁰

In addition, the "reasonable excuse" defense under section 12 exempting defendants from section 11 prosecution is limited by section 11's lower standard of culpability.²⁰¹ Under section 12, defendants can assert such a defense but must prove that their excuse is justified by what they reasonably should have suspected and not merely what they actually believed.²⁰² Alternatively, defendants could argue that while they knew or suspected that they were involved with terrorists, they acted under duress. This may be the only viable alternative given section 11's intent standard and the harsh reality of terrorism in Northern Ireland and Great Britain.²⁰³

Ultimately, a defendant's most promising defense is full disclosure. Under the 1989 Act, however, the disclosure provisions of sections 12 and 17 conflict. Specifically, under section 12 bankers can avoid section 11 liability by disclosing their involvement with terrorists or establishing a "reasonable excuse" for their failure to disclose.²⁰⁴ They may still, however, face penalties pursuant to section 17 if their disclosure prejudices or obstructs police investigations.²⁰⁵

¹⁹⁷ See *supra* notes 118–19 and accompanying text.

¹⁹⁸ See *supra* notes 117, 119 and accompanying text.

¹⁹⁹ See *supra* note 120 and accompanying text.

²⁰⁰ See Wheatley, *supra* note 144, at 499–500.

²⁰¹ 1989 Act, *supra* note 2, at pt. III, § 11(2)

²⁰² *Id.* at § 12(2)(a).

²⁰³ Bonner, *supra* note 6, at 460.

²⁰⁴ 1989 Act, *supra* note 2, at pt. III, § 12.

²⁰⁵ *Id.* at pt. V, § 17(2)(a).

Barring a successful defense, convicted money launderers face penalties under section 13 of the 1989 Act similar to those of the Drug Act. Defendants under both statutes are subject to fines and fourteen year prison sentences.²⁰⁶ Yet, the government's chances of successful prosecution may be greater under section 11 due to the provision's broadly defined standard of conduct and easily satisfied standard of intent.

In addition, the 1989 Act's disclosure provisions further complicate bankers' common law duty of confidentiality. The Act adds an additional statutory exception to the twenty-one exceptions listed in the Jack Report.²⁰⁷ As the Report concluded, the broad scope of the exceptions as well as their sheer numbers are problematic for Northern Irish and British bankers. For example, bankers must distinguish between their duties of disclosure under the Drug Act in contrast to their duties under the 1989 Act. In addition, conflicting provisions within the 1989 Act between a duty to disclose under section 12 and a penalty for wrongful disclosure under section 17 demonstrate that Parliament has failed to provide concise rules on a banker's duty of confidentiality.²⁰⁸ The 1989 Act thereby lacks what the Jack Committee considered "the measure of certainty" which bankers need to determine whether they are released from their duty of confidentiality.

U.S. law under the BSA offers a reporting alternative for the detection and prosecution of money laundering related to a variety of crimes. Instead of targeting discrete criminal activities such as terrorism²⁰⁹ or drug trafficking,²¹⁰ the BSA focuses on financial institutions including, but not limited to, banks and their employees.²¹¹ Such institutions are required to file reports or CTRs with the IRS for transactions above the Act's \$10,000 limit.²¹² These reports "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings"²¹³ because criminals, whether tax evaders or drug traffickers, deal in cash,²¹⁴

²⁰⁶ Compare 1989 Act, *supra* note 2, at pt. III, § 13(1)(a)–(b) with Drug Act, *supra* note 14, at § 24(5).

²⁰⁷ See JACK REPORT, *supra* note 97, at 30.

²⁰⁸ *Id.* at 35.

²⁰⁹ 1989 Act, *supra* note 2, at pt. III, § 11.

²¹⁰ Drug Act, *supra* note 14, at § 24.

²¹¹ See *supra* note 156 and accompanying text.

²¹² 31 C.F.R. § 103.22(a)(1) (1990).

²¹³ See *supra* note 151 and accompanying text.

²¹⁴ See *supra* notes 153–54 and accompanying text.

and the BSA's reporting requirements document their transactions. The CTRs create an audit trail which provides federal and state authorities with the names, dates, and social security or tax identification numbers of those involved.²¹⁵ Moreover, U.S. bankers on their own initiative can report suspicious transactions to authorities and may even receive rewards if their information results in convictions under the BSA.²¹⁶

In contrast, the 1989 Act addresses only terrorist money launderers. Instead of supplying authorities with transaction reports useful in criminal investigations, bankers in the United Kingdom must disclose information to authorities in a manner that will not prejudice or obstruct such investigations.²¹⁷ As an alternative, they may screen potential customers to avoid transactions with those that they suspect are terrorists. Unlike their U.S. counterparts, bankers in the United Kingdom must engage in difficult assessments of their customers, and moreover, risk severe penalties if their assessments are wrong.

Beyond the reporting context, the BSA also offers more specific definitions of proscribed conduct than the 1989 Act. For example, under the BSA, U.S. bankers are only subject to criminal or civil penalties when they fail to file reports, file them inaccurately, or structure transactions so as to avoid the reporting requirements.²¹⁸ Bankers in the United Kingdom, however, may be subject to criminal penalties if they merely enter into or are concerned with arrangements to facilitate the retention or control of terrorist funds.²¹⁹

In addition, the BSA offers a higher standard of culpability than the 1989 Act. It requires a willful standard rather than the easily satisfied "reasonable suspicion" standard of section 11 of the 1989 Act.²²⁰ U.S. prosecutors must establish that defendants knew of the reporting requirements but failed to report or report accurately, or knowingly structured their transactions to avoid the requirements.²²¹ The BSA does not require defendants to make difficult assessments and then subsequently demonstrate

²¹⁵ 31 U.S.C. § 5319; 31 C.F.R. § 103.28 (1990); 31 C.F.R. § 103.43(a)-(b) (1990).

²¹⁶ 12 U.S.C. § 3403(c).

²¹⁷ 1989 Act, *supra* note 2, at pt. III, § § 12, 17.

²¹⁸ 31 U.S.C. § § 5321, 5322, 5324.

²¹⁹ 1989 Act, *supra* note 2, at pt. III, § 11(1).

²²⁰ See *supra* notes 168-71 and accompanying text.

²²¹ 31 U.S.C. § § 5321, 5324.

that they had no reason to suspect that they were handling terrorist funds.²²²

CONCLUSION

The 1989 Act, born of violence to address violence, stipulates stiff standards of conduct, intent, and disclosure. The Act also adds an additional exception to the already confused state of bankers' confidentiality law. Moreover, section 11 fails to address money laundering as a systemic problem, treating terrorist money laundering separately and more severely than its drug trafficking counterpart. Finally, it fails to distinguish adequately between unwitting assistance and willful involvement with terrorists' funds; both are punished to the same degree.

As an alternative, the BSA offers a uniformly applied procedural approach to money laundering prosecution. It also offers a more narrowly defined standard for actionable conduct and a willful intent standard. In addition, U.S. bankers are encouraged to know their customers and are free to disclose suspicious transactions without the threat of criminal or civil liability.

Parliament should reconsider adopting money laundering provisions similar to the BSA. Such legislation imposes reporting requirements and prescribes higher standards of culpability, and specific conduct. Moreover, the BSA's more liberal disclosure provisions encourage bankers to assist the government in detecting terrorist money laundering schemes.

The 1989 Act's money laundering provisions cast easily reached bankers, rather than terrorists, as the subjects of money laundering prosecutions. A reporting requirement similar to the BSA would refocus the money laundering offense on those terrorists who raise and launder funds. To end the violence, Parliament should deputize the financial community rather than count it among the enemy.

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²²² See *supra* notes 114–16, 166–71 and accompanying text.