Sample

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Dear Colleague:

On behalf of the ***National Italian-American Bar Association*** we are pleased to present this seminal issue of *The Digest*, an annual collection of academic articles of interest to our members.

Our resolution to adopt the name *The Digest* deserves an explanatory note. In considering the appropriate title, the editors were presented with several good suggestions. *Il Pontenuovo*, one suggestion, appropriately described the journal as a new bridge between the legal environs of two peoples inextricably and historically linked, but did not convey the necessary legal focus. Other suggested titles captured the legal nature of the publication, but somehow failed to convey its essential purpose. Only *The Digest* seemed to reflect the spirit of this new endeavor.

Entitled *The Digest*, the journal is named after one of the scholarly works commissioned by Justinian, who in the 6th Century sought to codify Roman law in order to provide a uniform statement of law understandable and fairly enforceable throughout the empire. Under the immediate supervision of the distinguished jurist Tribonian, a collection of works known as the *Corpus Juris Civilis*, or as they are more commonly called the *Justinian Code*, was written. These writings initially consisted of the *Codex*, the *Digest*, and the *Institutes*.

The three monumental works have contributed to the lasting development of legal and academic thought, have influenced the collective body of law and principles that remain with us today, and have been recognized as the foundation of many of the world's legal institutions. Of the three, we believe the *Digest* has had the most durable significance.

Our modern word "digest" is derived from the Latin *Digesta* and the Greek *Pandects*, which refer to a systematic arrangement or collection. Considered to be the most important part of the *Corpus Juris Civilis*, the original *Digest* of Justinian was comprised of fifty books and contained a collection of thousands of excerpts from classical writers from the first century B.C. to the fourth century A.D. Through the *Digest*, Justinian expressed a timeless view that law is a development of thought over many ages, rejecting the idea that all wisdom can be found in one age. This theme is echoed in a founding legal principle of our Nation: that we are a nation of laws and not men.

Future publications of *The Digest* will be devoted to legal and historical issues which involve the interaction of law between the United States of America and the Republic of Italy. This broad mandate invites a plethora of academic and scholarly analyses, ranging from international trade, to international taxation, to immigration law, and to items of historical interest.

We hope that NIABA's *Digest*, as did Justinian's, will draw upon many gifted sources to present wide ranging individual views, opinions and scholarly research in order to promote a better understanding of the law and to improve the administration of justice. We gratefully acknowledge the efforts of our authors and the efforts of our supporters in the successful completion of this work.

May our American colleagues profit by the efforts of our writers in developing this inaugural issue. Speriamo anche que questa pubblicazione possa aiutare i nostri colleghe italiane alla comprensione della nostre leggi.

Respectfully,

Michael C. Rainone
President
Joseph N. Giamboi
Chair, Law Journal Committee

THE DIGEST

The Law Journal of the National Italian-American Bar Association

Cesare Beccaria - The Father of Criminal Justice: His Impact on Anglo-American Jurisprudence

Cesare Beccaria - The Father of Criminal Justice: His Impact on Anglo-American Jurisprudence

DOMINIC R. MASSARO*

> "In order that punishment not to be an act of violence . . . against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crime, [and] dictated by the law."

The name of Cesare Bonesara, the Marquis de Beccaria, is not widely recognized among Americans, yet it is Beccaria who influenced our current attitude about criminal justice, and who served as the fountainhead for many of the world's most lasting reforms.[1] Through his treatise, *On Crimes and Punishments*, Beccaria catalyzed the long, arduous campaign to reform late 17th century criminal laws and procedures.[2] *On Crimes and Punishments* offered an enlightened approach to criminal justice when the very concept was still mired in the Dark Ages — inequitable, misunderstood, and widely considered ineffective. His approach, scholars agree, was eventually successful in "expelling the use of torture from every tribunal throughout Christendom."[3] According to one scholar, Beccaria's writing:

> captivated . . . Europe, much more than did the learned voluminous lucubrations of theologians and publicists. . . . [I]t summed up in a masterly, unanswerable manner the conceptions and aspirations of the progressive minds of the age. . . . [I]ts intrinsic qualities — simplicity of ideas, directness and clearness of expression, sober exposition, aphoristic brilliance, concise cogent reasoning — . . . struck discerning readers as a charming and acceptable novelty.[4]

Today, more than two hundred years after Beccaria's treatise, a great yet quiet debate is again taking place, fueled by a growing dissatisfaction with our criminal justice system. This debate has refocused attention on Beccaria's classical orientation toward criminality, which stresses a balanced

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* Justice of the New York State Supreme Court. This article was conceived as part of the Bicentennial of the United States Constitution. The author has written and lectured on Beccaria both here and in Italy. An Italian version of the same title is being published under the imprimatur of the Universitas Internationalis Coluccio Salutati (Pescia).

1. See generally, B. Bailyn, THE IDEOLOGICAL ORIGIN OF THE AMERICAN REVOLUTION (1967).

2. H. Barnes and H. Becker, SOCIAL THOUGHT FROM LORE TO SCIENCE 551 (1952).

3. I L. Radzinowicz, A HISTORY OF ENGLISH CRIMINAL LAW 277 (1948). Continental law considered a confession the best of all evidence, and the machinery of judicial procedure was organized to obtain it.

4. C. Phillipson, THREE CRIMINAL LAW REFORMERS: BECCARIA, BENTHAM, ROMILLY 25 (1923).

view of retributive punishment, and away from the century-old positivist orientation which emphasizes the causes and cures of crime. The serious questions being raised go to the heart of societal concerns: the appropriate balance between the rights of the accused and rights of victims, alternatives to incarceration, the purposes of punishment, the degree of punishment, and the morality of the penalty of death.[5] In philosophical and practical terms, Beccaria addressed many of these issues, providing a beacon of light for reform throughout the Continent, in England, and eventually the United States. His enlightened reasoning and concept of justice serve as a useful reference as we struggle with similar questions in the present day.

This article is an expression of appreciation for Beccaria's accomplishments and eloquence of thought, and is an attempt to impart to the reader both his profound influence and his timeless observations. Beccaria's work inspired the world and his ideas have been tightly woven into the fabric of our modern system of our criminal justice. This article will briefly discuss Beccaria's life and his rise to fame, the tenets of his famous treatise, and the effect of his work on both sides of the Atlantic. Appreciation for the 200th anniversary of our own Bill of Rights, so much of which parallels his splendid thoughts, is enhanced by this knowledge.

I. BECCARIA: HIS LIFE AND HIS RISE TO FAME

Beccaria was born in Milan, Italy on March 15, 1738, the timid, first son of aristocratic parents. His father, the Marchise Gian Saverio Beccaria Bonesara, was an authoritarian from an ancient and distinguished Milanese family; his mother was a Visconti, a member of the Italian nobility that ruled Milan and Lombardy from 1277 to 1477. Of that much we are certain. But, there are few clues in Beccaria's formative years that even remotely foreshadow the renowned essay on criminal law and penal reform that he would write. As a young man, Beccaria was an uninspired student of philosophy and classical literature at the Jesuit College in Parma. His attitude improved markedly, however, when he studied mathematics, where he found his first true intellectual challenges.[6] He later studied contemporary French litera-

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5. See generally, J. Wilson, THINKING ABOUT CRIME (1975); E. Van den Haag, PUNISHING CRIMINALS (1975). In holding the death penalty unconstitutional in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Supreme Court spoke to Beccaria's view of social inutility. Justice Marshall referred to Beccaria in a concurring opinion which condemned punishment solely for the sake of retribution. 408 U.S. at 343 n.85. But see *Gregg* v. *Georgia*, 428 U.S. 153 (1975). Although unable to agree on a majority opinion, seven members of the Court found that imposing the death penalty for the crime of murder did not, under all circumstances, violate the Eighth Amendment prohibition against cruel and unusual punishment.

6. "[T]he cogent reasoning which the study demanded, the firm foundation on reality, the absence of unwarranted assumptions, the inferring of true conclusions from acceptable data, the con-

ture and became a fervent adherent of the Encyclopedist philosophers.[7] He graduated in law from the University of Pavia in 1758. Three years later, against his father's strenuous objections, he boldly contracted a marriage to Teresa Blasco, a women of relatively little means. Thereafter, he was forced to live modestly, indeed, under the specter of poverty. Resourceful friends later arranged for a reconciliation of father and son.

Beccaria was one of the founders of a small literary circle, known as the "academy of fists." The "academy" was a group of young, talented and enthusiastic men, who were dedicated to improving the lot of their countrymen in matters regarding the economic disorder, bureaucratic tyranny, religious stricture and intellectual pedantry of the day. It was as an "academy" member that Beccaria first took up his pen. With the encouragement of the distinguished brothers Verri,[8] in whose household the reformers regularly met, he wrote and published his first work: *On Remedies for the Monetary Disorders of Milan and the Year 1762*.[9]

Within two years, at age 26, Beccaria would be famous. His publication, *Dei Delitti e delle Pene* (Livorno, 1764), later published under the title, *An Essay on Crimes and Punishments* (London, 1767), was enthusiastically received and widely acclaimed.[10] As noted by one commentator:

> It had extraordinary success; it was an event; in eighteen months from publication it passed through six editions; in a few years through thirty-two Italian editions; four editions of the English translation were issued, and it was translated into most European languages. The French philosophers welcomed it with enthusiasm, as the result and to the honor of their doc-

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stant appeal to impartial reason rather than to prejudice and tradition, at last awakened his enthusiasm . . . ." Phillipson, *supra* note 4 at 3.

7. A French man of letters, Denis Diderot, was called upon to translate an edition of the English encyclopedia of EPHRAIM CHAMBERS. Not satisfied with this simple task, Diderot used the proposed work to promote new concepts which clashed with traditional viewpoints. Obtaining contributions from a wide variety of men of the world, and overcoming severe censorship, between 1750 and 1772, he produced eleven volumes of fact and propaganda on such social principles as "reason," "rights," "lawful authority," "liberty" and "equality." The ENCYCLOPEDIA became an institution in itself and gave rise to a reformist movement centered on the Parisian intelligentsia.

8. Pietro Verri was a noted economist as well as philosophical tract author; Count Alessandro Verri, barrister and historian, held office as a "Protector of Prisoners."

9. In June, 1764, the "academy of fists" established a periodical, *Il Caffe*. It was a popular medium to spread new ideas in Italy, and Beccaria contributed three early articles: "Fragments of Style" dealing with the art of literary composition; and "Periodical Newspapers" and "Pleasures of the Imagination," eulogizing the retired, contemplative life. *Il Caffe* came to a sudden end in May, 1766, when the "academy" itself was dissolved.

10. The first edition of *Dei Delitti e delle Pene* was published in July, 1764. Written between March, 1763 and January, 1764, the subject had been suggested to Beccaria by his friends, the Verri brothers.

> trines. The Abbe Morellet translated it; Diderot annotated it; Voltaire commentated it.[11]

Sixty editions were eventually printed in many languages, and the young Beccaria's essay drew the attention of the world.[12]

While the book was received with great enthusiasm in enlightened circles, traditional jurists and the inquisitional Council of Venice were quick to attack it.[13] In 1766, the treatise was placed on the index of condemned books by the Catholic Church for "extremely rationalistic presuppositions."[14] Although his book gave rise to hostility and resistance, these reactions came only from those who stood to gain by perpetuating the prevailing system. The fact that the essay was at first published anonymously, however, suggests the author's fear of retaliation.[15]

The threats proved of little consequence. The Patriotic Society of Berne, even before knowing who the author was, decided to award a gold medal to "a citizen who dared to raise his voice in favor of humanity against the most deeply ingrained prejudices."[16] Once it was clear that the Milanese political authorities welcomed the treatise, Becarria discarded anonymity. He was saved from further difficulty when the head of Milan administration, Count Carlo Firmian, a liberal and enlightened minister, praised the book to his Austrian overlord and intervened personally to end all attempts at persecution. The Austrian government, hearing that Beccaria had refused an offer from Catherine the Great to live in St. Petersburg, was moved to assign him a professorial chair in political economy at the Palatine College of Milan, and, later, named him a Councillor of the Realm.[17]

In the name of the Encyclopedists, Beccaria was invited by the Abbe Morellet to Paris, then the accepted cultural capital of the world. He arrived

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11. GREAT JURISTS OF THE WESTERN WORLD 506 (1914)(edited by J. MacDonell & E. Manson).

12. The first English translation was published in 1767; it was translated from a French edition and included a commentary by Voltaire, an achievement in its own right.

13. A Dominican, Angelo Fachinei, was charged with the task of refuting the volume. In 1765, he published "Notes and Observations On Crimes and Punishments," in which he accused Beccaria of sedition and agnosticism. As late as 1771, in France, Daniele Jousse reproached Beccaria for attempting to reverse what he termed the traditional belief of nations. D. Jousee, THE TRADITION OF CRIMINAL JUSTICE IN FRANCE (1771).

14. II S. Nicci, ENCICLOPEDIA CATTOLICO: "BECCARIA, CESARE" 1126 (1949). ON CRIMES AND PUNISHMENTS remained on the list until the Index itself was abolished by the Ecumenical Council convoked by Pope John XXIII in 1962.

15. In a reply to the Abbe Morellet, who reproached him, Beccaria wrote: "I ought to tell you that I have had before me whilst writing the example of . . . Galileo . . . I have heard the clank of the chains of superstition and fanaticism stifling the cry of truth, and the sight of this startling spectacle determined me to envelop the light in cloud. I wish to defend the cause of humanity without being a martyr." MacDonell and Manson, *supra* note 11.

16. M. Maestro, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 20 (1973).

17. Phillipson, *supra* note 4 at 14 ff.

in October, 1766, where in the company of his friend, Alessandro Verri, he was received in lively adoration by many luminaries. Escorted from salon to salon, he was honored as mankind's great benefactor. However, Beccaria cared neither for such "society" events, nor for the attention brought by his new found fame. Happily married, he could not live away from his wife, and he constantly wrote her to express sorrow over their separation. His timidity caused him to flee the metropolis after only a few weeks, returning home to Milan. To the consternation of his early circle of friends, he never again left the city.[18] His wife died in 1774, leaving two daughters. Later, Beccaria remarried and had a son. From time to time he served on various commissions of inquiry, enjoying the patronage of the Austrian government until his death in 1794 from apoplexy.

II. THE STATE OF THE CRIMINAL JUSTICE SYSTEM AT BECCARIA'S WRITING

Although timeless in nature, Beccaria's contributions to criminal reform can only be fully appreciated if one recognizes the state of the criminal law at the time of his writing — that system left much to be desired. In the powerful, opening words of his treatise, Beccaria describes the extant legal setting:

> A few remnants of the laws of an ancient predatory people, compiled for a monarch who ruled twelve centuries ago in Constantinople,[19] mixed subsequently with Longobardic tribal customs,[20] and bound together in the chaotic volumes of obscure and unauthorized interpreters — these form the tradition of opinions which in a large part of Europe is still accorded the name of law . . . .[21]

It is equally important to note the extant philosophical and religious climate. Beccaria wrote in a period where Church theology of the "fall from grace" and the doctrine of the divine right of kings were pitted against the intellectualism and nationalism of contemporary thought. The conventional

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18. MacDonell and Manson, *supra* note 11 at 507.

19. The great CORPUS JURIS CIVILIS was compiled by a committee of Roman jurists under Justinian I, Byzantine Emperor (527-565 A.D.). This sweeping statement by Beccaria appears to be overly critical; it is, apparently, explained away in a later part of his opening "To the Reader" — "These laws, the dregs of utterly barbarous centuries, are examined in this book with regard only for the part that relates to the criminal system . . . ." CORPUS JURIS CIVILIS, of course, is perhaps Rome's most noteworthy contribution to civilization. It is still the basic legal system in the majority of nations of the Western World. The criminal law of Rome did not have anywhere near as widespread or profound an influence as this body of civil law; and it did, in fact, evolve to form the basis of the inquisitorial form of criminal procedure. The great debate as to the superiority of Anglo-American procedure over the inquisitorial form is left for another treatment. But to its credit, it should be noted that Roman criminal law enunciated the doctrines of presumption of innocence and of habeas corpus, and likewise served as the root of trial by jury.

20. The Germanic Longobards invaded Italy in 568 A.D..

21. ON CRIMES AND PUNISHMENTS 3 (H. Paloucci trans., 1963).

wisdom held that individuals came together by way of social contract; that societal control of aberrant behavior was best exercised by way of fear; and that the right of punishment for criminal acts was ceded by the individual to the state for the purpose of influencing behavior. Outworn codes, obscurantist traditions, blind superstitions, dogmatic technicalities, and oppressive fictions were all the norm. As for cruelty, it was considered dutiful — on the basis of narrowly interpreted divine law — to apply literally the biblical retaliation, the *lex talionis* of "an eye for an eye."[22] As described by one historian,[23] the supposed divine origin of this principle precluded mitigation:

> The existent criminal law of eighteenth century Europe was, in general, repressive, uncertain and barbaric. Its administration permitted and encouraged incredibly arbitrary and abusive practices. The agents of the criminal law, prosecutors and judges, were allowed tremendous latitude in dealing with persons accused and convicted of crime, and corruption was rampant . . . .
>
> Fantastic as it may now seem . . . the criminal law of eighteenth century Europe vested in public officials the power to deprive persons of their freedom, property and life without regard for any of the principles which are now embodied in the phrase 'due process of law.' Secret accusations were in vogue and persons were imprisoned on the flimsiest of evidence. Torture, ingenious and horrible, was employed to wrench confessions from the recalcitrant. Judges were permitted to exercise unlimited discretion in punishing those convicted of crime. The sentences imposed were arbitrary, inconsistent and depended upon the status and power of the convicted. Punishments inflicted upon the more unfortunate of the offenders were extremely severe. A great array of crimes were punished by death not infrequently preceded by inhuman atrocities. Equality before the law as a principle of justice was practically nonexistent, but rather the treatment accorded persons depended solely upon the station in life of the offender and upon the power that he and his friends could exercise over the agents of the law. In practice, no distinction was made between the accused and the convicted. Both were detained in the same institution and subjected to the same horrors of incarceration. This same practice prevailed in regard to the convicted young and old, the murderer and the bankrupt, first offenders and hardened criminals, men and women. All such categories of persons were promiscuously thrown together free to intermingle and interact.

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22. One of the more quotable formulations of this general principle may be found in the Mosaic Code, the Book of Exodus 21:23:25 (King James Version of the Holy Bible): "And if any mischief follow, thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."

23. Monachesi, *Pioneers in Criminology: Cesare Beccaria (1738-1794)*, 46 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 441-442 (Nov./Dec. 1955).

England was the only European country which had resisted the inquisitorial system.[24] However, England was far from perfect. While English criminal procedure was generally superior to Continental procedure[25] — strong legal safeguards already existed to protect the rights of the accused, including open accusations, public trials and juries — other aspects of England's criminal justice system were comparable. Prison conditions in England, for example, were as wretched as those on the Continent,[26] and forms of corporal punishment, were as cruel. In the year Beccaria was born, new capital offenses were being added annually to England's statutes, and by 1764 when he produced his treatise, death by hanging was frequently imposed for a myriad crimes, including small thefts.[27] Indeed, by the time George III ascended to the throne in 1760, 86 crimes were punishable by death.[28]

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24. "In England, the common law did not admit torture, mainly because in the English procedure the onus of proving guilt was on the accuser; on the Continent, the accused had to prove his innocence . . . . Though English judges have occasionally allowed torture in fact, their pronouncements are wholly against it . . . . But in actual practice . . . torture . . . was from time to time used in England, by extraordinary courts and in virtue of the royal prerogative . . . ." Phillipson, *supra* note 4 at 34 (quoting D.A. Jardini, READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND (1837)).

Much more is now emerging about aspects of eighteenth century courts and trials in England. New studies of local justices of the peace, unpaid magistrates on whom most of the criminal justice administration fell, reveal "[men] who colluded or cooperated with fellow landowners or manufacturers to effect convictions." Due process in the higher courts was more assured, and, by the eighteenth century they had produced an immense body of case law respecting procedure, forms of indictment and evidence. "[But] we know now that the older accounts, based largely on 'state trials,' are quite unrepresentative. Ordinary people . . . were tried for the most serious crimes with amazing speed: a score in a day, before experienced jurors who heard several cases before considering verdicts, and who showed much deference to very directive judges. The basis for decision . . . tended to be a rapid assessment of the character of the accused, rather than a sifting of the evidence . . . . The trial resembled to a surprising extent the inquisitorial procedure of the Continent, where character and social standing were explicitly germane to the methods of establishing guilt and fixing punishments." Hay, *Crime in Eighteenth and Nineteenth-Century England*, CRIME AND JUSTICE, AN ANNUAL REVIEW OF RESEARCH 53 (N. Morris and M. Tonry eds., 1980).

25. By way of contrast, in Scotland, torture was freely allowed and was applied in dreadful ways known likewise to the Continent.

26. In 1773, John Howard, the prison reformer, was appointed sheriff of Bedfordshire. Howard found his prison, like all prisons of the time, grossly defective in arrangements. The gaoler (warden) was not a salaried office, but dependent on fees from prisoners. Here Howard found detainees whom juries had declared not guilty, others whom the grand jury had not indicted, and yet others whose prosecution never commenced, all detained because fees had not been paid the gaoler. Howard went from county to county uncovering terrible misery, harsh abuses, and total arbitrariness of prison management. He thereafter devoted himself to prison reform. See discussion accompanying note 122, *infra*.

27. "Once it was a capital offense to steal from the person something 'above the value of a shilling'." *McGauthu* v. *California*, 402 U.S. 183, 241 (1971) (Douglas, J., dissenting) (quoting I J. Stephen, HISTORY OF THE CRIMINAL LAW OF ENGLAND 467 (1883)).

28. H. Bedau, THE DEATH PENALTY IN AMERICA Introduction (1967 rev. ed.). George III (1760-1820) increased the number by 60.

Moreover, most of England's laws were still unwritten. Trial by jury had to be expressly accepted by the accused. The silent could not be tried — those who initially chose this route were often subjected to the torment of iron weights until, their bodies broken, they submitted to trial. Often, this torture was endured, even to death, in order to avoid conviction and the accompanying forfeiture of realty and personalty to the state instead of its preservation for the accused's family.[29]

Imprisonment as a penalty for crime was thought to be mitigation of the harshness of the *lex talionis*;[30] however, early prisons, as noted, were notoriously disagreeable places, as horrible and as frightening as the corporal and capital sentences they were replacing. Whipping the inmate upon reception, at stated intervals while the sentence was being served, and again upon release, was commonplace. Imprisonment was viewed as a severe form of punishment, and the business of institutional discipline was to make life so dehumanizing that men would be scared out of recidivism. As the translator of the second English edition of Beccaria's treatise emphasized:[31]

> [i]t may be objected, that a treatise of this kind is useless in England, where, from the excellence of our laws and government, no examples of cruelty or oppression are to be found. But it must be allowed, that much is still wanting to perfect our system of legislation . . . . The confinement of debtors, the filth and horror of our prisons, the cruelty of jailers, and the extortion of the petty officers of justice, to all which may be added the melancholy reflection, that the number of criminals put to death in England is much greater than in any other part of Europe . . . .

This was the dismal state of law and criminal procedure at the time of Beccarias's writing.

III. BECCARIA'S CONCEPT OF CRIMINAL JUSTICE

A. HIS OVERALL PHILOSOPHY

Many of Beccaria's concepts of criminal justice have become familiar tenets of our justice system. The value in understanding his efforts stems partly from a historical perspective, since his concepts were, at their inception, revolutionary. However, the reasoning espoused by Beccaria in support of his concepts remains an incredibly poignant and timeless commentary on the

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29. This absurd practice was not abolished until 1772. During the ordeal, the accused was fed on bad bread and stagnant water on alternate days. Quartering and disembowelling as a punishment for high treason was not officially abolished until 1870; burning the hand for a felony was abolished in 1779, but the pillory not until 1837.

30. Though used occasionally in ancient Greece and Rome, imprisonment appears first as a systematic penalty utilized by the Church for mild transgressions dealt with during the course of the Inquisition.

31. Radzinowicz, *supra* note 3 at 283 n.60.

means and goals of criminal justice. Accordingly, it is useful to review his writings not only for their historical value, but for their contemporary content.

Beccaria's overall philosophy on criminal justice can be said to exist of three axioms. First, Beccaria believed that law was essential to maintain order in society. Central to his philosophy was the social contract theory of law, which assumes that "laws are the conditions under which men unite to form a society."[32] Beccaria wrote:

> [T]he sum of all . . . liberty sacrificed by each for his own good constitutes the sovereignty of a nation . . . But merely to have established this deposit was not enough; it had to be defended against . . . usurpation by individuals . . . . Some tangible motives had to be introduced, therefore, to prevent the despotic spirit . . . in every man, from plunging the laws of society into its original chaos. These tangible motives are the punishments established against infractors of the laws. [33]

Second, Beccaria believed that the purpose of laws is to fulfill a humane, yet utilitarian goal: the maximization of happiness. According to Beccaria, the enactment of law has but a single purpose:

> If we glance at the pages of history, we will find that laws, which surely are, or ought to be, compacts of free men, have been, for the most part, a mere tool of the passions of some, or have arisen from an accidental and temporary need. Never have they been dictated by a dispassionate student of human nature who might, by bringing the action of a multitude of men into focus, consider them from this single point of view: the greatest happiness shared by the greatest number.[34]

Third, Beccaria believed that true justice can result only from clearly constructed and known laws and procedures, a fair trial and just retribution. The inequities that may arise from a policy of formal application of penal laws, according to Beccaria, cannot be compared in their deleterious effect with the inequities that may flow from judicial discretion in consulting "the spirit of the laws," then a popular axiom. The power to remedy any such inequity should be vested in legislators that life, property and freedom be maximized. "In this way citizens acquire that sense of security for their own persons which is just . . . because it enables them to calculate accurately the [penalty] resulting from a misdeed.[35]

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32. ON CRIMES AND PUNISHMENT, *supra* note 21, at 11.

33. *Id.*

34. Translator's note: "Many approximations of this celebrated formula are no doubt to be found in the extensive literature . . . which originated with the ancient Greeks, but there is no question that Jeremy Bentham, who made the formula famous, first encountered it here." *Id.* at 8.

35. *Id.* at 17.

B. SPECIFIC OBSERVATIONS

Beccaria discussed in practical terms the problems with the prevailing laws and procedures, and offered specific comments on the ways in which the laws and procedures could be improved. A review of the highlights of Beccaria's specific commentaries is instructive.

1. *Obscurity of the Laws.*—Beccaria's opposition to obscure laws prompted comment on four particular subjects: (1) the role of judges and legislatures; (2) pretrial detention; (3) the proper use of evidence; and, (4) the impropriety of secret accusations. First, Beccaria believed that the obscurity of law and procedure gave undue latitude to judges in the application of law.[36] Beccaria called for the law to be certain and invariable, written in clear language and widely published:

> [w]e can thus see how useful the art of printing is, which makes the public, and not some few individuals, the guardians of the laws. And we can see how it has dissipated the benighted spirit of cabal and intrigue . . . When the number of those who can understand the sacred code of laws and hold it in their hands increases, the frequency of crimes will . . . decrease, for undoubtedly ignorance of punishments add much to the eloquence of the passions.[37]

Having set forth his basic opposition to obscure laws, Beccaria declared that the appropriate sources of law are legislatures, not judges. According to Beccaria, since judges are not legislators, they have no right or authority to interpret penal laws, but simply to apply them: their task is to determine whether or not a person has acted contrary to law.[38] In so doing, judges should conduct the inquiry with strict adherence to rules: "[f]or every crime that comes before him, a judge is required to complete a perfect syllogism in which the major premise must be the law; the minor, the action that conforms or does not conform to the law; and the conclusion, acquittal or punishment."[39] Beccaria further wrote:

> [T]he authority [of making penal law] can reside only with the legislator, who represents the entire society united by a social contract. No magistrate can, with justice, inflict punishments upon another . . . that exceeds the limits fixed by the laws . . . a magistrate cannot, under any pretext of

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36. As a corollary, Becarria believed in "[f]ormalities and ceremonies . . . in the administration of justice, not only because they leave nothing to be determined arbitrarily, [but] because they give the populace the impression of a judgment that is not rash and partisan, but stable and regular." He quickly cautioned, however, against "fix[ing] such formalities . . . so firmly as to make them injurious to truth . . . ." *Id.* at 23.

37. Becarria firmly believed that an illiterate society could never acquire a fixed form of government with power that derives from the whole of the people. *Id.* at 18.

38. *Id.* at 19.

39. *Id.* at 15.

> zeal or concern for the public good augment the punishment already established . . . .[40]

In his view, the courts were primarily needed to resolve conclusively factual issues:

> [T]he sovereign, who represents the society itself . . . cannot judge whether someone has violated the social contract, for that would divide the nation into two parts, one represented by the sovereign, who asserts the violation of the contract, and the other by the accused, who denies it. There must therefore be a third party to judge the truth of the fact.[41]

Second, Beccaria believed that imprisonment before trial was sometimes needed, but argued that such detention must be specified by a law which indicates what evidences of crime justify the detention of the accused. The completely arbitrary nature of the criminal justice system at Beccaria's writing was indicated by the wide discretion afforded judges to impose, or not to impose, criminal sanctions.[42] Beccaria described the type of prima facie evidence that would justify such pre-trial detention, stating that "[a] man's notoriety, his flight, his nonjudicial confession, the confession of an accomplice, threats . . ., the manifest fact of the crime are proofs sufficient to justify imprisonment of a citizen."[43]

Third, Beccaria endorsed "the right of every man to be presumed innocent"[44] and spoke with specificity to the forms of evidence that must be presented in order to sustain a guilty verdict. He was clearly opposed to the system, then in force in most countries, whereby a full measure of guilt was determined by two half-proofs or a number of minor proofs dependent one upon another. "When the proofs are independent of each other, that is, when the evidences are proved otherwise than through themselves, the greater the certainty of the fact, for the falsity of one proof will not affect the others."[45] Beccaria believed that only proof of a crime that excludes the possibility of innocence could suffices for a finding of guilty.

As a corollary to his insistence upon dividing the duties of judge and legislator, Beccaria placed great trust in the triers of fact — the jury system. According to Beccaria:

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40. In holding that there can be no crime and no punishment without a law, Beccaria argued that "no law can have a retroactive effect." *Id.* at 14.

41. *Id.*

42. A judge is "free to imprison a citizen at his own pleasure, to deprive an enemy of liberty on frivolous pretexts, and to leave a friend unpunished notwithstanding the clearest evidence of his guilt." *Id.* at 19.

43. However, Beccaria denounced the fact that both the accused and convicted were indiscriminately placed in the same cell, and expressed the hope that "he who has been imprisoned and acquitted, ought not to be branded with infamy." *Id.*

44. *Id.* at 23.

45. *Id.* at 20.

> Most useful is the law that each man ought to be judged by his peers, for, where it is a matter of the liberty or fortune of a citizen, the feeling which inequality inspires should be silent; neither the superiority with which the prosperous man regards the unfortunate, nor the disdain with which the inferior regards his superior, can have any place in judgment . . . . It also accords with justice to permit the accused to refuse on suspicion, and without opposition, a certain number of his judges.[46]

Moreover, Beccaria was in favor of open proceedings.[47] He was hostile and uncompromising in his condemnation of secret accusations, a common 18th century practice. He argued that the existence of such practices was a proven sign of the weakness of a governmental system.[48]

2. *Substantive Comments on Law and Procedure.*—Beccaria made several observations on points of procedure as they related, for example, to the use of eyewitness testimony, to self-incrimination, to attempted crimes, and to crimes conducted with accomplices. In discussing the witness system, Beccaria argued against rules which forbade testimony from certain witnesses considered incredible. He believed that the true measure of credibility of a witness is nothing more than his interest in telling or not telling the truth; and he rejected the notion that witnesses should be determined incompetent before trial. "[F]or this reason it is frivolous to insist that women are too weak [to testify], childish to insist that civil death in a condemned man has the same effect as real death, and meaningless to insist on the infamy of the infamous when they have no interest in lying."[49] According to Beccaria, the credibility of a witness must diminish in proportion to the hatred, or friendship, or close connections between him and the accused; and he placed great faith in the ability of the triers of fact to determine credibility.[50]

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46. *Id.*

47. "Let the verdicts and proof of guilt be made public so that opinion, which is, perhaps, the cement of society, may serve to restrain . . . passions." *Id.* at 22.

48. To accuse in this manner "makes men false and deceptive" because "[w]hoever can suspect another of being an informer beholds in him an enemy." "Who," Beccaria asked, "can defend himself against calumny when it comes armed with tyranny's strongest shield, secrecy? What strange sort of constitution must it be in which the ruler suspects every subject of being an enemy and finds himself compelled . . . to deprive each man of his personal share in it?" Admitting that "when an evil is inherent in a national system an attempt to remove it may seem to precipitate utter ruin," he argued against its justification, adding "were I called upon to dictate new laws . . . before authorizing such a practice, my hand would tremble and posterity would loom up before me." Beccaria further endorsed the proposition that "public accusations are more suited to a republic, in which the principal passion of citizens ought to be for the public good, than to a monarchy, where that feeling is extremely weak owing to the very nature of the government . . . [b]ut every government, republican as well as monarchic, ought to inflict upon the false accuser the very punishment that the accused is suppose to receive." *Id.* at 25-27.

49. *Id.* at 22.

50. "The tone, the gesture, all that precedes or follows the different ideas men attach to the same words." *Id.* at 25.

In dealing with the problem of self-incrimination though the practice of holy oaths, Beccaria asserted a distinction between temporal and ecclesiastical laws. "Why compromise one with the other? . . . Why confront a man with the terrible alternative of either sinning against God or concurring in his own ruin? The law that requires such an oath commands one to be either a bad Christian or a martyr?"[51]

Regarding attempted crimes, Beccaria instructed that the law should not punish intent. However, he believed that an act undertaken with the manifest intention of committing a crime deserves punishment, though less than that which is due upon the actual execution of the crime.[52]

Beccaria perceived advantages and disadvantages in the favorable treatment accorded those who reveal their companions. A disadvantage was that "the nation authorizes treachery" when it seeks the aid of those who break law, a practice through which a tribunal "simply reveals [the] own uncertainty and weakness of its law."[53] On the other hand, such concession makes possible the prevention of greater crimes though the apprehension of the criminal. Although hesitant, Beccaria actually suggested that a law promising impunity to the accomplice who reveals a crime would be preferable because it would instill mutual fear that each accomplice would risk prosecution.[54]

3. *Punishment.*—In a short paragraph, Beccaria summarized the essence of his penal doctrine:

> In order for punishment not to be an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the law.[55]

a. *The Purpose and Measure of Punishment.*—Beccaria, however, not only commented on the purpose of punishment in the criminal justice system, but the appropriate measure and means of punishment. He believed that the purpose of punishment was neither to torment nor to undo a crime already committed, but to ensure the continued existence of society, and that the proper role of punishment was to educate the criminal — not to perpetrate an act of violence.[56] Beccaria also believed that punishment should be mea-

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51. *Id.* at 29.

52. He noted that "[t]he same applies, but for a different reason, where there are several accomplices of a crime, not all of them involved as its immediate perpetrators." *Id.* at 40.

53. *Id.* at 41.

54. *Id.*

55. *Id.* at 99.

56. "The purpose can only be to prevent the criminal from inflicting new injuries on citizens and to deter others from similar acts." *Id.* at 42.

sured so as to impress the criminal and be proportionate to the damage to society caused by the crime. He explained that "punishments ought to be chosen which will make the strongest and most lasting impression on the minds of men, and inflict the least torment on the body of the criminal,"[57] and further instructed:

> For a punishment to attain its end . . . [it] has only to exceed the advantage derivable from the crime; in this one should include the certainty of punishment and the loss of the good which the crime might have produced. All beyond this is superfluous and for that reason tyrannical.[58]

Explaining the necessity of reaching just proportions between crimes and punishments, Beccaria believed that obstacles that deter men from committing crimes should be stronger when the crimes are more harmful to the public good. He maintained that:

> It is in the common interest, not only that crimes not be committed, but also that they be less frequent in proportion to the harm they cause society.
>
> . . .
>
> Whoever sees the same death penalty, for instance, decreed for the killing of a pheasant and for the assassination of a man . . . will make no distinction between such crimes. . . . It is enough for the wise legislator to mark the principal points of division [between types of crimes] without disturbing the order [of classes of crime], not assigning to crimes of the first grade the punishment of the last.[59]

Beccaria then treated crimes against the security of the citizen. He stated that "[s]ome crimes are attempts against the person, others against property. The penalties for the first should always be corporeal punishments."[60] He made a clear distinction here between simple thefts and those accompanied by assault and violence. For the former, which he equated with low station, fines or short prison terms were thought proper; for the latter, more severe punishment, since the sacredness of human life would be imperiled.

It follows, of course, that Beccaria abhorred torture. He held that torture is useless, wrong, and barbarous. In his view, torture was conducive to false conclusions — worse for the innocent than the guilty, and worse for the physically weak than the robust. In this regard, he stated:

> A cruelty consecrated by the practice of most nations is torture of the accused, either to make him confess the crime or to clear up contradictory statements, or to discover accomplices, or to purge him of infamy in some

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57. *Id.*

58. Becarria suggested that as punishments increase in cruelty, "the spirits of men . . . become callous." *Id.* at 43.

59. *Id.* at 62-63.

60. *Id.* at 68.

> incomprehensible way or, finally, to discover other crimes of which he might be guilty but of which he is not accused.[61]

Beccaria argued that to inflict a punishment on a citizen before his guilt has been established is a misuse of power.[62] Beccaria also believed that severity of punishment may embolden men to commit the very wrongs the punishment was supposed to prevent; since they would be driven to commit additional crimes to avoid the punishments for a single one.

Beccaria was also opposed to the practice of forfeiting or confiscating property, which was common in his time:

> With respect to the body politic, [civil death] should produce the same effect as natural death. It would seem, then, that the possessions of which the criminal is deprived should pass to his legitimate heirs rather than to the ruler .... Confiscations put a price on the heads of the weak, cause the innocent to suffer the punishment of the guilty .... What spectacle can be sadder than that of a family dragged into infamy and misery by the crimes of its head .... [63]

Beccaria further argued that both justice and effectiveness of punishment demand swift trials. Trials, Beccaria said, should be held with the least possible delay because promptness of punishment is "one of the principle checks against crime."[64] And, where punishment must flow, fairness dictates the "counting as punishment the time of detention . . . which precedes the sentence."[65] He stressed the importance of swiftness in the conviction of criminals:

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61. *Id.* at 30.

62. "No man can be called guilty . . . nor can society deprive him of public protection before it has been decided that he in fact violated the conditions under which such protection was accorded him." "Crime is either certain or uncertain," Beccaria further explained; "if certain, all that is due is the punishment established by the laws; if uncertain, then one must not torture the innocent, for such, according to the laws, is a man whose guilt has not yet been proven." "What right is it, then, if not simply that of might, which empowers a judge to inflict punishment on a citizen while doubt still remains as to his guilt or innocence?," Beccaria asked. He observed that "the sensitive innocent man will . . . confess himself guilty when he believes that by so doing, he can put an end to his torment [but] every difference between guilt and innocense disappears by virtue of the very means one pretends to be using to discover it. This infamous crucible of truth is a still-standing memorial to the ancient and barbarous legislation of a time when trial by fire and boiling water, as well as the uncertain outcome of duels, were called judgments of God." He further noted:

> A strange consequence that necessarily follows from the use of torture is that the innocent person is placed in a condition worse than the guilty, for if both are tortured, the circumstances are all against the former. Either he confesses the crime and is condemned, or he is declared innocent and has suffered a punishment he did not deserve.

According to him, "this abuse should not be tolerated in the eighteenth century." *Id.* at 30-36.

63. *Id.* at 53.

64. *Id.* at 37.

65. *Id.* at 38.

> The more promptly and the more closely punishment follows upon the commission of a crime, the more just and useful it will be . . . so much stronger and more lasting in the human mind is the association of these two ideas, crime and punishment; they then become inseparable, one to be considered as the cause, the other as the necessary inevitable effect.[66]

While Beccaria believed that the accused must be allowed opportune time and means for his defense; he also believed that the laws should fix a definite length of time both for the defense of the accused and for the proof of crimes.[67]

b. *Illegitimacy of the Death Penalty.*—Continuing his fundamental thesis on the subject of punishment, Beccaria was prompted to examine whether the death penalty was a legitimate form of punishment or even necessary. He concluded that it was neither. Beccaria asserted that in forming the social compact, men did not cede their right to life. To have done so, in his mind, would have been illogical since the primary reason for the creation of society was to better insure the right of men to live.[68] According to Beccaria:

> The punishment of death . . . is not a right. It is the war of a nation against a citizen . . . . What manner of right can men attribute to themselves to kill their fellow human being? Was there ever a man who can have wished to leave to other men the choice of killing him?[69]

While detesting cruel forms of punishment like death and torture, Beccaria argued that the severity of the punishment could be mitigated if the certainty of punishment were clear. Together with a milder system of laws than those in effect, Beccaria believed, must go the certainty of incarceration. He explained:

> It is not the intensity of punishment that has the greatest effect on the human spirit, but its duration . . . . It is not the terrible yet momentary spectacle of the death of a wretch, but the long and painful example of a man deprived of liberty . . . which is the strongest curb against crimes.[70]

Additionally, Beccaria strongly reaffirmed the enlightened viewpoint of those adhering to the principle that a man is innocent until proven guilty.

Beccaria advanced two possible instances where the death penalty could be just and necessary: (1) where there is a threat to the national security during periods of anarchy, and (2) where death is the only real way of restraining

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66. *Id.* at 56.

67. But, he added, "[a]trocious crimes which are long remembered do not, when they have been proved, merit any prescription in favor of the criminal who has spared himself by flight." *Id.* at 37. As used by Beccaria, the term "prescription" meant "limitation of criminal prosecution." *Id.*

68. Even Rousseau, whose doctrine of the origin of society Beccaria followed, does not deny that the State has the right to inflict the punishment of death.

69. *Id.* at 45.

70. *Id.* at 46.

others from committing crimes.[71] In the perhaps most daring proposal in his book, he challenged the right of men to kill other men for any reason, characterizing execution as an act of barbarism. Beccaria noted that:

> It seems absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it. . . . A life sentence in place of the death penalty has in it what suffices to deter any determined spirit. . . . [T]he person does not exist who, reflecting upon it, could choose for himself total and perpetual loss of personal liberty, no matter how advantageous a crime might seem to be. . . . he who foresees a great number of years, or even a whole lifetime to be spent [in prison], in sight of his fellow citizen with whom he lives in freedom . . . makes a useful comparison . . . with the uncertainty . . . of his crimes, and the brevity of time in which he would enjoy their fruits.[72]

c. *Inequitable Application of Punishment.*—After making clear that the only true measure of crime is the harm done to society, Beccaria stated that the law should apply equally to all members of society, regardless of rank or wealth. It must be recalled that in his time equality before the law was more often a theoretical right with special privileges in favor of the nobility and the clergy. Beccaria stated "[t]he great and the rich should not have [advantage over] the weak and the poor. There is no liberty whenever the laws permit that in certain circumstances a man can cease to be a person and become a thing." He asserted that punishments should be exactly the same for "the first and least citizen."[73]

Consistent with his views on the unequal application of law, Beccaria opposed the practice of granting pardons. A pardon, in his view, was the tacit disapprobation for a code. He feared that pardons, would encourage the hope of impunity by showing men that crimes may be forgiven.[74] Moreover, Beccaria opposed grants of asylum. Referring to the ecclesiastical privilege he said: "within the confines of a country there should be no place independent of the laws."[75] Likewise where a criminal escapes to another country,

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71. This is a controversial issue in which a wide difference of opinion exists. Even today the unique deterrent power of capital punishment gives it a tenuous hold on the gravest of all offenses. It should also be noted that Beccaria's attitude towards capital punishment is somewhat inconsistent with his enunciated principle that penalties should be proportionate to the crime. This would seem to dictate the infliction of the death penalty at least for murder of the first degree.

72. *Id.* at 48-50.

73. *Id.* at 69.

74. "Let the laws be inexorable, but let the legislators be humane." *Id.* at 59.

75. Beccaria firmly believed that one should not be subject to two contradictory codes of law. The "right of sanctuary," for instance, avoided severe penalty by seeking refuge in a church, to be dealt with in accordance with the milder precept of canon law. With the exception of the "crimes" of heresy and witchcraft, prisoners were frequently released on commutation of sentence, in recognition of what was assumed to be evidence of restoration to the faith. Beccaria abhorred the former

Beccaria was for the principle of extradition, so that justice could be rendered in the country of the misdeed. However, he set forth the prerequisite that all participating nations to such a pact must have moderate and just laws, for as long as absurd and cruel punishments existed in some countries, deportation itself could be a cruel act.

d. *Prevention of Crime.*—Beccaria ended his treatment by examining ways to prevent crime. "It is better to prevent crimes than to punish them," he wrote; "[t]his is the ultimate end of every good legislation."[76] He suggest several ways — in addition to his code of just and clearly stated laws, known and understood by the citizenry — to accomplish this goal.[77] Included were a wise economic and fiscal policy, the repression of idleness, an honest judiciary, a sufficient number of judges, and the rewarding of virtuous deeds upholding the law.[78] According to Beccaria, "the surest but most difficult way to prevent crimes is by perfecting education" through the presentation of creative ideas to "the fresh minds of youths, in leading them toward virtue [and] away from evil."[79] This is to be preferred to "the uncertain method of command, which at best obtains only simulated and momentary obedience."[80]

IV. THE INFLUENCE OF BECCARIA

A. ON THE CONTINENT

The outcome of Beccaria's rousing call to reform was a tightly reasoned and devastating attack against inequity: an assault on the folly, injustice and cruelty of the existing state of criminal jurisprudence. His critical remarks contained constructive proposals and they invoked juridical tradition, reason and sentiment. Taken together, they formed a practically complete system of criminal law and procedure.

Chief among Beccaria's admirers was the brilliant and able Voltaire, the most popular writer of the century. In his 1766 Commentary, Voltaire endorsed almost all of Beccaria's ideas and stressed the urgency of penal reforms.[81] Following Beccaria's lead, Voltaire quoted voluminous historical facts in support of his reasoning and conclusions. He welcomed Beccaria's

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crimes as a "class of crimes that has covered Europe with human blood and has raised those awful piles where living human bodies are used to serve as food for flames." *Id.* at 86.

76. *Id.* at 93.

77. *Id.* at 95.

78. "The coin of honor is always inexhaustible and fruitful in the hands of the wise distributor." *Id.* at 98.

79. *Id.*

80. *Id.* at 99.

81. M. Maestro, *supra* note 16 at 45.

book as a sign that a new era in jurisprudence was about to dawn and promoted its ideas well beyond the boundaries of his native France.

Many of the principles contained in the celebrated French document, the Declaration of the Rights of Man and the Citizen (1789), are taken almost verbatim from Beccaria's treatise.[82] Indeed, one of the first reforms to which the newly proclaimed National Constituent Assembly[83] directed its attention was the preparation of a criminal code grounded on Beccaria's volume. It might be said that Beccaria's small book considerably hastened the approaching revolution in France, becoming a practical manual for the revolt's principal leaders and other ardent legislative reformers. By presenting an incisive criticism of the arrant folly and unrestrained abuse of the prevailing law and administration, and by expounding the fundamental principles of a more rational and human jurisprudence consistently and uncompromisingly based on necessity, justice, utility, public welfare, the work cast a bright ray of light into the obscure recesses of the complex mass of criminal law, and contributed much to arouse in France a spirit of dissatisfaction, and, ultimately, of general revolt.[84]

Frederick II of Prussia expressed his admiration by complaining, in a letter to Voltaire, that Beccaria "had left hardly anything to be gleaned after him; we need only follow what he has so wisely indicated."[85] Marie Teresa of Austria and the Grand Duke of Tuscany, the future Leopold of Austria, publicly declared their intentions to be guided by the book in the reformation of their laws, while Catherine the Great of Russia called upon its author to reside at her court and attend to the necessary reforms in person.[86] The King of Naples paid him a visit, and Gustavus III of Sweden studied his volume intently.[87]

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82. Phillipson, *supra* note 4 at 97. The *Declaration* contains a moving Preamble that attributes public misfortune to contempt for basic human rights and duties. The document also emphasizes the principle of equality under the law and the guarantee of justice on the basis of due process, holding that the law has the right to repress only acts injurious to society and must not ordain penalties other than those of strict necessity.

83. When the Estates General met in May, 1789, convened by Louis XVI for the first time since 1614 in an effort to solve the financial woes of his government, the Third Estate (the commoners) proclaimed themselves a National Constituent Assembly and vowed not to disband until France had a written constitution. They urged the members of the First (the clergy) and the Second (the nobility) estates to sit with them — an unmistakably revolutionary step.

84. See Article VIII of the DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (August 26, 1789); see also Radzinowitz, *supra* note 3 at 293; Phillipson, *supra* note 4 at 97; Maestro, *supra* note 16 at 152.

85. F. Voltaire, OEUVRES COMPLETES 265 (Moland ed. 1877-85).

86. Phillipson, *supra* note 4.

87. Radzinowitz, *supra* note 3 at 287.

B. IN ENGLAND

Beccaria has had an exceedingly strong influence on English penal policy. In his treatise, he provided an alternative to the frequently used death penalty, and offered reorganization of the entire penal system. While activists were utilizing his treatise in Parliament, his arguments transformed penological thought itself. As stated by one commentator:

> The reform in England, as over the rest of Europe, may be ultimately traced to that Voltarian School of which Beccaria was the representative, for the impulse created by the treatise On Crimes and Punishments was universal and it was the first great effort to infuse a spirit of philanthropy into the Penal Code, making it a main object of legislation to inflict the smallest possible amount of suffering.[88]

1. *Blackstone.*—The renowned Lord Chancellor of England, Blackstone, was the first author to follow Beccaria in some of the most progressive ideas and principles.[89] The volume of his Commentaries on the Laws of England, dealing with the criminal law, was issued shortly after the publication of an English translation of Beccaria's work from a French edition, which included Voltaire's commentary.[90] A review of Beccaria's book in the Annual Register, attributed to Edmund Burke, the political philosopher, was most favorable,[91] and had a profound influence on Blackstone.[92]

Blackstone referred to his Italian contemporary on many occasions, and Beccaria's influence on his writings is readily apparent.[93] Blackstone fol-

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88. MacDonell and Manson, *supra* note 11 at 513 (quoting I W. Lecky, *Rationalism in Europe* at p. 349).

89. It was Beccaria's treatise, as Sir William Holdsworth stated, that "helped Blackstone to crystallize his ideas, and it was Beccaria's influence which helped to give a more critical tone to his treatment of the English criminal law than to his treatment of any other part of English law." Radzinowitz, *supra* note 3, at 346.

90. IV W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769). Between 1769 and 1807 seven more English editions were published. In his preface to the second edition of 1769, the translator wrote: "Penal Laws, so considerable a part of every system of legislation, and of so great importance to the happiness, peace and security of every member of society, are still so imperfect, and are attended with so many unnecessary circumstances of cruelty in all nations, that an attempt to reduce them to the standard of reason must be interesting to all mankind . . . . It is not surprising, then, that this little book hath engaged the attentions of all ranks of people in every part of Europe . . . and perhaps no book, on any subject, was ever received with more avidity, more generally read, or more universally applauded . . . ." Radzinowicz, *supra* note 3 at n. 29.

91. 10 *Annual Register* 316-329 (1767).

92. Radzinowicz, *supra* note 3, at 283 n.60. Blackstone alluded to Beccaria in his characterization of the criminal laws of other nations, stating: "But even with us in England where our crown law is with justice suppose to be more nearly advanced to perfection . . . even here we shall occasionally find room to remake some particulars that seem to want revision and amendment." W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 90 at Chap. I at 3.

93. IV W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 3 (1769). He railed against legal "inhumanity and mistaken policy . . . sufficiently pointed out by [Beccaria]." *Id.* He argued

lowed Beccaria's reasoning in the matters of false accusations,[94] the distinction between principals and accessories,[95] between offenses against God and society,[96] on the effectiveness of "preventive" (as opposed to "punitive") justice,[97] on witnesses,[98] and on the subject of pardons.[99] He also condemned torture[100] — and the frequency of capital punishments, lamenting as a "melancholy truth" the existence on the English statute books of numerous offenses punishable by death.[101] Thereafter, Blackstone's authority was repeatedly quoted by reformers in support of their cause.[102]

2. *Jeremy Bentham.*—Around the same time, a young jurist, Jeremy Bentham,[103] became active in the movement for reform. A disciple of Beccaria, Bentham could not refrain from addressing his mentor: "Oh, my master, first evangelist of reason, you who have raised your Italy so far above . . . , you who speak reason about laws . . . , you who have made so many useful

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that "crimes are more effectively prevented by the certainty than by the severity, of punishment." *Id.* at 17. He considered it unreasonable to apply the same punishment "to crimes of different natures" assigning, like Beccaria, the "most severe punishment" to those who are "most destructive of the public safety and happiness." *Id.* at 16. Further crediting his contemporary, he stated that Beccaria had "ingeniously proposed, that . . . a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least" also directing the task to the "wise legislator [who] will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior rank . . . where men see no distinction made in the nature and gradation of punishment, they generally will be led to conclude there is no distinction in the guilt." *Id.* at 18.

94. *Id.* at 14.

95. *Id.* at 39.

96. *Id.* at 41.

97. *Id.* at 248.

98. *Id.* at 351.

99. *Id.* at 390. While Beccaria's disapproval of pardons would admit no exceptions, Blackstone did not share as strong an objection in light of English practice. The fundamental difference that in England the monarch was constitutional, while on the Continent he was absolute, suggests that Blackstone did not view the royal prerogative — "a magistrate, who has it in his power to extend mercy, whenever he thinks it deserved" — with Beccaria's suspicion. *Id.* at 396.

100. "It seems astonishing . . . rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves" *Id.* at 321.

101. *Id.* at 397. It should be mentioned that Sir William Blackstone (1723-80) enjoyed the greatest of fame in the early United States. In almost all parts of the young Republic, his was almost the only source of knowledge of English law. The COMMENTARIES, which in England was a legal textbook, became in the new nation an oracle of law, until American jurisprudence began to make its own contribution to legal literature.

102. Like Blackstone, Lord Mansfield also held Beccaria in great esteem. Phillipson, *supra* note 4 at 91. Lord Mansfield (1705-93) served as attorney general of England and leader of the House of Commons (1754-56), and chief justice of King's Bench (1756-88) while, by singular arrangement, continuing as a member of the cabinet, acting as Speaker of the House of Lords. It is said he never pronounced the name of Beccaria without a visible sign of respect. MacDonell and Manson, *supra* note 11 at 510.

103. Bentham has been called the greatest legal reformer in England. "The age of Law Reform and the age of Jeremy Bentham are one and the same . . . . No one before him had ever seriously thought of exposing the defects in our English system of Jurisprudence." 2 SPEECHES: LORD BROUGHMAN TO PARLIAMENT 287 *et seq.* (1938).

excursions into the path of utility, what is there left to do? — Never to turn aside from that path."[104] Bentham proclaimed that "[w]hen Beccaria came, he was received by the intelligent as an Angel from heaven would be by the faithful."[105]

In producing the first English exposition of an enlightened penal doctrine, Bentham made clear that Beccaria was the principal source of his penal theories, and that the product was melded of Beccaria's inspiration and utilitarian philosophy.[106] Bentham shared with Beccaria the great conviction that punishment, like every other social institution, should be subjected to rational criticism. He concurred with the uselessness of the traditional savageries of penal law, insisting that the measure of punishment be the least needed to offset the advantage men hope to derive from their crimes, and that severe punishment may actually increase crime.[107] He endorsed Beccaria's principle that punishment should be both speedy and certain, and supported Beccaria's general views concerning the nature of the rule of law and the proper function of legislator and judge. Importantly, he acknowledged that Beccaria drew his attention to the "greatest happiness" principle, and considered his book "the first of any account that is uniformly censorial, concludes as it sets out [to accomplish] with [a system of] penal jurisprudence."[108]

3. *Romilly.*—Also profoundly influenced by Beccaria was Samuel Romilly,[109] a central figure in the movement to stem the advance of capital punishment.[110] Romilly used the arguments advanced by Beccaria in his writings and parliamentary speeches to urged a total revision and reforma-

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104. E. Halevy, THE GROWTH OF THE PHILOSOPHICAL RADICALISM 21 (1928).

105. *Id.*

106. "It was from Beccaria's little treatise on crimes and punishments that I drew as I well remember the first hint of the principle by which the precision and clearness and incontestableness of mathematical calculations are introduced for the first time into the field of morals" (See X J. Bentham, WORKS 142 (Bowring, ed. (1843)). According to Bentham, Beccaria was the first to embark on the criticism of law and the advocacy of reform without confusing the task with the description of the laws then in force.

107. See generally, H. Hart, "Beccaria and Bentham," Turin, Italy (1961). Bentham concluded, however, that in spite of all its defects, capital punishment should be retained, confined to offenses of the highest degree.

108. Radzinowicz, *supra* note 3 at 378. According to Bentham, any writing on jurisprudence could have only two objects: to ascertain what the law is (expository jurisprudence) or what it ought to be (censorial jurisprudence). He anointed Beccaria as "the father of censorial jurisprudence." *Id.* at n. 89.

109. "I have lately read a second time, . . . ON CRIMES AND PUNISHMENTS, a favorite book, I know, of yours, and I think deservedly." *Letter from Romilly to Rev. John Roget, March 1, 1782* reprinted in I S. Romilly, MEMOIRS 24 (1840).

110. *Id.* at 314. See also, S. Romilly, OBSERVATIONS ON A LATE PUBLICATION ENTITLED, THOUGHTS ON EXECUTIVE JUSTICE 105 (1786). To this pamphlet he added an anonymous letter: "A Letter from a Gentleman Abroad," speaking to the need for reform of the criminal law and the penal system. The letter was written by Benjamin Franklin. See *infra* note 130 at 317.

tion of the English penal law and the adoption of a plan "which unites the advantages of a charitable with those of a penal institution, and has in view that important end of punishment, [that] has been overlooked in almost all our other laws — the reformation of the criminal . . . ."[111]

Romilly, like Beccaria, contended that the excessive severity of the criminal law was the main cause of the disquieting increase in crime, and that only a revision of the statutes imposing capital punishment could reverse the trend. Studying the trends of reform inspired by Beccaria, he generously noted that "the observed and barbarous notions of justice, which prevailed for ages, have been exploded, and human and rational principles have been adopted in their stead."[112] Romilly exposed the continuing disparity between capital laws and their administration in practice. He attacked the discretion of judges both in inquiring of aggravating circumstances and in sentencing as an untoward evil. Likewise, because of the former, he concluded that juries were often unable to serve their cardinal fact-finding functions. He, too, called for clear and unambiguous laws that should be widely published. "So evident is the truth of that maxim that if it were possible that punishment, as the consequence of guilt, could be reduced to an absolute certainty, a very slight penalty would be sufficient to prevent almost every species of crime . . . ."[113] He would achieve much success in repealing the extreme severity with which the death penalty was inflicted.[114]

4. *Eden and Meredith.*—The English reformers, William Eden and William Meredith, also took a stand against the disproportion between crimes and punishment.[115] Eden was the first to attempt a critical examination of the structure and principles of English criminal law. Strongly inspired by Beccaria, his book Principles of Penal Law sets forth a comprehensive plan for addressing the shortcomings of the English legal system, and quickly gained recognition as "a remarkable precursor of that new era of agitation for reform of the law . . . ."[116] While accepting a system inclusive of capital punishment as "our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is . . . inconsistent with public safety,"[117] Eden attacked its excessiveness and indiscrimi-

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111. *Id.* at 59.
112. *Id.* at 1.
113. *Id.* at 117.
114. Romilly, for all his admiration of Beccaria, did not follow his uncompromising view for the total abolition of the death penalty; he, nonetheless, concurred that it should not be appointed "without a gross violation of the laws of nature." He otherwise urged imprisonment as an appropriate and adequate sanction. S. Romilly, OBSERVATIONS, *supra* note 110 at 25: "Between a sum of money and the life of an individual there is no proportion." *Id.*
115. Maestro, *supra* note 16 at 131.
116. XII W. Holdsworth, HISTORY OF THE ENGLISH LAW 364 (1923-28).
117. W. Eden, PRINCIPLES OF PENAL LAW 25 (1771).

nate usage. Like Beccaria, he insisted that punishments should bear some proportion to the gravity of offenses, and excuses only an absolute standard for "the destruction of mankind by the hand of man."[118]

Again reflecting Beccaria's influence, Eden considered the main function of the state to be to ensure a maximum liberty to its citizens. The scope of the criminal law, he advanced, should be reduced to the minimum possible, and the definition of crimes set forth exactly. He urged the separation of detainees from convicted offenders. He called for revisions of the capital code, and, importantly, the outright repeal of all absolute statutes as well as those enacted to deal with emergency circumstances no longer relevant, describing them collectively as a "dismal catalogue" burdening the populace with capital offenses "when the grievances, for which it was framed, hath ceased and is forgotten."[119]

Three years after Beccaria's book appeared in English, Meredith successfully moved the House of Commons for an inquiry into capital offenses. He articulated the concepts of equal justice, espousing the view that no one should be put to death for minor offenses. Reformation of the offender was urged as an alternative. In England, he contended, the reverse was true: "[i]n all, the penalty is hanging; in larcenies and petty thefts, as well as in treason and murder."[120] He concluded, as did Beccaria before him, that such a system not only undermined the law but resulted in an increase rather than decrease in crime:

> [C]ruel laws do not prevent the commission of crimes, 'for it is not the mode, but the certainty of punishment, that creates terror. What men know they must endure, they fear; what they think they can escape, they despise'. Each new capital law leads to the enactment of a number of other capital laws. One argument is always sufficient: 'If you hang for one fault, why not for another? If for stealing a sheep, why not for a cow or a horse?'.[121]

5. *Howard.*—During this same period, John Howard started a movement to improve prisons. He focused attention on the hideous conditions in existing prisons, which were characterized by privation, filthiness, cruelty and neglect. He also drew attention to the great number of offenders who, for the want of corrective institutions and corruption, were being brought to the scaffold. His book on the state of penal incarceration appeared in 1777.[122]

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118. *Id.*

119. *Id.* at 305.

120. Radzinowicz, *supra* note 3 at 427.

121. *Id.* at 474 (quoting 19 PARLIAMENTARY HISTORY 235-241 (1777-1778)).

122. THE STATE OF PRISONS IN ENGLAND AND WALES (1774). This book was influenced by a prolonged tour of continental institutions; he praised those where milder sentences saw prisoners set to useful work, accompanied by moral instruction, with the object of reformation. Indeed, for some

His parliamentary efforts exposing the terrible misery to which prisoners constituted the dawn of prison reforms in England.

Howard's efforts first resulted in passage of a 1774 bill abolishing the outrageous fee system levied on prisoners for their safe keeping by gaolers (wardens), granting freedom to prisoners being held because of lack of ability to make payment, and establishing a fixed salary for the jailer's office. This was followed by other legislation requiring justices of the peace to see that the walls and ceilings of prisons were scraped and whitewashed at least once a year, that the rooms were regularly cleaned and ventilated, that infirmaries were provided for the sick and that the naked should be clothed, that the use of underground dungeons should be restricted, and generally that such courses should be taken as would tend to preserve the health of the prisoners. In 1778, a bill to provide for separate confinement in new penitentiary houses was passed, and Howard was appointed first supervisor. In 1781 a separate act was passed, making it compulsory for justices of the peace to provide separate accommodations for felons and ending the practice of arbitrarily intermingling all committed to local gaols, even those awaiting trial, and debtors and young persons of both sexes.[123]

C. IN THE NEW WORLD

The evidence of Beccaria's influence in the New World is clearly visible.[124] English editions of his work were available, and an American edition was advertised in Livingston's New York Gazetteer as early as October 28, 1773.

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sixty years after the publication of William Eden's PRINCIPLES OF PENAL LAW (1771), hardly any progressive writer in the sphere of English penal reform was uninfluenced by Beccaria's interpretation or failed to acknowledge his inspiration in their own efforts.

123. It is difficult to conclude whether the formal adoption by Parliament of the "separate plan" would have taken place but for the political necessity which arose from keeping prisoners at home. Theretofore, the American colonies (as continued with Australia well into the 19th Century) had allowed for a policy of riddance of dangerous convicts as an alternative to execution of the death sentence. The easy means of transportation across the Atlantic long relieved Parliament of the necessity of devising any new and encompassing methods for the punishment of crime at home.

124. In a recent address, Dean Santoro of the Delaware law school summed up Beccaria's contributions rather nicely:

> [M]uch of Beccaria's thoughts have found their way directly into the American Constitution. He believed in fundamental rights and 'the pursuit of happiness' — a phrase so familiar to us. Beccaria argued that punishment should fit the crime . . . . Beccaria attacked the arbityrary detention of persons pending trial. Our Fifth Amendment requires an indictment. Our Sixth Amendment requires a speedy trial. Our Constitution provides for bail . . . . Beccaria railed against torture and cruel punishments. Our Eighth Amendment prohibits cruel and unusual punishment . . . . Beccaria believed the laws of heaven were conducted by laws absolutely different from those governing human affairs. Our Fifth Amendment provides that no one need incriminate himself. . . . Beccaria believed there should be no secret accusations. Our Sixth Amendment gives the accused the right to confront witnesses against him . . . . I do not think America would have been vastly

An edition appeared in Charleston in 1777[125] and Beccaria's thoughts on human rights and individual dignity foreshadowed many reforms in the New World, finding their fruition in what is perhaps the most celebrated document of the Enlightenment, the United States Constitution,[126]

John Adams, in taking up the defense of the British soldiers implicated in "The Boston Massacre," paraphrased Beccaria's Introduction to an unfriendly 1770 court: "I am for the prisoners at the bar, and shall apologize for it only in the words of the marquis Beccaria: 'If I can be the instrument of preserving one life, his blessings and tears of transport shall be a sufficient consolation to me for the contempt of all mankind.'."[127] The trial proved a great success for Adams as none of the soldiers was found guilty,[128] and Adams later reported on "the electrical effect produced upon the jury and upon the immense and excited auditory, [of] the first sentence."[129] So highly did Adams prize Beccaria's book that he willed it to his son.

Benjamin Franklin, when the American minister to France, spoke often of the cruelty and absurdity in existing legal systems. He wrote about those aspects of English law that seemed to him most reprehensible, the disproportion between offenses and punishments. He wrote: "To put a man to death for an offense which does not deserve death, is it not murder?"[130] In referring to the execution of a woman convicted at Old Bailey for stealing gauze from a shop, he exclaimed: "Might not that woman, by her labour, have made reparation . . . . Is not all punishment inflicted beyond the merit of the offense, so much punishment of innocence. In this light, how vast is the

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> different without [Beccaria] but clearly it is better because of [his] contribution to our freedom.

Anthony J. Santoro, speech to the Order Sons Of Italy in America (Pennsylvania), Oct. 10, 1987.

125. Maestro, *supra* note 16 at 43.

126. This reference draws on the tradition of including in the Constitution itself the Bill of Rights, which, when adopted in 1791, closed America's period of constitution-making.

127. F. Kidder, HISTORY OF THE BOSTON MASSACRE 232 (1870). Beccaria's original text read:

> [I]f by defending the rights of man and of unconquerable truth, I should help to save from the spasm and agonies of death some wretched victim of tyranny or of no less fatal ignorance, the thanks and tears of one innocent mortal in his transports of joy would console me for the contempt of all mankind.

OF CRIMES AND PUNISHMENTS, *supra* note 21, Introduction.

128. Interestingly, two were found guilty of manslaughter, but were discharged after being burnt on the hand.

129. H. Paolucci, *Cesare Beccaria (1739-1794) and the Reform of Criminal Justice in Anglo American Law*, SEVEN ITALIANS INVOLVED IN THE CREATION OF AMERICA (1984) (quoting II J. Adams, WORKS 238).

130. "Franklin to Benjamin Vaughan, March 14, 1785," contained in IX A. Smyth, THE WRITINGS OF BENJAMIN FRANKLIN 291 ff. (1907). Franklin did not follow Beccaria in his opposition to the death penalty as a question of principle, but he shared the view that crime flourishes in a climate of cruelty and violence.

annual quantity of not only injured, but suffering innocence, in almost all the civilized states of Europe!"[131]

Criminal law in America underwent significant changes immediately following the Revolution. Punishments were reduced in severity and "cruel and unusual punishments," so common in the colonial administrations, were abolished.[132] These changes came at different periods in the different states, but the trend definitely began in Pennsylvania. Robert J. Turnbull, in a series of articles which appeared during February, 1796 in the Charleston Daily Gazette wrote of penal law reform on a visit to Pennsylvania:

> Several circumstances combined to make the proposed alteration expedient, and among others the small and valuable gift of the immortal Beccaria to the world had its due influence and weight; for on the framing of the new constitution of the state, in 1776, the legislature were directed to proceed as soon as might be to the reformation of the penal laws and to invent punishments less sanguinary and better proportional to the various degrees of criminality. [133]

Thus, after a series of new legislative acts, the punishment of death was reserved for "murder in the first degree."[134] At the same time, hard labor was first introduced as the penalty for other major offenses.

The exemplary administration of the Pennsylvania penitentiaries, which likewise were to serve as a model in other states, are described by Turnbull in a classic report [135] on an institution he called a "wonder of the world. . . . [O]f all the . . . penitentiaries I ever read or heard of, I have met with none founded on similar principles, or which could in any manner boast of an administration so extensively useful and humane."[136] Turnbull went on to describe the various quarters of the prison and the workshops where he observed men in a variety of activities, such as nail-manufacturing, marble-sawing and stone-cutting. He stated: "[t]here was such a spirit of industry visible on every side, and such contentment pervaded the countenances of all, that it was with difficulty I divested myself of the idea, that these men surely were not convicts, but accustomed to labour from their infancy."[137]

Turnbull described the apartments of the women, and likewise detailed their activity with cotton, wool, flax and hemp. Men and women, he noted,

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131. *Id.*

132. In the average colony there were 12 capital crimes. This was far fewer than existed in England; yet there were many executions because "[w]ith county jails inadequate and insecure, the criminal population seemed best controlled by death . . . ." Filler, *Movements to Abolish the Death Penalty in the United States*, 28 ANNALS AM. ACAD. POL. & SOC. SCI. 124 (1952).

133. Turnbull, *A Visit to the Philadelphia Prison*, CHARLESTON DAILY GAZETTE 6 (Feb. 1796).

134. See Pennsylvania Statutes: An Act for the Better Preventing of Crimes, March 25, 1794.

135. Turnbull, *supra* note 133 at 3.

136. *Id.*

137. *Id.*

were separated, as were convicted criminals and untried prisoners. Interestingly, he pointed out that no separation exists as between white criminals and the negroes and mulattoes, who, he said, constituted about one-eighth of the prison population: "There are no degrading distinctions . . . and at supper they all seat at the same table . . . ."[138] Turnbull, impressed by the cleanliness he found at Philadelphia, praised the fact that the prison supported itself with work done by the inmates covering all maintenance.

The influence of Beccaria's ideas in Pennsylvania was so great that several prominent men went so far as to urge abolition of the death penalty. In 1792, Dr. Benjamin Rush, a signer of the Declaration of Independence and drafter of America's first reasoned argument against capital punishment, proclaimed that "the marquis of Beccaria has established a connexion between the abolition of capital punishment and the order and happiness of society."[139]

In Virginia, we find yet more proof of Beccaria's influence. Thomas Jefferson's Commonplace Book quoted him no less than twenty-six times.[140] While this book was written between 1774 and 1776, Jefferson was serving on the Virginia Committee of Revisors for the reform of the legal system. By 1778, Jefferson's "Bill for Proportioning Crimes and Punishments in Cases heretofore Capital" referred to Beccaria four times. In his autobiography, Jefferson wrote: "Beccaria . . . had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death; and hard labor on roads, canals and other public works, had been suggested as a proper substitute. The Revisors had adopted these opinions. . . ."[141] When adopted, the law limited the death penalty to the crimes of treason and murder. Likewise, Jefferson agreed with Beccaria on the subject of restricting pardons: "When laws are made as mild as they should be . . . pardons are absurd. The principle of Beccaria is sound."[142]

Thus, Beccaria's influence reduced considerably the number of executions in the newly established American states.[143] Indeed, the Northwest Ordinance of 1787, enacted under the Articles of Confederation and laying the foundation by which new states might seek admission to the Union, included a prohibition against cruel and unusual punishment.

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138. *Id.*

139. See B. Rush, CONSIDERATION OF THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH 3 (1792).

140. THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT (G. Chinnard ed. 1926).

141. See I T. Jefferson, WRITINGS 67 (1903). It should be noted that the Pennsylvania experiment of hard labor as a public spectacle was not successful; in secluded penitentiaries it worked well, and this system was soon initiated in Virginia and elsewhere.

142. See THE COMPLETE JEFFERSON 61 (S. Padover ed., 1943).

143. See generally, Maestro, *supra* note 16 at 138 ff.

The Founding Fathers, quite naturally, identified oppression with abuse of the criminal law, and identified the rights of man with the basic right to a fair trial. The first laws of the Federal government thus show Beccaria's influence. The document promulgated at Philadelphia [144] provided that "the trial of all crime, except in cases of impeachment, shall be by jury"; it prohibits *ex post facto* laws and bills of attainer with consequent forfeiture and the confiscation of property upon conviction. Other provisions were added in the amendments to the Constitution in 1791.[145] While the English tradition is clearly visible, there is no doubt that the writings of Beccaria are responsible for an attitude that prevailed throughout America's period of constitution-making.

William Bradford, who would later serve as Attorney General of the United States, wrote:

> We perceive . . . that the severity of our [English] criminal law is an exotic plant, and not native growth . . . . It has endured but, I believe, has never been a favorite . . . and as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them. During our connection with Great Britain no reform was attempted; but as soon as we separated from her the public sentiment disclosed itself and this benevolent undertaking was enjoyed by the constitution. This was one of the first fruits of liberty . . . .[146]

Bradford's pamphlet is significant for it gives a review of the operation of the criminal law in colonial America that is unavailable in any other source. Crediting Beccaria as having "led the way," Bradford singled out the consti-

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144. In comparing the Preamble to the United States Constitution, Professor Paolucci notes "Beccaria's treatise has little to say about providing for the common defense, but, with respect to the use of force, or coercive power, to assure us justice, tranquility, and liberty at home, there is hardly a question current today that has not received detailed consideration in *Dei Delitti e delle Pene*. See *Cesare Beccaria (1739-1794) and the Reform of Criminal Justice in Anglo American Law*, *supra* note 129 at 21.

145. *See, e.g.*, the EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. "[T]here is evidence in the debates of the various state conventions that were called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments." See *Furman* v. *Georgia*, 408 U.S. 238, 396 (1972) (quoting 2 J. ELLIOT'S DEBATES 447-481 (2d. ed. 1876)). It should be noted that while the precise language of the Eighth Amendment was drawn verbatim from the English Bill of Rights of 1689, scholarship is divided as to whether the prohibition is properly read as a response to illegal punishment, as a reaction to barbaric and objectional modes of punishment, or both. The legislative history has led most historians to conclude it as a reaction to inhumane punishments. From every indication, it would appear that the framers intended to give the phrase a meaning far different from that of its English precursor. See generally, Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969). It is also clear that prior to the adoption of the Amendment there was feeling in the colonies that a safeguard against cruelty was needed. See generally, 7 B. Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71 (1971).

146. *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793), *reprinted in* XII AMERICAN JOURNAL OF LEGAL HISTORY 122, 137 (1968).

tutions of New Hampshire, Vermont, Pennsylvania and Maryland as enjoying the fruits of Beccaria's "march" whose principles "serve to protect the rights of humanity and to prevent the abuses of government [and] are so important that they deserve a place among the fundamental laws of every free country."[147] He concluded that it was doubtful whether capital punishment was at all necessary, advice, as we have noted, largely adapted. Later, Bradford would write to Milan:

> [T]his American copy of the celebrated book On Crimes and Punishment . . . is new proof of the veneration in which our countrymen hold [Beccaria]. I wish the author of this book, which has been so well received in the Old Continent, to know that his efforts to extend the empire of humanity have been crowned in the New with the greatest success . . . . The beneficial spirit spread by Beccaria is working secretly in favor of the prisoners, mitigating the severity of laws and tempering justice with piety.[148]

V. CONCLUSION

Beccaria wrote at a time when criminal justice was an oxymoron. Laws and procedures were unwritten, punishment was cruelly and inequitably applied, and only a privileged few had faith in the process whereby the accused was brought to justice. Into this world, Beccaria brought a brilliant, intellectually reasoned road map — a map which guided reforms throughout Europe, England and eventually the United States. The fruits of the essay for which he is deservedly lauded, whose underlying concepts of human rights and individual dignity found expression as part of the Age of Enlightenment, represent the foundations of our modern criminal justice institutions.

Notwithstanding, only a small segment of our society recognizes his accomplishments or ascribes to him the magnificent reforms which he catalyzed. And so, on a note not as felicitous as desired, we end our survey. It concludes with the hope that a new breath of gratitude will be expressed by "mankind at large"[149] for the blessing of Beccaria's vast influence.

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147. *Id.*, Introduction at 127.

148. *Id.* at 24. *Bradford to Luigi Castiglione, August 10, 1786*, quoted in G. Schiavo, ITALIANS IN AMERICA BEFORE THE CIVIL WAR 24 (1934).

149. "The justice of mankind at large . . . is rooted in the social union of the race of man." I Cicero, TUSCULAN DISPUTATIONS 64.

Business Visas for Italians: An Introduction

FRANCESCO ISGRO*

Pasta Bella, Spa., the Milan-based company you represent before the ITC and the Commerce Department, has decided to build a pasta plant in the United States. The company wants the new plant to meet the rigorous requirements of pasta factories that operate in Italy, including special ovens constructed with Italian bricks, the use of skilled pasta workers, and a host of special touches that make Pasta Bella more than just pasta. In short, your client wants to operate Pasta Bella USA strictly with Italian goods and Italian personnel. You may soon realize that while you can advise your client about the movement of goods, you will need to seek further advice on the movement of personnel.

The Immigration and Nationality Act ("INA")[1] governs the movement of foreigners into the United States. As aptly observed by one court, the INA bears "a striking resemblance [to] King Minos' labyrinth in ancient Crete."[2] Thus, anyone expecting the statute to be a road map guiding the way toward bringing clients into the United States will soon be disillusioned. On the other hand, you need not be an immigration law specialist to give some preliminary advice to your Italian clients.

Italians have always been attracted by "America."[3] Between 1820 and 1975, more than five million Italians came to the United States in search of their dreams. Most came to stay. Today, however, due to the economic changes that have taken place in Italy in the past two decades—particularly the improved standard of living and the emergence of Italy as a leading world economic power—Italy is no longer a country of emigration but has become a country of immigration.[4] As Italians like to say, "l'America e qui"—"America is here."[5]

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1. The immigration practitioners generally refer to the specific sections of the INA, and not to the code sections which can be found at 8 U.S.C. § 1101 *et seq.*

2. *Lok v. INS*, 548 F.2d 37, 38 (1977) (J. Kaufman).

3. "My father never regretted leaving Italy. He always told me, 'We worked and worked, but had very little to show for all the work we did.' He and our relatives came to America because they wanted to have a better life, better opportunity." A. Santoli, NEW AMERICANS: AN ORAL HISTORY 297 (1988).

4. *See*, Isgro, *Italy Enacts Law to Protect Basic Human Rights of Foreign Workers*, 1 GEO. IMMIGR. L.J. 693 (1986).

5. In Fiscal Year 1989, only 2,910 Italians immigrated to the United States. U.S. Department of Justice, Immigration and Naturalization Service, 1989 STATISTICAL YEARBOOK OF THE IMMIGRA-

But as Pasta Bella knows, it can sell only so much pasta in Italy and must expand to other markets, preferably those unhampered by trade tariffs or quotas. The United States, with 35 million Italian-Americans and with a population generally infatuated with anything Italian, is highly receptive to the goods and services offered by that Italian company you represent or hope to represent. Whether the Italian company is a multinational or a family-owned Neapolitan restaurant, you will have to deal with immigration laws and those laws may not always be as comprehensible or as responsive to your client's needs as you think they should be.

Last December, Congress approved new legislation that is intended to be responsive to the needs of the labor market.[6] As underscored by President Bush, the Immigration Act of 1990 "dramatically increases the number of immigrants who may be admitted to the United States because of the skills they have and the needs of our economy. This legislation . . . will promote the initiation of new business in rural areas and the investment of foreign capital in our economy."[7] The new law makes it easier for Italians with skills to come to the United States either permanently or temporarily. While much of the law is awaiting implementation by the INS, you may want to keep basic pointers in mind when advising your Italian clients.

I. COMING TO AMERICA

The laws governing immigration matters are found in the Immigration and Nationality Act of 1952 ("INA").[8] There are some useful bits of information you should know by way of introduction. Unless your client is a United States citizen, he is considered an alien.[9] The INA creates two broad classes of aliens who may enter the United States: immigrants and nonimmigrants.[10] The INA presumes that if your client seeks to enter the United States, he wants to come here permanently. Consequently, if your Italian client wants

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TION AND NATURALIZATION SERVICE, Table 7, at 16. By contrast, in the same year more than 400,000 Italians came to the United States with a temporary visa, more than half of them as tourists. *Id.* Table 44, at 74.

6. The Immigration Act of 1990 (the "1990 Act"), Pub. L. No. 101-649, 104 Stat. 4978.

7. President's Statement on Signing the Immigration Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1946 (Dec. 3, 1990).

8. The INA, however, is only the starting point. If you intend to make immigration law part of your practice the following materials, in addition to the text of the INA, are a must: Code of Federal Regulations, Title 8 Aliens and Nationality; Title 20 Employees Benefits (containing the Department of Labor regulations); Title 22 (Visa and Passport Regulations promulgated by the Department of State); and the Foreign Affairs Manual (Vol. 9 - Visas) published by the Department of State.

9. The INA defines an "alien" as "any person who is not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The equivalent term in Italian is "*stranieri*". The term "cittadini extracomunitari" is used to connote non-EEC citizens.

10. There are other classes of aliens, such as those who enter as refugees.

to come here as a visitor, he has to demonstrate that he has no intention of permanently residing in the United States.[11] Although the 1990 Act contained a provision which would in certain circumstances permit a nonimmigrant to have a "dual intent," it is always safer to advise your client that if he enters the U.S. as a nonimmigrant, his intent must be to return to Italy and not to reside permanently in the U.S.

An Italian citizen who seeks to enter the United States for the purpose of remaining here permanently is considered an "immigrant."[12] If he can prove that his visit to the United States is temporary, he may qualify as a "nonimmigrant." In most cases, your Italian clients, be they the company's senior level management or the builder of Pasta Bella's brick ovens, will come here temporarily as nonimmigrants. However, the Immigration Act of 1990 dramatically improved the opportunities for labor-based immigration. Therefore, it may be in the best interest of the employer who has long-term business goals to have his Italian employees enter the United States as immigrants.

The Immigration Act of 1990 (the "1990 Act") established a three-track immigration system: (1) family sponsored immigrants;[13] (2) diversity immigrants; and (3) employment based immigrants.

The acquisition of an immigrant visa is based on a preference system. The 1990 Act established a worldwide annual level of at least 675,000 immigrant visas beginning in Fiscal Year 1995.[14] The preference system makes immigrant visas available to Italians who have relatives in the United States who are either United States citizens or permanent residents, and to Italians who want to immigrate on a job-related basis. The Act of 1990 sets a ceiling of about 25,000 visas per country per year.

The central theme of the preference system is family unification, a theme that was strongly espoused and supported by the former Chairman of the House Judiciary Committee, Peter Rodino. The 1990 Act sets a worldwide level of 465,000 visas for family-sponsored immigration. Beginning with FY 1985, the level rises to 480,000. Immediate relatives of U.S. citizens (spouses and unmarried minor children, and parent of adult citizens) are exempt from numerical limit. They can always obtain a visa without waiting in line.

The second immigration track created by the 1990 Act is the diversity program.[15] The diversity program is an attempt by Congress to promote

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11. Normally, he would do so when he applies for a visa at an American Consulate.

12. Section 214(b) of the INA, 8 U.S.C. A. § 1184(b), divides the world of aliens into immigrants and nonimmigrants and creates a presumption that every alien who seeks to enter the U.S. is an immigrant.

13. Immigration Act of 1990, § 111.

14. *Id.* at § 101.

15. *Id.* at §§ 131-134.

immigration from countries which traditionally have had few immigrants to the United States. Beginning in FY 1995, 55,000 visas will be made available annually to natives of a foreign state from which immigration was lower than 50,000 over the preceding five years. In the interim, the law establishes a complex transition program beginning in 1992, that is principally geared to benefit the Irish. Italians will also be permitted to apply for visas under this transition program. However, until further pronouncement from the INS or the Department of State, the transition program remains the least understood provision of the 1990 Act.

The third immigration track, and the most important for your business clients, is the employment-based immigration system.[16] This is the most significant change brought by the 1990 Act.

II. EMPLOYMENT-BASED IMMIGRANT VISAS

Prior to the 1990 Act, only 54,000 immigrants could enter the United States based on their job skills. Under the new law, up to 140,000 employment-based immigrant visas are available annually to qualified immigrants. These employment-based immigrant visas are distributed to the following five employment-based preferences.

A. PRIORITY WORKERS

Three groups of immigrants can have access to the 40,000 visas available under the "priority workers" preference: aliens with extraordinary ability, outstanding professors and researchers, and certain executives and managers. Italians who have an extraordinary ability in the sciences, arts, education, business, or athletics, may qualify as "priority workers." To prove extraordinary ability, your Italian client should submit extensive documentation, showing "sustained national and international acclaim."[17]Outstanding professors and researchers who have at least three years' experience in teaching or research and who are recognized internationally can qualify as priority workers.[18]

Pasta Bella may be interested in the third group of priority workers, which is reserved for multinational executives and managers. To qualify, the Italian employee would have to show that he has been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary or branch of the petitioning employer.[19]

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16. *Id.* at § 121.
17. H.R. Rep. No. 723, 101st Cong., 2d Sess., pt. 1, at 59 (1990).
18. Immigration Act of 1990, § 121(a).
19. *Id.* at § 121(b)(1)(C).

B. ADVANCED DEGREE PROFESSIONALS

The second preference is reserved for persons who are members of the profession holding advanced degrees or persons of exceptional ability in the sciences, arts, or business. The new law reserves 40,000 immigrant visas for this category, in addition to visas that are not used by priority workers. Under the new law, "advanced degree" is defined as a bachelor's degree and at least five years' experience in the particular profession.

C. SKILLED WORKERS, PROFESSIONALS, AND OTHERS

If the Italian employee does not qualify as a priority worker or does not have an advanced degree, he may still qualify for an employment-based visa if he has an offer of employment in the United States. The law reserves 40,000 visas for this preference, plus any visas not used by the two prior preferences. It is likely, however, that the visa numbers in this preference will be used rather quickly.

To qualify under this preference, for example, once Pasta Bella has established an office in the United States, the company must file a visa petition and a labor certification on behalf of its Italian employees. To get its workers from Italy, Pasta Bella must demonstrate that the workers are skilled, and that their positions at Pasta Bella USA require at least two years' training or experience. Up to 10,000 visas are made available to unskilled workers in short supply. It is likely that there will be a considerable backlog of persons seeking to enter the U.S. with an "unskilled" visa.

D. EMPLOYMENT CREATION

The fourth preference is reserved for investors, who are known under the new law as "alien entrepreneurs." Only 10,000 visas are made available to investors.[20] An investment of as low as $500,000 may be sufficient to obtain an "alien entrepreneur" visa. To qualify, the Italian investor will have to establish a new commercial enterprise and invest between $500,000 and $3 million in that enterprise. The investor must create at least 10 full-time jobs for U.S. workers. If the investment is in a rural or high unemployment area, the new law permits the investment to be as low as $500,000. No fewer than 3,000 visas are reserved for entrepreneurs who invest in economically depressed areas.

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20. Alien entrepreneurs are admitted conditionally for two years. They must petition the INS to remove the conditions on their status. INA, § 216A.

E. SPECIAL IMMIGRANTS

This category of employment-based immigrant visas is reserved for, among others, ministers of religion, certain employees of the U.S. Government abroad, and religious workers.

III. BUSINESS-BASED NONIMMIGRANT VISAS

Your Italian clients, of course, have no intention of residing permanently in the United States. They want to come for a limited time to establish a venture, conduct business, and expand their Italian-based operations. They have no intention of abandoning their residence in Italy. In most cases, then, they will want to come to the United States for business purposes as nonimmigrants.

Nonimmigrant visas are obtained at U.S. embassies or at a U.S. consulate. Your Italian client may apply at the U.S. Embassy, Consular Section in Rome, or at the U.S. Consulate in Florence, Genoa, Milan, Naples, or Palermo. Visas used for business purposes and available to qualified Italians are known in the immigration trade as the B-1, E-1, E-2, H-1, H-2, H-3, L-1, and O visas. The following is a brief overview of the these visas.

A. THE B-1 VISA - TEMPORARY VISITOR FOR BUSINESS

The B-1 visa is generally the most desirable visa for someone coming to the United States to carry out a business transaction. This visa is normally obtained without delay. To be eligible for a B-1 visa your client must meet three requirements.[21] First, he must have an *intent* to continue to maintain his residence in Italy. Second, his entry into the United States must be *temporary*. Finally, he must come to the United States for the sole purpose of engaging in activities related to business.

A B-1 visa does not entitle your client to be employed in the United States. However, what constitutes employment is not always clear. Certain business activities have been recognized as within the scope of a B-1 visa. For example, if your client is traveling to the U.S. to negotiate a contract, to consult with business associates, or to attend and participate in seminars, he may do so with a B-1 visa.[22]

But what about the Italian workers who will build the brick ovens for Pasta Bella USA, can they travel to the United States with a B-1 visa? Thanks to the International Union of Bricklayers, Italians who seek to enter the United States to perform building or construction work, such as the in-

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21. INA, § 101(a)(15)(B).

22. The Department of State's FOREIGN AFFAIRS MANUAL ("F.A.M.") lists various classes of aliens who can be classified as B-1 nonimmigrants. *See* F.A.M. 41.31.

stallation of brick ovens, cannot do so with a B-1 visa.[23] Prior to 1985, it was permissible to issue B-1 visas for workers who were coming to the U.S. to perform construction work as part of a contract of sale. However, in 1985, the bricklayers' union brought a suit against the INS and the Department of State challenging the propriety of issuing B-1 visas in these circumstances. When the district court agreed with plaintiffs, the parties reached a settlement which now precludes the issuance of B-1 visas to aliens such as the Italian workers who would install the brick ovens. However, Italians who would supervise and train others to build the brick ovens could enter the United States with a B-1 visa. The example of the Italian brick workers is illustrative of the types of issues that have developed over the years in the field of business visas. The Act of 1990 did not make any substantive changes to the B-visa.

B. THE E VISAS - TREATY TRADERS AND INVESTORS

In 1949, the United States and Italy entered into a Treaty of Friendship, Commerce, and Navigation. Under this Treaty, Italian citizens may enter the U.S. as traders under the E-1 visa or as investors under the E-2 visa.[24] To qualify for an E-1 visa, your client must be coming to the United States solely to carry on substantial trade, principally between the U.S. and Italy. Until recently, the "trade" only related to the exchange, sale, or purchase of goods. However, in March 1989, the INS redefined the "trade" to include services. Some examples of service activities are banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism, and technology transfers. The 1990 Act codifies this practice by specifying that "substantial trade" includes "trades in services or trade in technology."[25]

The trade of goods or services must be "substantial."[26] The word "substantial" is not intended to discourage certain types of trade or exclude employees of small companies.[27] However, because the burden of proving eligibility rests with your client, the bigger the company, the easier your job will be. The substantial trade must be "principally" between the U.S. and Italy. The term "principally" has been defined to mean that more than 50% of the total volume of trade must be between these two countries.[28]

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23. *International Union of Bricklayers and Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985).

24. INA § 101(a)(15)(E).

25. Immigration Act of 1990, § 204.

26. INA, § 101(a)(15)(E)(i).

27. *See* F.A.M., *supra* note 22 at 41.51, n.4.2.

28. *See* F.A.M, *supra* note 22 at 41.51 n. 4.3.

The E-2 visa, or the treaty investor visa, is available to an Italian citizen who is coming to the United States "solely to develop and direct the operations of an enterprise in which he has invested, or is actively in the process of investing a substantial amount of capital."[29] A "substantial" amount of capital is not necessarily a large amount. The consular officers apply the "proportionality" test to determine whether the investment is substantial. Essentially, the officer weighs the amount invested against either: 1) the total value of the particular enterprise in question, or 2) the amount normally considered necessary to establish a viable enterprise of the nature contemplated. Thus, in a recent administrative decision, it was held that a corporation whose investment included $350 per month for office rental, $5,000 for office furniture, an initial bank account of $15,000, and one or two employees, qualified for E-2 visas. The amount of capital in question here was clearly minimal. However, it was proved that the amount of the investment was sufficient to establish a viable enterprise, in this case an automotive design firm that would provide designers to work for a U.S. auto company.

The Department of State has indicated that the "proportionality" test is flexible. For example, the test may not even apply to big companies, such as your client Pasta Bella, when there are multimillion dollar capital transactions. But, the Department of State has also indicated that in small business investments, such as grocery stores or restaurants, the term "substantial" connotes an investment of more than half the value of the enterprise, or an amount normally considered necessary to establish an enterprise. Therefore, if Pizza Napoli wants to establish a restaurant in Washington, D.C., you determine the start-up costs of such a business and then give your client appropriate advice. An important consideration, however, is that your client's investment in the United States must expand job opportunities for Americans. Therefore, an investment that provides a living solely for the Italian investor and his family would be considered an investment in a "marginal enterprise solely for the purpose of earning a living" and not eligible for an E-2 visa.

Another requirement that your Italian investor must meet is that he must come to the United States to "develop and direct" the enterprise. In order to "develop and direct" the enterprise he must have a controlling interest of 50% or more in the enterprise. A joint venture can meet this requirement if the Italian corporation can demonstrate that it has, in effect, operational control.

There are several reasons why E visas are attractive. First, your Italian client does not have to establish an intent to come to the United States for a specific temporary period of time. Second, your client does not have to have

29. INA, § 101(a)(15)(E)(ii).

a residence in Italy which he does not intend to abandon. Finally, the spouse and children of a treaty investor are entitled also to an E-2 visa. Italians who obtain E-1 or E-2 visas are normally admitted for one year, but successive admissions or extensions are normally granted.

C. L-1 VISA—INTRACOMPANY TRANSFEREE

If your Italian client company has a branch in the United States or a parent company, a subsidiary, an affiliate, or is part of a joint venture, Italian employees may be easily transferred to the U.S. and can be authorized to remain here from five to up to seven consecutive years. To obtain an L-1 visa for the Italian employee, the U. S. employer must file a petition with the INS. Once it is approved, the petition is mailed to the U.S. consulate in Italy, where the Italian employee can pick up the L-1 visa.

The basic requirements for qualifying for an L-1 visa are as follows.[30] First, the Italian employee must have worked for the Italian company for at least one year before his transfer to the U.S. Second, the Italian employee must have been employed in Italy in an "executive" or "managerial" position or a position involving "specialized knowledge" and is transferring to the U.S. to fill a position in one of these capacities. Third, the transfer must be temporary, although the position need not be. Fourth, as noted earlier, there must be a relationship between the company in Italy and the company in the U.S. Normally, the general rule is that one company must have "effective control" of the other company. Thus, for example, ownership of 20% of the stock in a publicly traded company may amount to effective control if the rest of the stock is widely dispersed.

Whether the Italian employee is an "executive" or a "manager" and is coming to the U.S. to perform in one of those positions, will not be determined by his title alone, especially in those cases where the size of the company is small and the few employees all carry exalted titles. The 1990 Act defines the terms "executive capacity," "managerial capacity," and "specialized knowledge" thus, removing some but not all of the ambiguities that these terms entail.[31] Normally, an executive is defined as one who supervises the work of other employees. A manager, on the other hand, directs the company or a department or division of the company. He has the authority to hire and fire people and exercises authority over other personnel matters. The new law also stresses the fact that managers and executives manage important functions within a company even if they supervise few employees.[32]

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30. *See* INA, § 101(a)(15)(L).

31. Immigration Act of 1990, § 123.

32. Immigration Act of 1990, § 123, creating INA, § 101(a)(44)(C).

The term "specialized knowledge" is defined as "a special knowledge of the company product and its application in international markets" or "an advanced level of knowledge of processes and procedures of the company."[33] The INS' interpretation has been that the position must be one that involves proprietary knowledge that is essential to the company's operation. Whether the new definition expands the INS's interpretation remains to be seen. Nonetheless, assuming all other eligibility requirements are met, your Italian workers are certainly the only individuals in the world able to construct the brick ovens that are vital to the future expansion of Bella Pasta USA. They, you will argue, possess "specialized knowledge."

Your clients, let us assume, are not small mom-and-pop stores, but large Italian companies who frequently shuttle personnel across the Atlantic to work for twelve months in the U.S. branch. If your client's US branch has sales of at least $25 million, or 1,000 employees in the US, or has had ten L-1 approvals in the past year, your client may qualify for the blanket L-1 petition program. Under this program, the INS will issue one blanket approval, which initially lasts for a three-year period. At the end of this period you may be able to extend the program for your client indefinitely.

D. H VISAS—TEMPORARY WORKERS AND TRAINEES

You have concluded that your Italian bricklayers will not be admitted to the United States with a B-1 visa. But you have seen them at work in Italy and have determined that they are truly specialized workers. In fact, you have concluded after reading the immigration statute that they should qualify for an H visa because they occupy a "specialty occupation." However, the term "specialty occupation" was recently added to the statute by the 1990 Act. The INS has not issued implementing regulations and its unclear whether your client could qualify for an H-1B visa.[34] The new law defines a "specialty occupation" to require, theoretical and practical application of a body of highly specialized knowledge and, attainment of a bachelor's or higher degree in the specific specialty or its equivalent.[35]

If the past is prologue, obtaining an H-1B visa for your client, or one of the several H visas available, can be a tough assignment. In addition to meeting the requirement of a "specialty occupation," the 1990 Act requires the employer to file a labor attestation with the Department of Labor documenting a number of requirements including wages and working conditions. People, including unions, who want to challenge an H-1B attestation can file a complaint with the Department of Labor, which must investigate the matter.

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33. Immigration Act of 1990, § 123, creating INA, § 214(c)(2)(B).
34. *See* INA, § 101(a)(15)(H).
35. Immigration Act of 1990, § 205(c)(2).

Sanctions can be imposed upon employers who commit fraud or other violations. In light of the foregoing, you may come to the conclusion that Pasta Bella should consider using the H-1B visa as a last resort.

If your client does not meet the requirement for a "specialty occupation" and does not qualify for an L or an E visa, he may qualify for one of the H-2 visas. The H-2A visa is available to agricultural workers.[36] Since it's unlikely that an Italian would come to America to work on a farm — Italy currently imports people to work on its farms — the H-2B visa is the other alternative.[37]

To qualify your client for an H-2B visa, you will have to deal with the Department of Labor (DOL) and the INS. First, the intending U.S. employer must file a petition, known as a "labor certification," with DOL. DOL then determines whether unemployed, qualified U.S. workers are available for the job in the area where the employee will be hired, and whether the employment will adversely affect the wages or working conditions of U.S. workers similarly situated. Assuming a negative finding, DOL will approve the labor certification. The approval by DOL is only a recommendation to INS, which determines whether the visa will be issued. At INS, you must establish that your client only intends to come to the U.S. for a temporary period, and that the intending employer's needs for your client's skill are "temporary." Essentially, your client can not come to the United States to occupy a position that needs to be filled on a permanent basis.

An H-3 visa is available to workers who come to the United States for a temporary period to participate in established company training programs.[38] Your client company wants to establish a training program in Orlando, Florida, for example, to train its executives in the English language and American economics. This type of training is not available in Italy. The executives can qualify for an H-3 visa, or as noted earlier, you can advise your client that a B-1 visa will be all they would need.

E. O VISAS—TEMPORARY WORKERS OF EXTRAORDINARY ABILITY

The Immigration Act of 1990 created several additional non-immigrant visas, including the "O-visa," which is reserved for persons who have extraordinary abilities in the sciences, arts, education, business, or athletics.[39] To establish that your client has "extraordinary abilities" he must show "sustained national and international" accomplishments. How this will be interpreted by INS remains to be seen.

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36. INA, § 101(a)(15)(H)(ii)(a).
37. INA, § 101(a)(15)(H)(ii)(b).
38. INA, § 101(a)(15)(H)(iii).
39. Immigration Act of 1990, § 207(a)(3), creating INA, § 101(a)(15)(O).

IV. THE VISA WAIVER PROGRAM

On July 29, 1989, Italy became one of six countries to participate in a pilot visa waiver program. Under the program, Italians are able to visit the U.S. without first obtaining a visa at the U.S. Consulate. There are, however, some restrictions to the program and serious consequences for those who violate the terms of the visa waiver program. First, an Italian citizen must enter the United States as a nonimmigrant visitor for pleasure or as a visitor for business (B-1 or B-2 visa). Second, the entry must be for a period not to exceed 90 days. There are no extensions to this time limit, other than for purely emergency reasons, i.e. recovery in a hospital. Third, the visitor must possess a round-trip ticket that is issued by an airline carrier that has entered into an agreement with the INS. Alitalia airlines has signed such an agreement and so have most of the American carriers. Fourth, before being admitted, the visitor must complete and sign a Visa Waiver Information form, which, among other things, waives certain rights that normally accrue to a visitor who enters with a visa. Entry without a visa does not exempt a visitor from the immigration inspections at the airport. The Immigration Act of 1990, extends the visa waiver program through fiscal year 1994.

V. CONCLUSION

The globalization of economic markets has necessitated an increase in the movement of personnel across transnational boundaries. Unrestricted freedom to travel either for fun or profit will become a reality in the European Community in 1992, but the movement of people across the Atlantic is still very much controlled and restricted. However, the policy of the U.S. has been, and continues to be, to promote free international trade and to facilitate participation in the international marketplace.

The recent implementation of the visa waiver program with Italy is a welcome step. In his speech in Rome on May 27, 1989, President Bush said that "[i]n the future Italians who wish to visit our country, whether as tourists or on business, will no longer need to apply for visas." It is unlikely, however, that in the near future the movement of people across the Atlantic will be as unrestricted as the planned movement of people within the European Community. However, the U.S. has always had a special relationship with Western Europe. As dreams of European integration become a reality in 1992, a bilateral effort by the U.S. and the EC should be taken to make the movement of people across the Atlantic free from any constraints, other than those related purely to national safety. Until such a day, it will continue to be imperative for lawyers who have clients in Italy to have some knowledge of U.S. immigration laws.

Financial Secrecy in the West Indies: Not Just a Haven for Tourists

DAN R. MASTROMARCO*

The United States' war against the growing epidemic of drug abuse is being fought on several fronts: production, distribution and consumption. The tactics employed in this war have been traditional, such as increased law enforcement, youth eduction and treatment; less traditional, such as border surveillance and interdiction; and desperate, such as paramilitary operations involving the destruction of crops and laboratories. More than $10 billion is estimated to be spent in 1991 towards this effort — an amount averaging $40 for each taxpayer in the U.S.[1] Yet despite all these efforts and expenditures a vital link in the distributional chain of drugs has been largely ignored: foreign jurisdictions that act as secret havens for laundering drug money, the fuel for the machinery that fosters the epidemic's growth.

The primary geographical areas of concern for the U.S. should be the Bahamas, the Turks and Caicos, and other islands off the Florida Coast, all of which have created a cloak of secrecy unrivaled by most of the world's secrecy havens, including Switzerland. As U.S. prosecutors on the front lines know, transactions involving economic activity in the islands can be impregnable to U.S. law enforcement authorities and insulated from the processes of U.S. courts. Statutory, evidentiary and common laws of these jurisdiction thwart law enforcement efforts by making it prohibitively expensive and time-consuming to gather information regarding the laundering of drug proceeds or other illicit profits.[2] Without the ability to trace ownership of funds, law enforcement officials lose an important if not vital source of evidence for prosecution. Unbridled secrecy shields the drug barons from audits, enforcement of summons, grand jury subpoenas, and, effectively, prosecution. Moreover, the secrecy laws have greatly assisted in the perpetration of a vast number of other crimes, such as securities fraud, commodities fraud, and tax evasion.[3]

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1. Budget of the United States Government, Fiscal Year 1991, at 111. U.S. Government Printing Office.

2. *See,* Hockstader, *Caribbean Seeks Rein on Traffickers: Countries Facing Upsurge in Flow of Drug Funds, Ask U.S. for Aid,* WASH. POST, June 11, 1990, at A18, col. 1.

3. More than 100 reported cases of crimes from drug laundering to tax evasion involving the secrecy laws of the West Indies have been tabulated by this author. These cases are presented in

The role of the islands in the drug trade has been widely acknowledged and has been the subject of extensive Congressional hearings over the years;[4] however, little has been done to rectify the serious problems the secrecy laws pose. Many island jurisdictions believe their livelihood depends upon the licencing of offshore banks and companies through which the drug money is laundered. To preserve these institutions, they have strenuously resisted efforts by the U.S. government to effect information exchange agreements.[5]

Senate Perm. Subcomm. on Investigations, Comm. on Government Affairs, Crime and Secrecy: The Use of Offshore Banks and Companies, S. Rep. No. 130, 99th Cong., 1st Sess. at Appendix (1985).

4. Congressional concern over the matter has resulted in more than 35 hearings concerning offshore entities, bank secrecy and related issues. *See, Review of the Section 2013 Report and the State Department Mid-Year Update Report: Hearing Before the Task Force on International Narcotics Control,* 100th Cong., 2nd Sess (1988); *Review of the 1989 International Narcotics Control Strategy Report: Hearings Before the Task Force on International Narcotics Control,* 101st Cong., 1st Sess. (1989); *Drugs, Law Enforcement and Foreign Policy, Part 1: Hearings Before the Subcomm. on Terrorism, Narcotics and International Operations and the Subcomm. on International Economic Policy, Trade, Oceans and the Environment,* S. Hrg. 773, 100th Cong., 1st Sess. (1987); *Narcotic Review in the Caribbean: Hearing Before the Task Force on Int' Narcotics Control,* 100th Cong., 2nd Sess. (1988); *U.S. Foreign Policy and Int'l Narcotics Control, Part II: Hearings Before the Select Comm. on Narcotics Abuse and Control,* Comm. Serial No. SCNAC-100-2-3, 100th Cong., 2nd Sess (1988); *Caribbean Basin Initiative: A Congressional Study Mission and Symposium: Hearings Before the Subcomm. on Int'l Economic Policy and Trade and the Subcomm. on Western Hemispheric Affairs,* 100th Cong., 1st Sess. (1987); *Money Laundering Operations and the Role of the Department of Treasury: Hearings Before the Subcomm. on Oversight, Comm. on Ways and Means,* Comm. Serial No. 62, 99th Cong., 1st Sess. (1985); *Foreign Assistance and Related Programs Appropriations for 1987, Part 5: Hearings Before the Subcomm. on Foreign Operations Appropriations,* 99th Cong., 2nd Sess. (1986); *Effects of Drug Trafficking and Drug Abuse in the South Florida Community: Hearings Before the Select Comm. on Narcotics Abuse and Control,* Comm. Serial No. SCNAC-98-1-5, 98th Cong., 1st Sess., pp. 15-56, 108-135 (1983) (statement of Jon R. Thompson, Dep. Asst. Sec., Bur. of Int'l Narcotics Matters, U.S. State Dept.); *Tax Evasion Through the Netherlands Antilles and Other Tax Haven Countries: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs,* 98th Cong., 1st Sess. 568 (1983); *Crime and Secrecy, The Use of Offshore Banks and Companies: Hearings Before the Perm. Subcomm. on Investigations of the Committee on Gov't Affairs,* S. Hrg. No. 151, 98th Cong., 1st Sess. (1983); *Commodity Investment Fraud: Hearings Before the Perm. Subcomm. on Investigations, Comm. on Government Affairs,* 97th Cong., 2nd Sess. (1982); *To Investigate the Enforcement and Effectiveness of the Bank Secrecy Act: Hearings Before the Subcomm. on General Oversight and Renegotiation,* Comm. Serial No. 97-70, 97th Cong., 2nd Sess. (1982); *Improper Use of Foreign Addresses to Evade U.S. Taxes: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs,* 97th Cong., 2nd Sess. (1982).

See also, Mutual Legal Assistance Treaty Concerning the Cayman Islands, S. Exec. Rpt. 8, 101st Cong., 1st Sess. (1989); Mutual Legal Assistance Treaty Concerning the Cayman Islands, S. Exec. Rpt. 8, 101st Cong., 1st Sess. (1989); Treaty with the Bahamas on Mutual Assistance in Criminal Matters, S. Exec. Rpt. 12, 101st Cong., 1st Sess. (1989); Staff Study of Crime and Secrecy: The Use of Offshore Banks and Companies, S. Prt. 21, 98th Cong., 1st Sess. (1983); Commodity Investment Fraud: Perm. Subcomm. on Investigations, Comm. on Government Affairs, S. Rpt. No. 495, 97th Cong., 2nd Sess. (1982).

5. Most West Indies jurisdictions view strict secrecy as a *sine quo non* of economic wellbeing. Exemplary is the view expressed by Donald Fleming (former President of the International Monetary Fund) and a Bahamian banking official, before the Bahamian Chamber of Commerce: "[S]ecrecy . . . between financial institutions and their client[s] [is a] factor essential in the financial business . . . any lessening of this guarantee would harm the interests of the Bahamas, and any strengthening of it would bolster them." NASSAU TRIBUNE (Nassau, Bahamas), October 18, 1983,

While some success in the form of bilateral agreements has been achieved in response to U.S. pressure, the most troublesome jurisdictions, like the Turks and Caicos and the Bahamas, have reacted instead by fortifying their laws.[6]

The purpose of this paper is to explore the legal mechanisms by which secrecy laws operate in the West Indies with a view toward heightening awareness and understanding of the problems the secrecy laws pose to U.S. law enforcement, particularly to the U.S. war on drugs. The paper discusses the common law of bank secrecy, which is the foundation of banking secrecy in the West Indies; the statutory laws of model jurisdictions, which are targeted to afford blanket protection of transactions; and the letters rogatory process, which impedes U.S. requests for information. The paper concludes that the U.S. must do more to encourage information agreements with the West Indies in order to successfully wage the drug war.

I. SECRECY PROTECTION

Secrecy in the British West Indies is secured through three primary devices: the British common law, statutory law and the letters rogatory procedure. The common law, which exists throughout the islands, affords the lowest level of secrecy. Pertaining exclusively to bankers and their customers, it creates a private cause of action by imposing on bankers a duty to maintain the confidences of depositors.

Statutory secrecy laws, the greatest deterrents to disclosure, impose fines and prison terms on persons who improperly release or in some cases merely inquire into confidential matters. The protection afforded by secrecy statutes fall into one of three categories. Some statutes penalize disclosures or inquiries which take place solely outside the secrecy haven. They can allow the depositor or investor to withhold financial information from the haven authorities, such as, profit or loss statements and records of beneficial ownership. Lastly, the statutes can guarantee total anonymity by permitting bearer shares, bearer bonds and trust deeds which need not specify holders of equitable interests.

The letters rogatory process is ostensibly a device to facilitate intergovernmental information exchanges. It often ensures that the statutory and com-

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p. 5, col. 4. *See also,* NASSAU TRIBUNE (Nassau, Bahamas), Sept. 29, 1983, p. 1, col. 5; Gordon and Zagaris, *International Exchange of Tax Information: Recent Developments,* 33 CANADIAN TAX JOURNAL 877 (1985).

6. The Bahamas and the Cayman Islands are examples. *See, e.g.,* The Confidential Relationships (Preservation) Law of 1976, 1976 Cayman Is. Laws, ch. 8. This law was passed "to provide more substantial sanctions, cast its net wider, and leave less doubt as to the [previous law's] interpretation." *Id.* at Memorandum of Objects and Reasons. *See also, supra* notes 47-58 and accompanying text.

mon law serve as insuperable barriers when formal requests for evidence are received by U.S. courts.[7]

The secrecy devices are not only coextensive, but may be combined synergistically with other haven laws to create multiple layers of protection.[8] For example, a corporation in the Bahamas may be the beneficiary of a trust in the Turks and Caicos, the corpus of which is funded by bearer shares in a Bermudian 'exempt company,' which is wholly owned by a Cayman corporation holding title to monies on deposit in Anguilla. By utilizing such layers of secrecy, the so-called paper trail left by the stockholder of the Bahamian corporation, is difficult to trace if it can be followed at all.

A. COMMON LAW

1. *Origins and Scope.*—The U.S. offshore secrecy havens,[9] which share a common heritage as English colonies, also share a fundamental legal structure derived from the common law. At the cornerstone of English common law bank secrecy, applicable in the islands, is the renowned case of *Tournier v. National Provincial and Union Bank of England* [hereinafter *Tournier*].[10] Today the common law legacy of *Tournier* is firmly interwoven in the legal and institutional framework of the islands. West Indies banks pedantically adhere to its principle, as customers, for whatever purpose, have come to expect.

Tournier — one of the world's banking communities's most sweeping legal precedents — originated from unassuming, if not amusing circumstances. The case began in 1922 with a dishonored check in the amount of 7 pounds written by Tournier on his account at the National Provincial and Union Bank (National Provincial). Tournier, who was unable to satisfy the overdraft, entered into an agreement with National Provincial to pay the debt in

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7. Confidentiality is also bolstered by the absence of taxing laws. By refraining from enacting tax legislation for offshore companies, tax havens avoid establishing a foundation upon which a request concerning a tax violation may be predicated. Similarly, secrecy havens refrain from entering into information exchange agreements that would compromise their ability to ensure confidentiality.

8. This was referred to as the "veil of tiers" by Professor Harvey P. Dale of New York University Law School. Hearings Before the Subcomm. on Oversight, Comm. on Ways and Means, 96th Cong., 1st Sess. 236 (1979).

9. *See, infra* notes 37-45 and accompanying text for a list of these havens.

10. [1923] 1 K.B. 461. The *Tournier* case is cited as an element of secrecy in:, B. Spitz, TAX HAVEN ENCYCLOPEDIA (1984 Ed.) [hereinafter Spitz]; W. Diamond, Tax Havens of the World (1983 Ed.) [hereinafter Diamond]; and E. Chambost, Bank Accounts: A World Guide to Confidentiality (1982 Ed.) [hereinafter Chambost]. *See also* Blum, Criminal Aspects of the Use of Offshore Haven Banks, Trusts and Companies: Probes, Perspectives and Suggestions for Actions, Report to the U.S. Senate, Committee on Government Affairs, Permanent Subcommittee on Investigation (January 1983) (unpublished document on file with the Subcommittee); Richard A. Gordon, Tax Havens and Their Use by U.S. Taxpayers — An Overview; U.S. Department of Treasury, Internal Revenue Service (unpublished report prepared January 12, 1981); Tax Haven Information Book, U.S. Dept. of Treasury, IRS Doc. No. 6743 (February 1982).

installments. After Tournier failed to make good on his debt an unfortunate series of events occurred: the bank manager noticed that his paycheck had been endorsed to a bookmaker. Thereafter, the bank manager telephoned Tournier's employer to advise him of the overdraft, and in the course of that discussion, implied that Tournier endorsed the check (and perhaps many others) to a bookmaker. As a consequence, the employer fired Tournier, who then sued National Provincial alleging defamation.[11]

Tournier's lawsuit was dismissed at the first hearing; on appeal, however, the English court accepted his case and ordered the matter remanded for further consideration. In so doing, the appellate court found that Tournier's cause of action was grounded in a qualified legal duty between a banker and a customer. When this duty applies, the Court stated, it prohibits the banker from divulging to a third party information pertaining to the state of the customer's account, any of the customer's transactions with the bank, or any other information acquired through the banking relationship.[12] The *Tournier* court clearly implied a broad interpretation of the duty. According to the court, "[T]he duty does not cease the moment a customer closes his account;" rather, information learned during existence of the account remains confidential "until and unless released."[13] Furthermore, not only is the state of the customer's account confidential, but also all "information derived from the account."[14]

2. *Limitations of the Common Law.*—Despite *Tournier's* seemingly broad scope, common law secrecy is subject to certain limitations. First, there is no automatic penalty for the breach of a common law duty.[15] The common law duty is enforceable only through civil litigation, which only takes place after a breach of the duty; and a breach of the duty is actionable only in conjunction with provable damages. A bank can be sued for damages, as was National Provincial, but the plaintiff bust bear the burden of proof. As a practical matter, therefore, a bank's adherence to the principles of *Tournier* may depend upon the circumstances underlying a litigants's cause of action.

Second, the effectiveness of the common law duty will depend upon the degree of leverage prosecutors are able to exert in order to compel disclosure of confidential information. Prosecutors are in a position to exert sufficient pressure to compel disclosure when an office of either the financial institution

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11. [1923] 1 K.B. at 466.

12. *Id.* at 474. The Court did describe four classic exceptions: (1) where disclosure is under compulsion of law; (2) where there is a public duty to disclose; (3) where disclosure is in the interest of the bank; and, (4) where disclosure is by the customer's express or implied consent.

13. *Id* at 473.

14. *Id.*

15. This is unlike statutory secrecy. *See infra* notes 36 to 80 and accompanying text.

from which the information is sought[16] or the depositor is under U.S. jurisdiction. When this jurisdictional nexus is present, U.S. courts have not been reluctant to compel disclosure of protected information through contempt proceedings under the threat of seizure or incarceration.[17] Although the U.S. courts generally acknowledge the extraterritorial nature of their order against U.S. branches of foreign banks, when U.S. law enforcement interest are balanced[18] with the policy interest of the tax haven in maintaining secrecy, the U.S. interests generally emerge paramount.[19]

United States v. Nova Scotia (Brady Subpoena)[20] is an example of the use of the balancing approach. In that matter, a U.S. court ordered a U.S. branch of Canadian-based Bank of Nova Scotia to comply with a grand jury subpoena requesting production of bank records located in Nassau, Bahamas and Georgetown, Cayman Islands. Neither the district court nor the Eleventh Circuit was persuaded by Nova Scotia's argument that disclosure was prohibited by criminal and common law in the Cayman and the Bahamas. The U.S. interest in securing the information was found to be superior to the interest of the Bahamas and Cayman Islands in maintaining confidentiality and the bank was held in contempt and fined until the financial records were released.[21]

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16. Sometimes an official of the bank within the U.S. jurisdiction will suffice.

17. One author contends that courts will "respect those foreign laws whose policies we approve, but not those we dislike." Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 30 AM. J. OF COMP. L. 1, 6 (1983) [hereinafter Maier].

18. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S., Section 40 (1965), for a balancing concept utilized by U.S. courts in the face of inconsistent laws. *See also* United States v. Toyota, 569 F. Supp. 1138 (C.D. Cal. 1983), where the court adopted the Restatement (Revised) Tentative Draft No. 3 (1982). The tentative draft, which spoke more directly to the issue of extraterritorial discovery, provided:

> If disclosure of information . . . is prohibited by law . . . [the court] . . . (a) [may require] the person to whom the order is directed . . . to make a good faith effort to secure permission from the foreign authorities to make the information available . . . (b) . . . may not ordinarily impose the sanction of contempt . . . on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information . . . (c) make findings of fact adverse to the party that has failed to comply with the order for production.

RESTATEMENT (REVISED) TENTATIVE DRAFT NO. 3 OF THE FOREIGN RELATIONS LAW OF THE U.S. (1982).

19. *See, e.g.* United States v. Bank of Nova Scotia (Brady Subpoena), 722 F.2d 657 (11th Cir. 1983); *In re* Marc Rich, Cr. No. M-11-188 (Slip Opinion) (S.D.N.Y. December 13, 1983); United States v. Bank of Nova Scotia (Twist Subpoena), 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1982); United States v. Field, 532 F. 2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976). *But cf.* Ings v. Ferguson, 282 F 2d 149 (2d Cir. 1960); SEC v. Minas de Artemisa, S.A., 150 F. 2d 215 (9th Cir. 1945); Chase Manhattan Bank, *ex rel.*, 297 F. 2d 611 (2nd Cir. 1962).

20. 722 F.2d 657 (5th Cir. 1985).

21. The bank was fined $25,000 per day until the financial records were released, a total of $1.25 million. *Id.*

U.S. courts have also succeeded in avoiding the appearance of direct inconsistency with foreign law by creating the fiction that disclosure would fall within an exception to the common law duty in *Tournier*. In *United States v. Ghidoni*[22] the court granted federal prosecutors a consent directive, which required the defendant to consent to release the information under penalty of contempt.[23] Because the duty imposed by common law flows from the banker to the depositor, control of the secret — and the authority to waive the privilege — rested with the depositor.[24] The consent directive is now commonly used by Federal prosecutors when the depositor (though not necessarily the bank) is under U.S. control.[25]

Another exception is public duty. In at least one case, *Garpeg v. United States*,[26] a U.S. court broadly interpreted the "public duty" exception to the common law to compel disclosure of bank records from a U.S. branch. *In Garpeg v. United States*, an Internal Revenue Service (IRS) summons was served on the Chase Manhattan bank, seeking information on accounts maintained by Garpeg Ltd., a Hong Kong Corporation. The Tax Court enforced the summons based upon its interpretation of the Hong Kong common law, which stemmed from the Tournier decision.[27]

3. *Limitations on the Limitations.*—There are, however, limitations on U.S. courts' ability to secure information protected by the common law. Neither the *Nova Scotia*,[28] the *Ghidoni*,[29] nor the *Garpeg*[30] approach is guaranteed to pierce the common law secrecy when the depositor is unknown, the bank is outside U.S. subpoena authority, or the documents to be disclosed are physically within the secrecy haven. In such cases, the secrecy jurisdictions remain the final arbiters of the issues presented, regardless of whether a U.S.

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22. 732 F.2d 817 (11th Cir. 1984).

23. Under the facts in *United States v. Ghidoni*, Ghidoni was indicted for tax evasion. The U.S. government claimed Ghidoni diverted taxable income to the Bank of Nova Scotia in the Cayman Islands while Ghidoni maintained that the funds were loans from foreign clients. A government subpoena was issued, and when Nova Scotia's Miami branch refused to comply with the subpoena, the court ordered Ghidoni to sign a consent directive authorizing release of the information. When Ghidoni refused to sign, he was held in contempt. On appeal, the 11th Circuit affirmed the order and rejected Ghidoni's Fifth Amendment claim on the grounds that their existed no "testimonial communication" that would have protected Ghidoni under the Fifth Amendment to the U.S. Constitution. *Id.*

Article V of the U.S. Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

24. In *United States v. Ghidoni*, the statutory law provided corresponding exceptions for consensual release. 732 F.2d 817 (11th Cir. 1984).

25. *See also* United States v. Quig, Cr. No. 80-41-1 (D. Ver. June 5, 1981).

26. Garpeg v. United States, 583 F.Supp. 789 (S.D.N.Y. 1984).

27. *See*, Tournier, [1923] 1 K.B. at 461.

28. 691 F.2d 1384; 722 F 2d 657.

29. 732 F.2d 817.

30. 583 F. Supp. 789.

court in an earlier or collateral proceeding decides the issues. Of course, the secrecy havens cannot be expected to agree with a U.S. court's expansive interpretation of an exception to *Tournier* or with a U.S. court's determination that U.S. enforcement concerns are superior to the concerns of the secrecy haven.

Also the legal bases of *Ghidoni* and *Garpeg* are subject to attack. For example, it is doubtful that the court's interpretation of the exception in *Garpeg* is correct. While the *Tournier* court did not elaborate on the "public duty" exception to common law secrecy, it is unlikely that a court within a secrecy jurisdiction would have so liberally construed the exception. The plausibility of the district court's interpretation of the "public duty" exception rests on either of two premises: (1) that a threat to the state (the secrecy haven) may arise from the Internal Revenue Service (IRS) not getting the information sought by the summons; or (2) that the "state" to which the *Tournier* court referred to could be a foreign state.[31] Neither premise appears to be accurate.[32]

Furthermore, it is unlikely that foreign courts will continue to find consent directives to be voluntary, such as the one used in *Ghidoni*. In response to the practice employed in *Ghidoni*, for example, the Swiss Bankers Association wrote to the U.S. Securities Exchange Commission and warned that the use of waivers will not have legal effect in Switzerland.[33] A similar and perhaps more formal response can be expected from the Caribbean jurisdictions, which will respond — as they have traditionally — to repair any holes in the armor.[34] For the foreseeable future, therefore, the common law remains an important impediment to information-gathering efforts.

B. STATUTORY LAW

In addition to the common law, most West Indy secrecy jurisdictions have provided safeguards from disclosure in the form of statutory secrecy. Statutory laws generally expand the scope of information required to be kept confidential, enlarge the class of individuals who are charged with the duty of secrecy and restrict the possible defenses available to a wrongfully disclosing party. Most important, however, the laws impose criminal penalties for unlawful disclosure. By imposing criminal penalties the statutes more effec-

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31. *See* [1923] 1 K.B. 461 at 473.

32. In *Tournier v. National and Provincial Bank*, Lord Bankes explained that a "public duty" is owed when a higher duty than the private duty is involved. This occurs when duty to the State "may supercede the duty to the agent." [1923] 1 K.B. 461, 473 (Lord Bankes quoting Lord Finlay in Weld-Blendell v. Stephens, [1920] A.C. 956, 965).

33. *See* Posztor, *U.S. Employs New Method to Overcome Bank Secrecy Laws in Caymans Islands*, WALL ST. J., Dec. 10, 1984.

34. *See infra* notes 47-51 and accompanying text.

tively deter those who might otherwise cooperate with U.S. law enforcement authorities.

These statutes generally represent more than a mere strengthening or codification of *Tournier*;[35] they operate in conjunction with the common law, imposing a duty which is owed to and enforced by the state.[36] The statutory secrecy laws serve as the single-most effective instrument of confidentiality. Of the nine West Indies jurisdictions generally classified as tax havens,[37] eight — the Caymans Islands,[38] the Bahamas,[39] the Turks and Caicos,[40] St. Vincent and the Grenadines,[41] Bermuda,[42] Anguilla,[43] Antigua[44] and Barbados[45] — have enacted some form of statutory protection. For purposes of illustration it is useful to examine the Bahamas and the Turks and Caicos, two model secrecy jurisdictions.

1. *The Bahamas' Statutory Secrecy Law.*—The most notorious of the Caribbean secrecy havens — the Bahamas — was the first to invoke statutory secrecy. After several revisions over the last two decades, the Bahamian law has emerged as a model for iron-clad secrecy which attracts the money-laun-

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35. *See generally,* [1923] 1 K.B. at 467.

36. *See, e.g.,* United States v. Bank of Nova Scotia, 722 F.2d 657 (5th Cir. 1985). (involving a criminal investigation of the violation of the Bahamas Banks and Trust Companies Regulation Act, which prohibits any Bahamian branch from surrendering documents to foreign authorities without authorization from the Bahamian Supreme Court). *See also,* Zagaris, *Barbados: Summary of Recent Legal Developments,* 18 U. MIAMI INTER-AM. L. REV. 625 (1987).

37. *See* Spitz, Chambost and Diamond, *supra* note 10.

38. Bank and Trust Companies Regulation Act, 1965, 1966 Cay. Is. Laws, ch. 8.; Confidential Relationships (Preservation) Law of 1976, 1976 Cay. Is. Laws, ch. 8; Confidential Relationships (Preservation) (Amendment) Law, 1979, 1979 Cay. Is. Laws, ch. 26, Section 4.

39. Bank and Trust Company Regulation Act, 1965, Act No. 64 (1965) (codified as amended in 1980 Bah. Laws, ch. 3, § 10).

40. Turks and Caicos Ordinance to Give Sanction to the Duty of Non-Disclosure of Information, November 3, 1979 (hereinafter Ordinance); Turks and Caicos Companies Ordinance, 1981 (codified in Laws of the Turks and Caicos Islands, 7 vol. set, Oceana Publications, Inc., Dobbs-Ferry, N.Y. 10522. *See also* ABA National Institute, *Transnational Litigation: Practical Approaches to Conflicts and Accommodations,* vol. II, docs. 38-117, pp. 1390-1392 (1980); Spitz, *supra* note 11, at 4-9; Moore, *Incorporating Offshore in the Turks and Caicos — The New Companies Ordinance,* 9 INT'L TAX J. 125 (1982).

41. St. Vincent and the Grenadines International Companies Act, 1982, (supplanting the St.Vincent and the Grenadines International Companies Act, 1976); St. Vincent Trust Authority Act, 1976, (St. Vincent Law No. 203, ch. 25 (1977). (supplanting The International Business Companies Ordinance, 1966). *See also,* Diamond and Spitz, *supra* note 10.

42. *See* Diamond, *supra* note 10, Bermuda ch. Financial secrecy stems from Bermuda statutes governing the formation of corporations, particularly because of the allowance of bearer shares. Since ownership of bearer shares is legally defined by physical possession, bearer shares, like numbered bank accounts, permit total anonymity.

43. *See* Diamond and Spitz, *supra* note 10, Anguilla ch.

44. International Business Corporations Act, 1982, Law No. 28, §§ 244(1) and (2) (adopted on December 31, 1982).

45. Barbados Offshore Banking Act, 1979, No. 26; Barbados International Business Companies Act, 1965, (as amended). *See also* Diamond, *supra* note 11, Barbados ch., at 4-5.

dering clientele and supports the island's reputation as a haven for illicit profits. Armed with this statute, it is difficult to imagine any circumstance outside the *Ghidoni* context[46] where Bahamian secrecy would not protect against a request for production of evidence relating to purely fiscal crimes.

Bahamian statutory secrecy was originally codified in § 10 of the Bank and Trust Company Regulation Act of 1965,[47] which was believed to have provided impenetrable protection from disclosure. However, in 1975, the Bahamian Supreme Court in *Barclay Bank v. McKinney*[48] interpreted § 10 to apply only to certain government officials acting within the scope of their duties. The Barclay decision virtually emasculated Bahamian statutory secrecy because criminal sanctions no longer applied to bank officers or their employees.[49]

This weakening of protection was remedied in 1980 when § 10 was replaced with a new provision that embraces almost everyone with access and opportunity to acquire confidential information. The revised provision states in relevant part as follows:

> . . . No person who has acquired information in his capacity as . . . director, officer, employee or agent of any licensee . . . counsel and attorney . . . consultant . . . accountant or auditor . . . shall, without the . . . consent of the customer . . . disclose to any person . . . any information relating to the identify, assets, liabilities, transactions, accounts of a customer . . . except:
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> . . .
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> (i) for the purpose of the performance of his duties . . . or
>
> . . .
>
> (iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas . . .

The criminal sanctions applicable to the expansive group are contained in § 10(3), which provides:

> Every person who contravenes the provisions of subsection 1 of this section shall be guilty of an offense against the Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years, or to both such a fine and imprisonment.[50]

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46. 732 F.2d 817. *See supra* note 22 and accompanying text.

47. Bank and Trust Company Regulation Act, 1965, Act No. 64 (1965) (codified as amended in 1980 Bah. Laws, ch. 3, § 10).

48. [1975] No. 474, Bah. S. Ct.

49. The Bank of Canada was then the official government bank.

50. Bank and Trust Company Regulation Act, 1965, Act No. 64 (1965) (codified as amended in 1980 Bah. Laws, ch. 3, § 10).

There is, however, a provision in the Act that allows for piercing Bahamian secrecy through an order of a court of competent jurisdiction.[51] The method has been cited by one authority of the Bahamian government as an effective means to overcome secrecy.[52] However, in the absence of a mutual assistance treaty, memorandum of understanding[53] or other cooperative agreement, the order from a court of competent jurisdiction would entail the use of the letters rogatory procedure, which is itself problematic.[54]

It has also been suggested that the exception from the penalty for disclosure by a bank official acting in the performance of duty can be seen as another loophole from an otherwise tightly drafted, comprehensive statute.[55] Is a bank official, who complies with a foreign subpoena, fulfilling a normal function and therefore exempt from the disclosure penalties? While the issue has never been litigated, the common law precedent established in *Tournier* militates against this interpretation. Under the common law, which the Act does not supercede,[56] the duty of the banker is to the depositor, and the performance of this duty requires the banker to maintain all information gained from the contractual relationship confidential. New § 10, therefore, seemingly succeeds in affording investors wide protection from inquiries into their financial affairs.

2. *The Turks and Caicos' Statutory Secrecy Laws.*—Over the past decade, the Government of the Turks and Caicos Islands has manifested a strong desire to become a prominent offshore financial center. Judged in terms of the quantity of investments, the British Crown Colony has succeeded. Since

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51. § 10(1)(e)(iii). A similar provision exists in the Caymans Islands Confidential Relationships (Preservation) Law, 1976 (codified in Cay. Is. Laws, ch. 8 and section 2(c); 1979 Cay. Is. Laws, ch. 26, section 4), which permits a petition to the Governor for an exception to statutory secrecy. The Cayman provision was utilized with success by the U.S. Department of Justice in *United States v. LeMire*, Cr. No. 82-2492 (D.C. Cir. Nov. 4, 1983) (commonly known as *Interconnex*), who hailed it as a ". . . valuable precedent for future requests . . ." *See* S. Rep. No. 130, 99th Cong., 1st Sess. at 210 (1985).

Several factors, however, detract from Interconnex's precedential value: first, the matter required Cayman counsel and resort to the letters rogatory process; two, the case involved a rare post-indictment application; three, the case involved an offense triable under Cayman Island law (unlike tax offenses and some financial crimes); and fourth, the application was only granted on appeal to the appellate Jamaican tribunal.

52. *See* S. Rep. No. 130, *supra* note 4, at Appendix (1985) (citing a staff interview with the Bahamas' Attorney General of April 22, 1982).

53. The United States entered into a 1982 Memorandum of Understanding with Switzerland.

54. The many problems attendant with this procedure are mentioned below. *See, infra* notes 87-105 and accompanying text.

55. This was suggested by an early observer of the law. Statement of Stephen Clarke, Senior Legal Specialist, Library of Congress, in a letter to the U.S. Senate, Permanent Subcommittee on Investigations, Committee on Government Affairs (1982). *Reproduced in*, S. Rep. No. 130, *supra* note 4.

56. Bank and Trust Company Regulation Act, 1965, Act No. 64, § 10(2)(a) (1965) (codified as amended in 1980 Bah. Laws, ch. 3).

the statutory secrecy law has come into effect more than 5,000 offshore companies have been registered with the Islands.[57] The Turks and Caicos, however, have become one of the most favorable repositories for criminal funds.

The "success" of the Turks and Caicos' ambitious program are owed to certain new legislative initiatives which combine lenient requirements for corporate and trust formation with some of the most severe penalties for disclosure of confidential information. The most important of these legislative initiatives was the comprehensive Turks and Caicos Companies Ordinance [hereinafter Ordinance] which came into effect on January 20th, 1982.[58]

At the heart of the Ordinance is a distinction between exempted companies and ordinary companies. The Turks and Caicos' concept of an exempted company was the masterpiece of several internationally known tax authorities.[59] Exempted companies, the ownership of which is limited to non-haven parties and the activities of which are limited to offshore activities, are afforded the greatest secrecy protection under the Act. Unlike an ordinary company which must file with the official registrar an annual return indicating the ownership of shares and share capital,[60] an exempted company need not file any return or profit and loss statement.[61] Furthermore, although an exempted company must appoint a resident representative in the Turks and Caicos,[62] shareholders, directors and officers are under no obligation to hold annual meetings on the islands or ever be physically present there.[63] Exempted companies need never report or disclose to officials the names of shareholders, directors or officers.[64] Nor must an exempted company maintain at its registered office a ledger of shareholders, directors, and secretaries or of mortgages and charges.[65] Also, an exempted company may redeem common shares without securing prior court approval.[66]

Exempted companies are guaranteed broad and strict secrecy by the Ordinance.[67] According to the Ordinance, "confidential information" encom-

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57. *See* S. Rep. No. 130, *supra* note 4 at 33 (citing the U.S. Senate Permanent Subcommittee on Investigation's staff interview in Grand Turk, September, 1983).

58. Turks and Caicos Companies Ordinance, 1981 (codified in Laws of the Turks and Caicos Islands, 7 vol. set, Oceana Publications, Inc., Dobbs-Ferry, N.Y. 10522).

59. *See* Spitz, *supra* note 10, Turks and Caicos ch. at 4; Moore, *supra* note 41.

60. § 39(1).

61. § 187(a), (b) and (c). An exempted company need only make an annual declaration to the effect that it is substantially complying with the Companies Ordinance and is conducting business "mainly outside the Island." *Id.*

62. §§ 6(b), 26, 48 and 182(b). *See also* Diamond, *supra* note 10, at 8.

63. Ordinance, table A, § 53 and table B, § 25. *See* Spitz, *supra* note 10, at 8.

64. *See* Spitz, *supra* note 10, at 8.

65. *Id.* at 5.

66. *Id.*

67. Ordinance, §§ 199 to 204.

passes "information concerning any property which the recipient thereof is not . . . authorized by the principal to divulge."[68] The secrecy provision has application to all confidential information with respect to business of a professional nature of an exempted company which arises in or is brought into the Island, and to all persons coming into possession of such information at any time thereafter, whether they are within the jurisdiction or without.[69] The Ordinance specifies that "divulging" or "attempting," "offering" or "threatening" to divulge confidential information, as well as "obtaining" or "attempting to obtain" confidential information shall subject an individual to a fine of $5,000 and imprisonment for two years.[70] If the individual misusing the confidential information is a professional person entrusted with such information, the penalty prescribed is doubled.[71] Further, if a reward or benefit is derived from the offense, the disclosing party faces twice the penalty and a further fine equal to the reward or benefit received, and to the forfeiture of the amount of reward or benefit received.[72]

The law also provides some protection for those choosing to operate through ordinary companies. For example, although ordinary companies must file annual returns, in the case of non-banking ordinary companies, the annual returns are not required to disclose financial information.[73] In the case of a banking company, financial information must be filed, but no information concerning individual depositors need to be provided.[74]

Moreover, certain secrecy provisions apply regardless of whether the company is classified as exempt or ordinary. Both exempt and ordinary companies, for example, may issue bearer shares, debentures and bonds.[75] Additionally, ordinary and exempt companies are guaranteed secrecy by virtue of the Turks and Caicos Ordinance to Give Sanction to the Duty of Non-disclosure of Information [hereinafter Ordinance to Give Sanction].[76] The Ordinance to Give Sanction provides:

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68. *Id.* at §§ 198 and 199.
69. *Id.* at § 200(1).
70. *Id.* at § 202.
71. Id.
72. *Id.*
73. Ordinance, § 39(1).
74. According to Spitz:

> With this exception, a Turks and Caicos company is not required to file its financial statements with the Registrar or with any other Turks and Caicos Government department, and no Government department has access to information regarding any company's or individual's financial dealings. No other information is required to be made available to any authorities, and books of accounts may be kept anywhere and in any currency.

supra note 10, Turks and Caicos ch., at 9.
75. Ordinance, §§ 32 and 185(3).
76. Turks and Caicos Ordinance to Give Sanction to the Duty of Non-Disclosure of Information, 1979, Act of November 3, 1979 [hereinafter Ordinance to Give Sanction]. *See also* ABA National

> Any person who: (a) being in possession of confidential information, however obtained, (i) divulges it to any person not entitled to possession thereof; or (ii) attempts, offers or threatens to divulge it. . . .or (b) obtains or attempts to obtain confidential information to which he is not entitled (in the normal course of business), shall be guilty of an offense.

The penalties provided by the Ordinance to Give Sanction for both exempted and ordinary companies are severe. An individual's misuse of confidential information is punishable by "a fine of five thousand dollars or . . . imprisonment for two years . . . or both." A corporation which misuses confidential information is subject to a fine of twenty-five thousand dollars. Additionally, if the offense is committed by a "professional person," that person is liable to twice the pecuniary penalty. In the case of a "professional" the maximum prison term is also extended to three years.[77]

Laws pertaining to Turks and Caicos trusts and mutual funds also frustrate U.S. investigators seeking to gather information. Turks and Caicos trusts are governed by English principles of equity, which give wide latitude for designing trustee powers and duties. There is no required publication or disclosure of trust company financial statements and trust instruments can specify that the names of beneficiaries be kept confidential. Of course, an exempt company, if it is selected to function as a trust company, will provide the maximum protection from inspection.

Furthermore, since the Turks and Caicos rely entirely on licensing, registration and probate fees, no capital gains, corporate, property, gift or sales taxes are imposed.[78] Under the Ordinance, exempted companies may obtain a twenty year agreement against the levy of possible future taxes.[79] The Islands have no monetary exchange controls and as a result there is no disclosure to any exchange control authority.[80] Finally, no central bank exists, bank accounts may be kept in any currency, and there are no restrictions whatsoever on the repatriation of funds.

Institute, Transnational Litigation: Practical Approaches to Conflicts and Accommodations, vol. II, docs. 38-117, at 1390-1392.

77. Ordinance to Give Sanction.

78. *See* Diamond, *supra* note 10, Turks and Caicos ch., at 1; Spitz, *supra* note 11, Turks and Caicos ch., at 13.

79. *See* Diamond, *supra* note 10, Turks and Caicos ch., at 12; Spitz, *supra* note 11, Turks and Caicos ch., at 14.

80. Turks and Caicos Exchange Control Regulation Ordinance, Act of December 23, 1967 (which had provided for regulation of the sale of gold, securities and foreign exchange currency) (revoked on July 17, 1973). In August 1973 the U.S. dollar replaced the Jamaican dollar as the official currency of the Turks and Caicos Islands. *See*, Spitz, *supra* note 10, Turks and Caicos ch., at 5.

C. LETTERS ROGATORY PROCEDURE

1. *A Procedural Barrier to Discovery.*—In addition to *Tournier*, another legacy of British rule in the West Indies is the letters rogatory procedure. This procedure has either been formerly adopted by, or extended to the British West Indies, and is the law in almost all havens, including the Caymans[81] and St. Vincent and the Grenadines.[82] With the exception of Bermuda, which has adopted a more liberal evidence procedure based on the Foreign Tribunals (Evidence) Act of 1856 (U.K.),[83] West Indies jurisdictions which do not formally follow the procedure nonetheless adhere to its guidelines.

The letters rogatory procedure, as codified in most jurisdictions, is essentially a replica of England's Evidence (Proceedings in Other Jurisdictions) Act, 1975 [hereinafter Evidence Act],[84] which emerged as a product of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.[85] The Evidence Act is the formal mechanism, and in some cases the only mechanism, whereby requests for information between the West Indies and other governments are processed. The procedure permits a government outside the secrecy jurisdiction, speaking through its own courts, to apply to the secrecy haven for an order for the production of evidence.[86]

On its face the Evidence Act is not an instrument of confidentiality, but instead a mechanism to facilitate evidentiary requests. Indeed, the stated purpose of the letters rogatory procedure is to ". . . assist in obtaining evidence required for the purpose of proceedings in other jurisdictions."[87]

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81. *Extended by* Order of the Caymans Island Counsel, Act No. 1890, § 10(3) (by virtue of S.I. 1978) (subject to modifications).

82. *Adopted by* the St. Vincent Parliament as the St. Vincent and the Grenadines Evidence (Proceedings in Other Jurisdictions) Act 1983.

83. The Evidence Act, 1905, II Bermuda Rec. Laws, tit. VIII, It. 10, §§ 52-57 (1978). U.K. Foreign Tribunals (Evidence) Act, 1856 (19 & 20 Vict. c. 113). The Foreign Tribunals (Evidence) Act was applied to "Her Majesty's colonies or possessions abroad." Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 6. *Replaced by the* Evidence (Proceedings in Other Jurisdictions) Act, 1975. Evidence (Proceedings in Other Jurisdictions) Act, 1975, s. 8(2), sch. 2. *See also,* Radio Corp. of America v. Rauland Corp., [1956] 1 All E.R. 549, D.C. at 553, *per* Devlin, J.

84. *Entered into force on* May 4, 1976. Evidence (Proceedings in Other Jurisdictions) Act, 1975 (Commencement) Order 1976, S.I. 1976 No. 429.

85. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, October 26, 1968 [hereinafter Hague Convention] (*entered into force on* October 7, 1972). *See,* the Final Act of the Eleventh Session of the Hague Conference on Private International Law (October 26, 1968). *See generally,* Sutherland, *The Use of Letters of Request (or Letters Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad,* 31 INT'L COMP. L. Q. 809 (1982).

86. The authority of U.S. courts to make such requests is provided for by statute. *See,* 28 U.S.C. § 1781 (1964) (civil proceedings); 18 U.S.C. 3491 (1936) (criminal proceedings). *See also* FED. R. CIV. P. 28; F. R. CRIM. P. 3. *See generally* O'Kane, *Obtaining Evidence Abroad,* 17 VAND. J. TRANS. L. J. 69 (Winter 1984); Fried, *Compelling Discovery and Disclosure in Transnational Litigation: A Canadian View,* 16 N.Y.U. J. INT'L L. & POL. 961 (1984); Lowenfeld, *Introduction: Discovery International Style,* 16 N.Y.U. J. INT'L L. & POL. 957 (1984).

87. *See* Evidence Act, *supra* note 86, at Preamble.

None of the provisions of the Evidence Act contain any substantive law of privilege. In practice, however, the Evidence Act conflicts dramatically with U.S. civil and criminal procedures, making it a potent obstacle to information-gathering efforts in the U.S. In order to understand how the Act functions as a secrecy device, we must examine its interaction with U.S. civil and criminal procedures.

2. *The Procedure Requires Proceedings to be Too Far Advanced to be of Assistance in the U.S.*—The Evidence Act[88] prohibits the furnishing of evidence unless the proceeding for which the evidence is requested is at a particular stage in the legal proceedings.[89] Whether the proceedings are considered sufficiently advanced depends upon whether the proceeding is a criminal or civil matter. Specifically, in the case of criminal matters, the proceeding must have been "instituted" by the time the request is made.[90] If the application for evidence relates to a civil proceeding, then the proceeding must have been "instituted" or "contemplated" in order for the application to be entertained.

The methods of discovery are also restricted, depending upon whether a civil or criminal matter is involved. In a civil proceeding, the order for the obtainment of evidence may provide for "the production of documents . . . the inspection, coping or detention of documents, or the examination of witnesses, whether orally or in writing."[91] For the purpose of criminal proceedings outside the requested court's jurisdiction, the evidence obtainable is generally limited to the examination of witnesses and the production of documents.[92] The formidable barrier these sections pose to U.S. discovery procedure does not result from disagreement over what constitutes a "civil" as opposed to "criminal" matter.[93] Rather, the U.S. Competent Authority, the U.K. Central Authority and the West Indies jurisdictions that follow the lead of the U.K., construe the terms "civil or commercial" liberally.[94]

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88. Cites to the Evidence Act are provided to avoid cites to recodifications.

89. § 5(1)(b) (criminal proceedings); § 1(b) (civil proceedings). These provisions are described as a "crucial filter" to the Evidence Act. *See*, Sutherland, *supra* n.86.

90. Evidence Act, § 5(1)(b).

91. § 1(b).

92. § 5.

93. This problem is often presented when the U.S. seeks to obtain evidenced from civil law jurisdictions which are also parties to the Hague Convention. Civil law jurisdiction generally view all requests emanating from administrative tribunals or requests involving issues of "public" rather than "private" law as criminal matters. By imposing the higher standard provided for criminal evidentiary requests, civil law jurisdictions deny requests by administrative bodies unless the proceedings have been instituted. *See* Amran, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 12 INT'L LEGAL MATTERS, 327, 329 (1973).

94. Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] 1 All E.R. 434. The phrase "civil or commercial" was considered a ". . . wide, general term, covering all kinds of suits, peti-

The U.S. and West Indies courts differ significantly, though, in their interpretation of when a proceeding has been "instituted" or "contemplated." Perhaps the most significant difference is that under the English common law, as it was transplanted to the West Indies, grand jury proceedings are considered to be of an inquisitional nature. As such, they are proceedings which are not "instituted" within the meaning of the 1975 Act.[95] Accordingly, a letters rogatory issued by a U.S. court at the request of a grand jury, since it constitutes a pre-indictment request, will not be favorably received by most West Indy governments.[96]

Because of a similarly restrictive interpretation accorded the term "contemplated," the courts are also reluctant to honor a request for evidence intended for use in civil matters.[97] The limitations attendant to the term "contemplated" may be said to consist of both a procedural and a substantive component. In the procedural sense, the proceedings are "contemplated" only when ". . . the institution of proceedings is imminent or impending . . . at a stage of not merely being considered or examined,[98] but is

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tions, summonses, applications for order and so forth, for which courts are competent to take cognizance." *Id.* at 437.

95. According to Lord Viscount Dilhorne in *Westinghouse*, "An order should not be made to give effect to the letters rogatory for the obtainment of evidence to be used before the grand jury since an order could be made providing for evidence to be obtained for the purpose of criminal proceedings only under section 5 of the Evidence Act, and then only when the proceedings had been instituted." *Id.* at 451.

96. Article V of the U.S. Constitution provides in relevant part: "No person shall be held to answer for a capital . . . crime . . . unless on a presentment or indictment of a grand jury . . ."

97. Provisions of the Evidence Act restrict pre-trial access to information for use in civil proceedings by incorporating a long-established disdain for pre-trial discovery, or "fishing expeditions." *See*, Radion Corporation of America v. Ruland Corporation [1956] 1 Q.B. 618. Unlike U.S. civil procedure, which encourages discovery for purposes of narrowing issues for trial, and which permits the discovery of any information "reasonably calculated to lead to . . . admissable evidence," English discovery procedure is almost always limited to the production of unprivileged documents in the possession of the parties once pleadings have been filed, and will not extend to third parties. *Compare,* R.S.C. Ordinance 24; F. R. Civ. P. 26(b)(1). *See also* Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the U.S.*, 13 INT'L LAWYER 27 (1979). The Evidence Act distinguishes between material sought as evidence in the nature of proof at trial, from material for the purpose of leading to a train of inquiry, which might produce evidence for the trial, preserving inviolate the distinctions between the methods of discovering each. Moreover, when the British government deposited the instrument of ratification to the Hague Convention, it declared a reservation to the effect that the "U.K. will not execute a letter of request issued for the purpose of obtaining pre-trial discovery of documents." *See* Hague Convention, *supra* note 85, at Art. 23; Evidence Act, *supra* note 83, at §§ 2(3) and (4). *See also* Sutherland, *supra* note 85.

98. It is unclear when proceedings advance beyond consideration or examination, but the terms imply that the evidence should not be released if needed to advance the proceeding beyond the point of mere consideration. Apparently, therefore, the decision to initiate proceedings must have been made without the benefit of an additional evidence source in the request. On the other hand, to satisfy the procedural component of the test, commencement of the trial is not required, so in some cases the request might extend to pre-trial discover.

almost about to happen."[99] In a substantive sense, the court considering the request will likely weigh the evidence submitted in support of disclosure in view of the probability that the proceeding will be "instituted" in the requesting court. In making that determination, the court within the secrecy haven will not be satisfied the proceedings are "contemplated" unless and until there are cogent grounds to support the foreign request.[100]

The problems clearly manifest themselves when U.S. law enforcement officers or prosecutors attempt to gather information to support indictments. Although indictments are constitutionally required before a defendant can be brought to trial for a felony, attempts to gather information in compliance with basic U.S. constitutional principles are considered premature by the foreign jurisdiction.[101] Furthermore, ancillary efforts to gain access to information for criminal prosection by utilizing the more lenient standard provided for in civil matters has not met with success. The mere possibility that evidence requested in a civil matter might also be used in a criminal proceeding will not, by itself, justify a refusal to execute a request. However, the court of which the request is made will often be concerned with the ultimate use to which the evidence may be put. When the possibility of dual application exists, the courts will closely scrutinize the underlying purpose of the request.[102]

3. *The Letters Rogatory Procedure Incorporates the Secrecy Law.*—The Evidence Act also serves as a hurdle to obtaining evidence by incorporating the statutory and common law by reference,[103] and by creating a procedure whereby objection to requests can be made on the basis of the substantive secrecy law. According to §§ 3(1)(a) and (b) a person may not be "compelled to yield evidence which [that person] could not be compelled to yield . . . in the country or territory in which the requesting court exercises jurisdiction." Sections 3(1)(a) and 3(1)(b) are made expressly applicable to criminal proceedings.[104]

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99. Supreme Court Practice, Pt. 1, ¶70/1 - 6/7 (1982).

100. *See* Hammersley Iron Pty. Ltd. v. Stanke Steamship Co. Ltd. [1981] W.L.R. 113. *See generally* Sutherland, *supra* note 85.

101. The search for information concerning taxpayer assets through summonses would almost certainly be frustrated, particularly if the information is needed to support a possible civil action. The possible civil action is not, and perhaps never will be contemplated.

102. In *Westinghouse*, the English court ordered the execution of a letter rogatory requested on behalf of the Westinghouse Corporation by a U.S. Court. In a separate and contemporaneous proceeding, a federal grand jury investigating some transactions involving the subject of the letter rogatory, issued a subpoena to Westinghouse requiring the production of documents and testimony that Westinghouse sought from abroad. Concerned that the evidence would ultimately be put to use in criminal proceedings, the House of Lords reversed the lower court and denied the application. [1978] 1 All E.R. 434.

103. *See* Evidence Act, *supra* note 86, at § 3(1).

104. *Id.* at § 5(a).

Through §§ 3(1)(a) and (b), the procedure incorporates all the privileges bestowed by common law and statutory law so they are applicable to letters rogatory. Arguably, the provision appears to allow for production of evidence if disclosure could be compelled by either the secrecy haven or the requesting court. However, the proper construction is the converse—production of evidence would not be compelled if: (1) it could not be compelled in a secrecy haven proceeding; or (2) it could not be compelled in the U.S. or other requesting jurisdiction.[105] These sections ensure, therefore, that the party seeking information has three hurdles to overcome: (1) U.S. law of privilege; (2) the *Tournier* duty; and (3) statutory secrecy laws. As a practical matter, the sections also confer upon the foreign tribunal the power to interpret U.S. law of privilege.

II. EFFORTS TO COMBAT THE ABUSES OF SECRECY LAWS

The U.S. enforcement community has sought to combat the use of secrecy laws by making it unprofitable: (1) for individuals to abuse tax havens; and, (2) for tax havens themselves to create an environment in which criminal activity flourishes. The Department of Justice and other prosecutorial agencies have reacted by attacking criminal offshore schemes. Concerted efforts with the Federal Bureau of Investigation and the IRS have resulted in such notorious projects as Operation Greenback.[106] By targeting transactions invoking secrecy laws, the law enforcement community has made it less profitable for investors to take advantage of secrecy havens by increasing the risk of exposure.

Courts that have dealt with the problem have reacted by extending the heretofore generally accepted limits of U.S. territoriality. As indicated by such cases as *United States v. Field*,[107] it is seldom enough for a person over whom jurisdiction is properly asserted to claim that disclosure might encourage violations of tax haven law.

Congress has also reacted with legislation designed to combat offshore criminality. One of the most effective legislative initiatives has been the Cur-

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105. This restrictive interpretation is substantiated by the Evidence Act, which indicates that one purpose of the Act is to preserve the parties ability to contest under the laws of both the requesting and requested courts' jurisdictions. Evidence Act, *supra* note 86, at Preliminary Note. It is further substantiated by looking to *Westinghouse*, where the English court determined that the litigant refusing production of certain documents would be entitled to a claim of privilege under English law and the Fifth Amendment to the U.S. Constitution. [1978] 1 All E.R. 434, 436.

106. *See* S. Rep. No. 130, *supra* note 4.

107. United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied* 429 U.S. 940 (1976). In this case, Field, a non-resident alien and director of the Castle Bank in the Cayman Islands refused to testify before a Miami grand jury investigating possible criminal tax violations because Cayman non-disclosure law would subject him to criminal liability. Field was cited for contempt.

rency and Foreign Transactions Reporting Act.[108] The Currency and Foreign Transactions Reporting Act is intended to provide record keeping and reporting tools to assist in the investigation of the financial aspects of a wide variety of illegal activities. Under the Act, a bank or other financial institution is required to file a Currency Transaction Report (Form 4789) with the IRS for each deposit, withdrawal or exchange of currency in excess of $10,000. A related provision requires the filing of a Currency Transaction Report when monetary instruments valued at $10,000 or more are moved into or out of the United States.[109] To improve the effectiveness of the Currency and Foreign Transactions Reporting Act, the 98th Congress increased the maximum penalties for violations from $1,000 and one year in jail to $50,000 and a possible five years imprisonment. Congress also made violation of the Act a predicate offense under the Racketeering and Corrupt Organizations Act (RICO),[110] thereby enabling law enforcement personnel to intercept wire or oral communications when it can be demonstrated by probable cause that the Act has been violated.[111]

The Foreign Evidence Acquisition Act,[112] another legislative initiative, was designed to facilitate the introduction of evidence and lower the cost of U.S. discovery efforts in connection with litigation involving offshore havens. Essentially, the Foreign Evidence Acquisition Act makes four well-designed changes: (1) it eliminates certain burdensome procedural steps by eliminating the need to bring foreign record custodians to the U.S. in order to demonstrate authenticity in connection with the admission of foreign business records; (2) it permits the United States special masters to attend foreign depositions in aid of gathering evidence; (3) it requires defendants who invoke blocking and secrecy laws in foreign jurisdictions to file copies of their foreign pleading with United States courts, and (4) when it can be shown that evidence located outside the United States is material to an investigation or trial, it extends the statute of limitations under the Speedy Trial Act a maximum of three years to facilitate the acquisition of that evidence.[113]

Other legislative initiatives have been intended to encourage secrecy havens to enter into information exchange agreements. For example, under

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108. *Codified in* 31 U.S.C. §§ 5311-5324 and regulations thereunder.

109. This provision has been applicable to interbank transfers since 1980. Whether this provision is complied with, however, is subject to question. For example, on February, 1985, First National Bank of Boston pled guilty to knowingly and willfully failing to file transaction reports. The transactions amounted to about 1000 individual transfers aggregating $1.4 billion transferred to Swiss bank accounts. *See* WALL ST. J., Feb. 14, 1985.

110. 18 U.S.C § 1961 (racketeering); *see generally*, Razzano, *RICO Constitutionality: Multifactor Test Gets Top Markets*, 1 NIABA L. J. 79 (1991).

111. 18 U.S.C. § 2515 (wiretapping).

112. *Amended* 18 U.S.C. §§ 3491-3494. Added 18 U.S.C. § 3292. (passed as an amendment to the Comprehensive Crime Control Act of 1984).

113. *Id.*

the Caribbean Basin Economic Recovery Act (CBI),[114] which was signed into law August 5, 1983, those nations who sign an exchange of information agreement will qualify for favorable "North American Treatment," which permits business expenses incurred in the island to be deductible against U.S. taxable income.[115] The Act requires information to be exchanged if it is necessary or appropriate to carry out and enforce the tax laws of the two countries, regardless of whether civil or criminal proceedings are involved.[116] It would also permit the IRS to carry out its own investigations.[117]

Congressional interest in fostering information sharing agreements was also expressed in the Deficit Reduction Act of 1984 (DEFRA).[118] Under Title VIII of DEFRA,[119] the Foreign Sales Corporation (FSC) replaced the Domestic International Sales Corporation (DISC), which served as the principal domestic export subsidiaries of U.S. based concerns.[120] Among the many requirements for establishing a FSC, the legislation required that the FSC be formed only in countries with exchange of tax information agreements with the U.S. To qualify as a suitable environment for the establishment of a FSC, the foreign country must not have a statute or other stated policy which denies the IRS access to the home office of the FSC for audit purposes. Additionally, with overwhelming bipartisan and administrative support, DEFRA repealed the withholding tax on certain portfolio debt instruments.[121] The law vests in the Secretary of the Treasury authority to reimpose withholding for interest paid to persons in countries that do not exchange information with the United States.[122]

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114. Caribbean Basin Economic Recovery Act of 1983, Pub. L. No. 98-67, 98th Cong., 1st Sess. (1983).

115. *Codified in* 26 U.S.C. § 274(h). The statute provides in part: " 'North American Area' includes, with respect to any convention, seminar or similar meeting, any beneficiary country if . . . there is in effect a bilateral or multilateral agreement . . . between such country and the United States primarily for the exchange of information between the United States and such country. *Id.* at § 274(h)(6)(A).

These incentives are expected to attract tourist business in the form of U.S. conventions. However, while the initiative can certainly be hailed as a step in the right direction it is not expected to have much leverage.

116. In light of recent U.S. court decisions involving income tax treaties, the agreement would probably require the CBI country to conduct an investigation if the requested information is not already in its files. *See, e.g.,* U.S. v. Bache Stuart Inc., 563 F. Supp. 898 (S.D.N.Y. 1982), *aff'd (unreported decision)* (2d Cir. 1982).

117. *See* ABA 1983 Annual Meeting, (M. Langer, *Exchange of Information and Tax Developments Related to the Caribbean Basin Initiative* (1983), at 6).

118. Pub. L. No. 98-369 (Enacted July 18, 1984) (codified in scattered sections of 26 U.S.C).

119. *Id.*

120. 26 U.S.C. § 921.

121. 26 U.S.C. § 871.

122. Like the Caribbean Basin Initiative, however, this legislation cannot be expected to provide significant leverage. Formerly, a 30% withholding tax was imposed on U.S. sourced interest paid to non-resident aliens of countries, or possessions of countries, who were not tax treaty partners with the United States.

These efforts have had very limited success.[123] Even with the generally well designed legislative changes and policy initiatives, secrecy jurisdictions continue to flourish unabashed. The sole exceptions are Bermuda and the Caymans islands, who have entered into limited information exchange agreements with the U.S. Efforts to mollify the effects of secrecy laws by entering into information sharing agreements seem only to have intensified the secrecy haven's intransigence.[124]

III. CONCLUSION

Financial and transactional secrecy can indeed serve valid functions for secrecy jurisdictions. For some jurisdictions, secrecy advances domestic economic policy by stimulating banking, corporate and trust business, and in conjunction with low taxes, is an incentive for foreign investment. Secrecy also addresses investors' widely recognized right to financial privacy, which is also recognized under U.S. law.[125] Finally, secrecy laws function to create a monetary asylum for those who fear political instability.[126]

An important distinction should be drawn, however, between secrecy laws which are carefully designed and implemented to allow proper inquiries into underlying transactions and secrecy laws which are strict and unyielding.[127] This latter form of secrecy laws, as enacted by many of the West Indies, not only serve privacy interests, but mask and nurture a burgeoning growth of criminal activity by providing a safe haven where the proceeds of the drug trade can be recycled. The secrecy laws of the West Indies pose serious obstacles to U.S. law enforcement by blocking attempts to secure information on violations of U.S. laws.

In its efforts to combat the drug trade, the U.S. enforcement and diplomatic community must not fail to draw this important distinction. The se-

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123. Gordon & Zagaris, *International Exchange of Tax Information: Recent Developments*, 33 CANADIAN TAX J. 877 (1985).

124. *See generally* Zagaris, *A Caribbean Perspective of the Caribbean Basin Initiative* 18 Int'l Lawyer 563 (1984); Zagaris, *The Caribbean Basin Initiative*, 28 TAX NOTES 1021 (1985).

125. This concern is addressed, for example, in the Right to Financial Privacy Act, which protects financial records from access by government agencies seeking information not connected to legitimate law enforcement concerns. Financial Institutions Regulatory and Interest Rate Control Act of 1978, P.L. 95-630, Title XI, 96th Cong., 1st Sess. *See* Kirschner, *The Right to Financial Privacy Act of 1978 — The Congressional Response to U.S. v. Miller: A Procedural Right to Challenge Government Access to Financial Records*, 13 U. MICH. L. REFORM 10 (1979). The Internal Revenue Code also addresses this concern by subjecting government employees to civil and criminal penalties for wrongfully releasing taper information. 26 U.S.C. §§ 6103, 7217, 4424, 7213 and 7217; 18 U.S.C. § 1905. These offenses are punishable upon conviction by a fine of not more than $5,000 and imprisonment of not more than 5 years. *Id.*

126. In Switzerland, the quintessential case, numbered bank accounts were first invoked to frustrate efforts to confiscate assets of the persecuted during World War II.

127. White, *Offshore Banking: A Move to Absolute Privacy?*, 4 THE COMPANY LAWYER 43 (1983).

crecy laws within many of the islands of the West Indies are necessary links to the U.S. drug trade, as surely as if they were part of the production or distribution apparatus. If the drug war is to be successful, effort must be devoted to understanding and severing this link.

The Impact of the Second Banking Directive Upon United States Banks Operating in the European Community

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The European Community[1] is well on its way towards achieving an independently integrated economic market. This evolving process of integration covers a broad range of goods and services and is premised on the complete removal of legal, technical and financial barriers.[2] One of the main areas where these barriers are being dismantled is the financial services sector, which encompasses banking, credit, mutual funds, and insurance.

In 1985, an EC White Paper proposed the concept of a single banking license to facilitate access by third countries to the EC financial services' market. The Second Banking Directive[3] responds directly to the process required to implement the single banking license program by easing administrative and technical burdens imposed by individual member states on U.S. or other third countries' banks. Individual EC members presently allow United States' banks or financial institutions, such as brokerage houses, commercial institutions, or mutual funds investment houses, to open branches or subsidiaries within member states. However, a U.S. bank or other financial institution must apply to and conform with each member state's laws and requirements for the operation of financial services. The process is cumbersome, confusing, and expensive.

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1. The Community members include: Italy, Belgium, Germany, France, Luxembourg, the Netherlands, the United Kingdom, Denmark, Ireland, Greece, Spain, and Portugal. Austria and Turkey applied for membership in 1989. Turkey has been denied membership at this time and Austria's application is still pending. In addition, Poland, Hungary, and the Federative Republics of Czech and Slovak have informally requested consideration for associate membership. Although the EC is currently unwilling to consider these East European countries for full membership, it is actively discussing the possibility of associate membership for each nation. The rights and obligations of associate membership have not yet been established.

2. The barriers stem from individual member state's laws respecting customs, border checks, duties, and technical specifications. Treaty of Rome, Art. 3(a) (1957).

3. *The Second Banking Directive*, COM(89) 190 final of May 29, 1989. The EC Council issued its Common Position on July 24, 1989, reflecting changes made to the original directive by the EC Parliament. The Common Position, as the currently updated law on banking, was used by this author to discuss direction and requirements of the single license. The First Banking Directive was supplemented by the Second Banking Directive Common Position. The EC Commission and Council redrafted the First Directive, which resulted in the Draft Second Directive considered by the Commission and Council.

This article analyzes the Second Banking Directive and those ancillary financial section recommendations, regulations, or directives which implicate the Second Banking Directive and discusses its impact on the United States' banking industry. In addition, various sections of this article discuss problem areas within the Directives, especially the concepts of "reciprocity" and "national treatment." This article concludes that the EC will rely on a broad definition of "national treatment" to avoid being considered protectionist. Moreover, it will ostensibly apply its single banking license rules to third countries' institutions in a uniform fashion. The EC's treatment of U.S. financial institutions will likely result in legislative changes to U.S. banking laws, such as repeal of, or amendment to, the Glass-Stegall Act or the Douglas Act.

I. DIRECTIVES, REGULATIONS AND RECOMMENDATIONS

The European Community's economic integration is being accomplished through a series of directives which govern the actions of not only EC member states, but third countries, as well. By definition, the United States is considered a third country.[4]

The banking directives,[5] presently in various stages of development, apply to all banking institutions: commercial and investment banks, savings and loans, cooperative banks, mortgage and other specialty banks. Therefore, any party participating in any aspect of the U.S. banking industry, interested in operating within the EC, is bound by directives applying to third countries and financial institutions.[6]

The following directives, each discussed separately, directly affect the conduct of banking services within the EC. The most important is the Second Banking Directive, which defines the terms under which United States' banks may function within the EC. In addition, a slew of ancillary directives discussing solvency, administration, and recordkeeping play pivotal roles in any U.S. bank's decision to maintain or establish a business in the EC.

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4. Each time a directive or recommendation discusses the rules applying to third countries, the United States is included.

5. The primary banking directives which most affect U.S. financial institutions are listed in the appendix of a July 1989 study by the United States International Trade Commission. *See The Effects of Greater Economic Integration Within The European Community On The United States: First Follow-Up Report*, USITC Publication 2268, at 17-7 - 17-9, App. C-3 - C-4 (March 1990). A complete analysis of the new banking law was recently published by the ABA Section of International Law and Practice. Gruson and Feuring, *The New Banking Law of the European Economic Community*, 25 INT'L LAWYER 1 (1991).

6. The "third country" status of the bank is defined by the country of incorporation of the institution. Thus, a British-owned U.S. bank, if incorporated in the United Kingdom, would not be considered a "third country" institution for purposes of the Directive.

A. THE SECOND BANKING DIRECTIVE

Although not yet implemented by EC members, the Second Banking Directive is the most important of all the proposed, projected, or existing financial services directives. One of the Directive's aims is to provide a simplified and unified procedure whereby foreign-owned banks may operate within the Community.[7] It creates a single banking license, obtainable through the EC Council and Commission, and valid throughout the European Community. Foreign-owned financial institutions will be eligible for the single license beginning January 1, 1993, and once the license is granted, these institutions can practice banking throughout the entire Community.

The Directive establishes Community-wide criteria through which a member state can authorize the establishment of a bank within its own territory. Once that authorization is received, the member state becomes the "home country" of the established bank. Thus, a United States bank may establish a branch or subsidiary in West Germany; West Germany then is considered the "home country" for purposes of the Directive, once the branch or subsidiary is granted permission to conduct business.

The home country may establish stricter rules governing prudential and financial activities than the general rules outlined in the Second Banking Directive. Although no country has actually granted "home country" authorization to a U.S. bank, the more rigid rules will most likely involve minimum solvency requirements, reporting and accounting procedures, and permissible risk portfolios. Articles 4-5 of Title II of the Second Banking Directive dictate the minimum requirements which must exist in order to permit the establishment of a branch of a subsidiary within an EC member country's borders:

1. Authorization is granted only to those whose initial capital is equal to or greater than five million ECUs.[8]
2. A list identifies the direct or indirect shareholders who have a qualifying interest in the credit institution to be established.
3. The host country must establish the suitability of the listed shareholders.
4. Sound administrative and accounting procedures must be in place.
5. Adequate internal control mechanisms must exist.

The receipt of "home country" authorization then permits the U.S. bank subsidiary to operate other subsidiaries or branches throughout the European Community without having to reapply either to the EC Commission or

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7. Introduction, *Second Banking Directive*, Common Position (July 24, 1989); *id.* at title III, arts. 8-9. *See also Second Council Directive*, 89/646/EEC, 32 O.J. Eur. Comm. (L386) 1 (December 30, 1989) (Introduction).

8. Exceptions to this requirement may be found in Art. II.4(2)(a)-(d), *Second Banking Directive*, Common Position, *supra* note 5.

seek reauthorization from each individual member state. Responsibility for supervising the EC operations of this U.S. bank falls on the "home country" member state.

Once home country authorization exists, the EC Directive requires that the treatment of European banks in the third country requesting the license be reviewed. This requirement, originally based on the concept of reciprocity,[9] troubled the U.S. banking industry, the Administration and Congress.[10] Upon reviewing the objections raised by the United States and Japan, the European Parliament and Council adopted a Common Position,[11] issued on July 24, 1989, which replaced the reciprocity provision with the concept of "national treatment."[12]

Article 9 of Title III to the EC Council's Common Position requires that periodic reports by the Commission reflect whether EC credit institutions are receiving "effective market access comparable to that granted by the Community to credit institutions from that third country." "Effective market access" means that EC institutions receive "the same competitive opportunities as [those] . . . available to [third country] domestic institutions."[13] The concept, however, is ambiguous and raises many questions regarding its application to U.S. banks.

The adoption by the EC Council of both the Common Position and the Directive indicates that no real policy changes in national treatment will occur. Moreover, since the European Parliament has already placed its impri-

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9. Reciprocity required that European banks receive the exact same treatment in the third country as Europeans accorded the third country's institutions. The United States found this requirement particularly onerous since banking laws within the U.S., with few exceptions, derive from state legislatures. In addition, the Glass-Steagall Act prevented U.S. banks and third country banks operating in the U.S. from mixing investment and banking services, whereas European laws have no such restrictions. Thus, under the reciprocity provision, U.S. banks would never be able to qualify for a single license because European banks would not be treated precisely the same in the U.S. as U.S. banks are treated in Europe. *See also* Feinman, *National Treatment of Foreign Banks Operating in the United States*, 1979 ILL. POLICY INT'L BUS. 1109.

10. Commentators throughout the U.S. expressed great dismay when the EC announced that granting an EC banking license would require reciprocity towards EC banks in the United States. Gruson & Nikounitz, *The Second Banking Directive of the European, Economic Community and its Importance for Non-EEC Banks*, 12 FORDHAM INT'L L.J. 205, 229-32 (1989). The peculiarities of U.S. federal and state banking laws do not permit reciprocal treatment for foreign banks. *See supra* note 9.

11. A "Common Position" is an analysis drafted by the EC Council representing the comments on, and relevance of, the Directive being analyzed.

12. *See supra* note 5. Although not binding, the Common Position paper accurately reflects the most likely final language of the proposed directive or regulation.

13. Title III, Art. 9, CP. The Second Council Directive of December 15, 1989, maintained the integrity of the concept of national treatment but characterized the opportunities available as "comparable competitive opportunities for Community . . . institutions." Second Council Directive, Title III, Art. 9(3). Again, the EC affirmed its intent not to return to the concept of reciprocity. *But see* text *infra* at 11 (Statement of Sir Leon Brittan).

matur on the Directive, it is also likely that no further minor technical modifications will appear when the final Directive is issued. As such, U.S. banks must begin to examine the impact this Directive will have on their continuing or future operations within the EC.

B. EFFECT ON U.S. BANKS

The effect on United States' banks hinges on the ultimate treatment the EC will accord U.S. branches or subsidiaries. Of primary concern is whether financial institutions currently doing business in the EC will be grandfathered into any directives passed subsequent to the institutions' establishment in Europe. A grandfathering will protect existing businesses in the EC, will minimize costs to these institutions, and will allow them to compete efficiently with incoming, newly licensed bank subsidiaries or branches. But U.S. institutions need reassurance that they will not be alienated or competitively disadvantaged through any changes. Sir Leon Britton has provided some reassurance by stating that the EC has no wish to alienate existing banking business.

Second, existing and projected bank branches or subsidiaries must be able to cope with new administrative or recordkeeping requirements without being inundated. The Second Banking Directive accomplishes this. It is designed to simplify the procedures for operating within the EC. This simplification stems from a straightforward license application and procedure, plus clear recordkeeping requirements.

This simplification, however, is deceptive. While it is true that Community-wide administrative and recordkeeping requirements are reduced, similar member state burdens may not. Supervision of the financial institution, subsidiaries, and branches now falls to two masters: the home country and the host country. A host country is the country where the financial subsidiary or branch actually exists and operates. Although the Directive provides that the majority of supervision rests with the home country, a host country is free to impose additional reporting or minimum administrative requirements upon the branch or subsidiary as well.

Third, therefore, the U.S. bank must concern itself with the license processing, the proper licensing rules and procedures, the home country administrative requirements relating to the home country's supervisory responsibility over the institution, and lastly, the host country's administrative burdens. A U.S. bank could literally spend a good third of every year wading through paperwork. But additional paperwork is not a daunting obstacle to the conduct of business in the EC if that conduct will be profitable for U.S. institutions.

A fourth effect arises from the distinctions made between the activities of a subsidiary as opposed to a branch. The Second Banking Directive addresses

these distinctions and allows host countries to define the restrictions on each. A U.S. bank, therefore, needs to decide whether it wishes to operate as a subsidiary or a branch in a particular member state.

The establishment of a subsidiary results in higher costs. A subsidiary requires separate management, separate accounting and administrative procedures, and additional costs to maintain operations. Moreover, a subsidiary may be required to fulfill further qualifications with a host member than would a branch, because a subsidiary is capable of operating independently from its parent U.S. bank. If a U.S. bank wishes to retain greater control of an entity established in a member state, it should create a branch office there. But each maintains its own type of competitive advantage.

C. ANCILLARY DIRECTIVES

A slew of ancillary directives, some binding and some pending, work in tandem with the Second Banking Directive to facilitate the establishment of a unified market. The most important of these ancillary directives include:

1. The Liberalization of Capital Movements Directive;[14]
2. The Own Funds Directive;[15]
3. The Bank Accounting Coordination Directive;[16]
4. The Branch Disclosure Directive;[17] and,
5. The Solvency Ratio Directive.[18]

Each directive will be discussed below.

1. *The Liberalization of Capital Movements Directive.*—The liberalization of capital movement represents an essential element of the single banking license. The directive stems directly from Article 3(c) of the Treaty of Rome. It provides for the progressive abolition of all restrictions on the freedom of movement of capital by July 1, 1990.

The directive affects and applies to commercial, savings, banking and investment activities. Although establishing that capital shall move freely throughout the EC, the directive leaves the actual implementation and methodology to member countries. The directive places the onus on member status to remove all restrictions on capital movement between member states to

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14. 86/566/EEC, O.J. No. L 332/22 (November 26, 1986) (eff. February 28, 1987), extended by 88/361/EEC, O.J. No. L 178/5 (July 8, 1988). This directive has been implemented by all member states except Portugal. *See USITC Publication 2268, supra* note 5, at App. C-3.

15. 89/299/EEC, O.J. No. L 124/16 (May 15, 1989). Expected to be implemented by January 1, 1993. *Id.* at App. C-4.

16. 89/299/EEC, O.J. No. L 124/16 (May 15, 1989).

17. 89/117/EEC, O.J. No. L 44/40 (February 16, 1989)(eff. January 1, 1991). Additional directives cover mortgage credit and electronic payments. *See id.* at App C-3 - C-4.

18. COM(89) 239, final of May 26, 1989, amending COM(88) 194, O.J. No. C 135/4 (May 25, 1988).

facilitate "interstate" banking. While laudatory in nature, the broad scope of this mandate is restricted in several ways. First, member states may regulate bank liquidity — funds and assets available — which affect transactions carried out with nonresidents. This restriction is justified on the theory that the sovereign interests of member states permit them to regulate the flow of domestic money. Second, a member state may protect itself from wild fluctuations in exchange markets based on large movements of capital. The projected fluctuations, however, must not be speculative in nature, but reasonably expected. Third, a member state may pass general measures which prohibit the violation of a member state's laws. General laws protecting consumers from financial or insurance fraud, credit card misuse, or insider trading fall within this category, since each is affected by and integrally impacts the free movement of capital. Lastly, certain countries within the Community may be granted transitional exceptions to the effective liberalization.[19] Transitional exceptions may be in effect only for limited periods of time and are frequently reviewed.

The directive also applies directly to international capital movements, as well. The Treaty of Rome considers the liberalization of capital movements critical to business relationships between EC institutions and third country institutions. The liberalization provided by this directive directly affects a U.S. bank conducting business in the EC because a U.S. bank, its subsidiary, or branch will move funds among the EC member states, even if the funds originate in the U.S. bank. The directive, however, issues a proviso to third countries:

> The provisions of the preceding subparagraph shall not prejudice the application to third countries of domestic rules or Community law, particularly any reciprocal conditions, concerning operations involving establishment, the provisions of financial services and the admission of securities to capital markets.[20]

Thus a third country institution will have to review with care any individual national laws applicable to financial institutions, whether the EC member is a host or home country. This review may require some negotiation with a member state regarding the rules applicable to the institution under international liberalization.[21]

2. *The Own Funds Directive.*—The Own Funds Directive objectively defines the capital adequacy required for any credit institution requesting authorization to operate within the EC. When read in conjunction with Article

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19. The exempted countries are Spain, Portugal, Greece, Ireland, Belgium and Luxembourg. Each of these countries' local laws must be consulted.

20. *Liberalization Directive, supra* note 14 at Art. 7.

21. All member states, with the exception of Portugal, have implemented this directive.

4.1 of Title II of the Second Banking Directive,[22] this directive mandates that any institution must have available minimum capital of 5 million ECU in order to be considered and granted authorization to operate.[23] As mentioned, however, individual member states may impose higher capital requirements. The directive thus is fairly clear.

3. *The Bank Accounting Coordination Directive.*—The Bank Accounting Directive establishes administrative and recordkeeping requirements for institutions operating within the EC.[24] These requirements affect general and consolidated accounts, deposits, and provision of services. The directive prescribes the minimum number of years records must be kept and the essential records each third country financial institution must maintain.

4. *The Bank Disclosure Directive.*—In general, disclosure obligations require that branches of financial and credit institutions report certain information and provide documentation regarding the operation and existence of the branches. The Bank Disclosure Directive[25] simplifies existing disclosure requirements and applies to third country institutions only if EC institutions receive similar "reciprocal" and favorable treatment in the third country. Member states are effectively precluded from forcing branches of EC institutions to publish annual accounts relating to their own activities, but rather may only require that one report be filed by the home office of the institution.

5. *The Solvency Ratio Directive.*—The Solvency Ratio Directive[26] sets common standards on debt-equity ratios in order to measure an institution's solvency. This directive, enacted and implemented as of January 1, 1991, ties in to Article 4 of Title II to the EC Council's Common Position and Second Council Directive on the Second Banking Directive, which outlines the requirements for authorization of institutions within a home country. The ratio requirements include a minimum fiscal solvency of ECU 5 million.

II. CONCLUSION

The EC intends to maintain an open market in the financial sector, even though an open market greatly increases competition.[27] The Second Bank-

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22. This section provides that a minimum level of funding is necessary to ensure continued bank solvency.

23. *Own Funds Directive, supra* note 15 (impl. January 1, 1993).

24. *Bank Accounting Directive, supra* note 16.

25. *Bank Disclosure Directive, supra* note 17.

26. *Solvency Ratio Directive, supra* note 18.

27. The myth of "Fortress Europe" is still debated throughout the U.S. and Europe. *See, e.g., EC Single Market Plan Will Bring Partnership, Not a Fortress, Commission Paper Declares: Foreign Bank Eligibility Questioned*, 5 INT'L TRADE REP. (BNA) 1416-17 (Oct. 26, 1988). *But see Com-*

ing Directive and its ancillary directives will directly affect the continued or projected operation of U.S. banks within the EC by imposing additional financial, administrative, and recordkeeping requirements on these institutions. Any financial institution presently conducting business in any member state can expect to be grandfathered into the provisions of the Directive. Those banking institutions choosing to develop or establish a branch or subsidiary in the EC may be eligible to apply for the single license as of January 1, 1993. Whether the competitive impact of the license process will be entirely favorable to U.S. institutions remains unclear, although the EC Council has sought to clarify certain ambiguous provisions found through the various directives. For now, the directives applicable to the U.S. banking industry appear to make it profitable and efficient to operate an institution within the EC.

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merce Official Warns of Protectionist Potential in EC's Plan for Unified Market: Banking Issues, 5 INT'L TRADE REP. (BNA) 1338-39 (Oct. 5, 1988).

RICO Constitutionality: Multifactor Test Gets Top Marks

FRANK C. RAZZANO*

Nearly two years have passed since Justice Scalia suggested that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, may be unconstitutional because of the vagueness associated with the law's "pattern of racketeering" requirement.[1] At that time, this author wrote in the August 1989 issue of the RICO Law Reporter that the next great challenge to the RICO statute would be on vagueness grounds.[2] Since then, however, Justice Scalia's and this author's concerns appear to have been laid to rest.

Though there are still those who argue that RICO should be held unconstitutional due to an alleged lack of clarity surrounding the pattern of racketeering element,[3] the courts, with just one exception[4], have consistently found that the law survives such attacks.[5] Moreover, courts throughout the country have demonstrated an ability to come to grips with the previously elusive concept of pattern of racketeering. Most notably, the Seventh Circuit Court of Appeal's multifactor test seems to be the most logical and workable standard that has been developed. As such, this test should, and probably will be adopted by the other courts, and ultimately by the Supreme Court.

This article will trace the development of RICO's pattern of racketeering element and argue that the multifactor test is the best reasoned and principled formulation for determining what constitutes a pattern. The article begins with a survey of the development and growth of RICO in Part II. Next, in Part III, the article highlights the confusion among the courts regarding the pattern of racketeering requirement. Part IV examines the Supreme Court's landmark ruling in *H.J. Inc. v. Northwestern Bell Telephone Co.*[6]

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1. *H.J. Inc. v. Northwestern Bell Telephone Company*, — U.S. —, 109 S. Ct. 3893, 2909 (Scalia, J., concurring) ("No constitutional challenge to this law [RICO] has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is present.").

2. *RICO's Death Watch?*, 10 R.L.R. 222 (August, 1989).

3. *Making RICO Lawyers Pay*, WALL STREET JOURNAL, February 9, 1991.

4. *See Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990) (*see* notes 87-90, *infra*, for a discussion of this case).

5. *See, e.g., United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991); *United States v. Coiro*, 922 F.2d 1008 (2d Cir. 1991).

6. 109 S. Ct. 2893 (1989).

Part V then explores the varied responses by the circuit courts in the aftermath of *H.J.* Then Parts VI and VII develop the argument in support of the multifactor test by examining the leading case for this proposition, *Morgan v. Bank of Waukegan*,[7] reviewing some of the cases which have followed *Morgan's* lead, and making some observations regarding the application of the multifactor test. Finally, Part VIII offers some concluding remarks.

I. THE DEVELOPMENT AND GROWTH OF RICO

In an effort to combat organized crime, Congress enacted the Racketeer Influenced and Corrupt Organizations Act in 1970. The legislative history of the Act reveals that the purpose of RICO is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[8] However, RICO's reach is much broader than this legislative statement suggests. In addition to criminal actions, the statute also authorizes private plaintiffs and the government to seek equitable or legal remedies in civil actions.[9] Moreover, RICO has also been interpreted to be applicable to "legitimate businesses", and thus not limited to traditional notions of organized crime.[10] Finally, Congress expressly mandated that RICO "be liberally construed to effectuate its remedial purposes."[11]

The result of these developments was an expansive application of RICO by prosecutors and civil plaintiffs, with the cooperation of the judiciary. This was achieved primarily through the creative use of the RICO statute and a broad interpretation of the statutory elements of a RICO claim.

To sustain a charge of a RICO violation, a prosecutor must allege the following seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce."[12] In a civil case, a plaintiff must also prove that there

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7. 804 F.2d 970 (7th Cir. 1986).

8. The "Statement of Findings and Purposes" of RICO, Pub. L. No. 91-452, 84 Stat. 922, 923, (1970).

9. 18 U.S.C. § 1963(b), (c).

10. *See United States v. Turkette*, 452 U.S. 576, 586-87 (1981); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

11. *See* Pub. L. No. 91-452, § 904, 84 Stat. 922, 947; Note, *RICO and Its Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

12. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

was an injury to his or her business or property as a result of a violation of the RICO statute.[13]

Perhaps the most fiercely debated aspect of RICO is the pattern of racketeering element. While there is a divergence of opinion regarding the constitutionality of the pattern element, there nevertheless seems to be a consensus that this element may be the most influential in defining the scope of RICO. Still, in the early years of RICO, courts virtually ignored the pattern element until the Supreme Court's ruling in *Sedima, S.P.R.L. v. Imrex Co.*,[14] and since then they have struggled in their search for the parameters of what constitutes a pattern of racketeering activity.

II. UNCERTAINTY OVER THE PATTERN OF RACKETEERING REQUIREMENT

A pattern of racketeering activity must consist of at least two racketeering acts within a ten-year period.[15] At the same time, the commission of two predicate acts within ten years does not, alone, violate RICO. If RICO liability could be based merely on the showing of two predicate acts, a RICO claim could be made in a wide range of criminal activities beyond the intended scope of the law. To prevent such a broad application of RICO, the courts designed varying limitations on what constitutes a pattern of racketeering.[16]

In *Sedima, S.P.R.L., v. Imrex Co.*,[17] the Supreme Court attempted to clarify what constitutes a pattern of racketeering. In doing so, the Court rejected a narrow reading of § 1964(c) by the Second Circuit Court of Appeals that would have made it a condition for maintaining a civil RICO action both that the defendant had already been convicted of a predicate racketeering act or of a RICO violation,[18] and that plaintiff show a special racketeering injury.[19] The Court's rationale was based largely on its interpretation of RICO's legislative history. The Court observed that "RICO is to be read broadly"[20] in light of Congress's use of expansive language and its "express admonition that RICO is to 'be liberally construed to effectuate its remedial purpose.' "[21]

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13. *Id.*; *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

14. 473 U.S. 479 (1985).

15. 18 U.S.C. § 1961(5).

16. *See United States v. Bright*, 630 F.2d 804, 830-31 (5th Cir. 1980) (predicate acts must be related to affairs of enterprise).

17. 473 U.S. 479 (1985).

18. *Id.* at 488-93.

19. *Id.* at 493-500 ("There is no room in the statutory language for an additional amorphous 'racketeering injury' requirement." [footnote omitted] *Id.* at 495).

20. *Id.* at 497.

21. *Id.* at 498, *quoting* Pub. L. No. 91-452, § 904, 84 Stat. 922, 947.

In addressing the pattern element of a RICO claim, the Court relied on the Senate's original report on the proposed RICO statute in stating, in the now-famous footnote 14, that a pattern consists of "continuity plus relationship."[22] Justice White suggested that § 3575(e) of Title 18 of the United States Code[23] might provide a useful definition of this concept, then invited lower courts to "develop a meaningful concept of 'pattern' " to limit the reach of RICO.[24]

Notwithstanding this guidance, the circuit courts of appeals reached varying conclusions as to what conduct gives rise to a pattern of racketeering. The cause for this divergence of opinion stemmed from the fact that 18 U.S.C. § 3575 tells us what a relationship is but does not instruct us on what is meant by continuity.[25] As a result, in the years following the Court's *Sedima* decision, three general standards emerged among the circuits: "multiple schemes," "multiple acts," and "multifactor."

A. THE RESTRICTIVE APPROACH: MULTIPLE SCHEMES

The multiple schemes approach was an outgrowth of the "continuity and relationship" definition of pattern enunciated in *Sedima*. To satisfy the pattern requirement under this approach, the predicate acts must be related and also be part of more than one criminal scheme. If both of these requirements are not met, then the complaint must be dismissed for lack of a pattern. The multiple schemes test was most notably articulated by the Court of Appeals for the Eighth Circuit in *Superior Oil Co. v. Fulmer*.[26] After a jury trial, the defendants, former employees of the plaintiff, were found liable for stealing gas from an oil company, as well as for a RICO claim related to the same conduct. The court of appeals affirmed the wrongful conversion claim but reversed the RICO claim because it found that the complaint failed to show that the defendants' activities formed a pattern of racketeering activity.

The court determined that the actions of the defendants comprised just one continuing scheme to convert gas from Superior Oil's pipeline and there was no evidence that they were involved in any other criminal activities.[27] Thus, in light of its view that "[i]t is difficult to see how the threat of continu-

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22. *Id.*, *citing* S. Rep. No. 91-617, 91st Cong., 2d Sess. 158 (1969).

23. 18 U.S.C. § 3575(e) provides, in pertinent part: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics."

24. *H.J.*, 109 S. Ct. at 498 ("The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.' ").

25. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2901 (1989).

26. 785 F.2d 252 (8th Cir. 1986).

27. *Id.* at 257.

ing activity stressed in the Senate Report could be established by a single criminal episode," the court ruled that the continuity prong of pattern was not satisfied.[28] The court also observed that "[i]t places a real strain on the language [of the Senate Report] to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.' "[29]

B. THE EXPANSIVE APPROACH: MULTIPLE ACTS

In contrast to the multiple schemes analysis, courts using the multiple acts approach sustained a RICO claim merely on the showing of two related predicate acts. This mode of analysis was adopted by the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*,[30] which involved a claim that the defendant had attempted to defraud the plaintiff company by twice mailing fraudulent invoices to the plaintiff. The district court dismissed the RICO count on the grounds that there was evidence of only one act of mail fraud. The Fifth Circuit reversed, finding that the question of whether defendant had committed one act of mail fraud or two was a jury question.[31] In doing so, the court rejected the argument that two acts might not be sufficient to constitute a pattern. The court reasoned that "[t]he Supreme Court in *Sedima* implied that two 'isolated' acts would not constitute a pattern. In this case, however, the alleged acts of mail fraud are related," and thus could satisfy the pattern requirement.[32]

C. THE MIDDLE GROUND: MULTIFACTOR TEST

The Seventh, Third, and Fourth Circuit Courts of Appeals adopted a flexible analysis of pattern that focuses on the facts and circumstances of each case. The Seventh Circuit, for instance, did not embrace a *per se* rule regarding the definition of a pattern, nor did it require multiple schemes in order to have a pattern. The court, in *Morgan v. Bank of Waukegan*,[33] recognized that a tension existed between the terms "continuity" and "relationship," to the extent that predicate acts are closely related they tend to negate continuity. Yet, to the extent that the acts extend over time, they tend to be less related. Thus, it attempted to balance these competing concepts.[34]

To this end, the Seventh Circuit examined several factors to determine if a pattern existed, including: the number and variety of predicate acts; the length of time over which the acts were committed; the number of victims;

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28. *Id.*
29. *Id.*
30. 774 F.2d 1350 (5th Cir. 1985).
31. *Id.* at 1354-55.
32. *Id.* at 1355.
33. 804 F.2d 970 (7th Cir. 1986).
34. *Id.* at 975.

the presence of separate schemes; and the occurrence of distinct injuries.[35] The court concluded that the continuity and relationship aspects of pattern were satisfied in *Morgan* because the predicate acts took place over a period of several years and were distinct in that they related to two separate foreclosures and a fraudulent loan transaction.[36]

The Third Circuit, in *Barticheck v. Fidelity Union Bank/First National State*,[37] also adopted a fact-dependant test in which it interprets the existence of a pattern based "on a combination of different factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarly of the acts, the number of victims, the number of perpetrators, and the character of the unlawful act."[38] Based on this formulation, the court found that a pattern existed in *Barticheck*, where several individuals and two separate entities made misrepresentations to more than twenty investors in furtherance of a single fraudulent scheme.[39]

The Fourth Circuit, in *International Data Bank Ltd. v. Zepkin*,[40] also adopted a flexible approach to the pattern requirement, declining to adopt a single test or formula. *Zepkin* involved RICO charges by investors against the ousted founders of a business who allegedly made fraudulent statements in the prospectus, falsified the amount of their advance to the company and fraudulently obtained reimbursement.[41] The court held that no pattern was present in this single scheme to defraud and that all that existed were ordinary claims of fraud, not RICO claims.[42] Furthermore, the court rejected the two-scheme approach and any method that relied on the number of predicate acts involved.[43] The court stated that "[n]o mechanical test can determine the existence of a pattern."[44] In fact, in a later case, the Fourth Circuit described its method as "a case- by-case standard akin to that announced by the Seventh Circuit in *Morgan*."[45]

III. *H.J. INC. V. NORTHWESTERN BELL TELEPHONE CO.*

In an effort to resolve this conflict among the circuits, the Supreme Court granted *certiorari* in an Eighth Circuit case to address the question of what

35. *Id.*
36. *Id.* at 976.
37. 832 F.2d 36 (3d Cir. 1987).
38. *Id.* at 38-39.
39. *Id.* at 40.
40. 812 F.2d 149 (4th Cir. 1987).
41. *Id.* at 150-51.
42. *Id.* at 154-55.
43. *Id.*
44. *Id.*
45. *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988).

constitutes a pattern of racketeering activity. In that case, *H.J. v. Northwestern Bell Telephone Co.*,[46] the Supreme Court rejected the multiple scheme test utilized by the Eighth Circuit. The Court found such a requirement to be overly rigid and, since it relied on the undefined concept of scheme, unhelpful. But in rejecting this standard, the Supreme Court still had difficulty in providing a definitive formulation for the courts to use in determining what constitutes a pattern of racketeering.

A. FACTS AND PROCEDURAL HISTORY

In 1986 H.J. Inc. filed a class action suit against Northwestern Bell, alleging federal RICO violations. H.J. claimed that between 1980 and 1986, Northwestern Bell officials and employees had tried to influence illegally members of the Minnesota Public Utilities Commission (MPUC), which sets telephone rates, to approve rates for the company in excess of what was fair and reasonable. The alleged conduct which gave rise to this bribery claim included cash payments, job offers, parties and meals, tickets to sporting events, and airline tickets.

The District Court granted Northwestern Bell's motion to dismiss, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted.[47] The court found that each of the single acts alleged were part of a single scheme and thus, under Eighth Circuit precedent, were not part of a pattern of racketeering activity.[48] The Court of Appeals affirmed the dismissal, noting that the controlling law in the circuit requires more than one scheme to be present in order to establish a pattern.[49] The Supreme Court granted *certiorari* so it could address the pattern of racketeering element of RICO.

B. MAJORITY OPINION

Justice Brennan, writing for Justices White, Marshall, Blackmun, and Stevens, noted that developing a meaningful concept of "pattern" under RICO is not an easy task.[50] Brennan observed that the *Sedima* Court had rejected a strict definition of pattern, and that since that time Congress had been silent on the subject and the courts of appeals had developed a "plethora of different views" on the subject.[51]

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46. 109 S. Ct. 2893 (1989).

47. 648 F. Supp. 419 (D. Minn. 1986).

48. *Id.* at 423-26.

49. 829 F.2d 648 (8th Cir. 1987), *citing Superior Oil v. Fulmer* 785 F.2d 252 (8th Cir. 1986) and *Hulmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986).

50. *H.J.*, 109 S. Ct. at 2899.

51. *Id.*

The *H.J.* Court then rejected the Eighth Circuit's proposition that predicate acts form a pattern only when they are part of separate schemes.[52] The Court also dismissed the notion, subscribed to by some courts,[53] that two predicate acts constitute a pattern.[54] Moreover, the majority rejected the argument of the *amici* that the word "pattern" referred to predicate acts that were indicative of a perpetrator involved in organized crime or its equivalent.[55] At the same time the majority opinion did not discuss the multifactor test adopted by the Seventh Circuit in *Morgan v. Bank of Waukegan*.[56] The Court's failure to discuss this major approach may indicate, at least by implication, that it has rejected it *sub silentio*, or it may suggest that the Court wanted to allow the multifactor test to develop further through continued application.

In any event, having rejected the multiple scheme and multiple acts tests, two of the three standards commonly used by the federal courts, the majority set out to shed some light on what it views as constituting a pattern. Justice Brennan began his analysis by recognizing that although § 1961(5) of Title 18 states that only two predicate acts within a ten-year period are necessary to establish a pattern, it implies that two predicate acts alone are not sufficient. "[I]t assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved."[57] Reviewing RICO's legislative history, the Court found that Congress intended that to prove a pattern, one must show "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."[58]

The *H.J.* Court found, like the *Sedima* Court, that RICO's notion of relationship is informed by the definition of pattern in Title X of the Organized Crime Control Act of 1970.[59] According to that definition, "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[60]

Turning to the continuity requirement, the Court specifically rejected the Eighth Circuit's "multiple scheme test." That test, the Court concluded, was too rigid, and introduced a concept — the scheme — that is not present in

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52. *Id.*

53. *See, e.g., United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985).

54. *H.J.*, 109 S. Ct. at 2899.

55. *Id.*

56. 804 F.2d 970 (7th Cir. 1986).

57. *H.J.*, 109 S. Ct. at 2899-2900 (emphasis in original).

58. *Id.* at 2900 (emphasis in original).

59. Pub. L. No. 91-452, 84 Stat. 922, codified at 18 U.S.C. § 3575(e).

60. *H.J.*, 109 S. Ct. at 2901.

the language or history of RICO.[61] The Court then indicated that what a plaintiff or prosecutor must prove is "continuity of racketeering activity, or its threat, *simpliciter*."[62] Because proof of continuity could be established in a variety of ways, the majority concluded that it is difficult "to formulate in the abstract any general test for continuity."[63] This difficulty is compounded by the fact that the term continuity is both a closed- and an open-ended concept "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[64]

In an effort to delineate the pattern requirement, the Court attempted to formulate some examples of continuity. In short, the Court determined that predicate acts over a few weeks or months, without the threat of future criminal conduct, do not satisfy the continuity requirement.[65] At the same time, the Court found that continuity can be satisfied by showing a distinct and specific threat, that the predicate acts are part of a "regular way of doing business," are part of an ongoing RICO enterprise, or "can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes."[66]

Turning to H.J. Inc.'s complaint, the Court found that H.J. Inc. had sufficiently alleged multiple predicate acts that met the pattern requirement.[67] The Court noted the alleged acts were arguably related by the common purpose of influencing the commissioners. Moreover, the claim that the predicate acts occurred with some frequency over a six-year period could satisfy the continuity requirement.[68]

C. CONCURRING OPINION

Justice Scalia, joined by Justices Rehnquist, O'Connor, and Kennedy, concurred in the judgment, but expressed concern that the majority did little to cure or settle "the widest and most persistent circuit split on an issue of federal law in recent memory."[69] Justice Scalia charged that the Court did "little more than repromulgate" the four broad "hints" it set forth in *Sedima*.[70] He found that the only new advice offered by the majority — "continuity plus relationship" — was "about as helpful . . . as 'life is a foun-

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61. *Id.*
62. *Id.* (emphasis in original).
63. *Id.*
64. *Id.* at 2902.
65. *Id.*
66. *Id.*
67. *Id.* at 2906.
68. *Id.*
69. *Id.* at 2906-07 (Scalia, J., concurring).
70. *Id.*

tain.' "[71] Scalia opined that "[t]oday's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions . . . [and] increases rather than removes the vagueness."[72] Such vagueness is "bad enough with respect to any statute . . . but intolerable with respect to RICO," Scalia lamented.[73] While conceding that it was "unfair to be so critical . . . because I would be unable to provide . . . significantly more guidance,"[74] Scalia expressed concern regarding the future of RICO.[75] In particular, Scalia found that the vagueness surrounding the "pattern" element bodes ill for the day when the RICO statute is challenged on constitutional grounds.[76]

Notwithstanding these concerns, Justice Scalia concurred in the Court's judgment because he agreed that the court of appeals had erred in holding that predicate acts that are part of a single scheme can never support a cause of action under RICO.[77]

D. SUMMARY

Both the majority and concurring Justices conceded that the determination of what conduct meets RICO's pattern requirement is a difficult task. The *H.J.* opinions probably did little to clarify the pattern requirement beyond the familiar "relatedness and continuity" test developed in *Sedima*. Thus, absent the unlikely event that Congress sheds light on this matter, the lower courts were again called upon to develop, within the framework enunciated by the Supreme Court, a principled definition of "pattern of racketeering activity."

IV. THE CIRCUIT COURTS' MIXED RESPONSES TO *H.J.*

In the aftermath of *H.J.*, the circuit courts have addressed the constitutionality of RICO and the definition of pattern in a variety of contexts and with differing results.

A. THE CONSTITUTIONALITY OF RICO

Despite Justice Scalia's invitation to RICO defendants to assert a void for vagueness argument, the lower courts, with one exception, have not sustained such a claim. The federal courts consistently have rejected the argument made by defendants that they did not have adequate notice that their

71. *Id.* at 2907.
72. *Id.* at 2908.
73. *Id.*
74. *Id.*
75. *Id.* at 2909.
76. *Id.*
77. *Id.*

conduct fell within the purview of RICO. Courts have evaluated this due process claim based on the underlying facts of the case at issue and, in all but one case, the courts have found that RICO was constitutional as applied to the defendant at bar.

1. *RICO Held Constitutional.*—A federal district court recently dismissed a constitutional challenge to the pattern requirement in a case involving a 175-count RICO indictment against members of a street gang engaged in an extensive drug conspiracy.[78] The court first noted the legal standard that a criminal statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence that the conduct at issue falls within its prohibitions.[79] Turning to the facts of the case at hand, the court found that it was "exceedingly clear" that an " 'ordinary person' would have fair notice that the conduct charged against each defendant constitutes a 'pattern of racketeering.' "[80]

The thirty-seven defendants were alleged to be long-standing members of a far-reaching narcotics network that involved drug trafficking, murder, kidnapping, and witness tampering, among other crimes.[81] Thus the court stated that it was clear even to an ordinary person that such conduct satisfied the pattern requirement of RICO.[82] In conclusion, the court observed that "[s]urely, no one has ever doubted that RICO proscribes the commission of numerous racketeering crimes at the behest of and in furtherance of a wholly criminal organization."[83]

The Third Circuit Court of Appeals also rejected a constitutional challenge of the RICO statute.[84] The case involved an appeal of a guilty verdict issued by a jury against several members of a nationwide criminal organization commonly known as the Mafia. After describing the activities of the Philadelphia Mafia which included murder, illegal gambling operations, and intimidation tactics, the court determined that "[a]s applied to the appellants' criminal activities, the 'relationship plus continuity' test for a pattern is readily satisfied."[85] Therefore the court concluded that "appellants argument that they lacked notice that their conduct constituted a 'pattern' under RICO is totally devoid of merit, as they have engaged in a classic pattern of racketeering under RICO."[86]

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78. *United States v. Andrews*, 749 F. Supp. 1520 (N.D.Ill. 1990).
79. *Id.* at 1523, *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).
80. *Id.*
81. *Id.* at 1521.
82. *Id.* at 1523-24.
83. *Id.* at 1524.
84. *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990).
85. *Id.* at 1104.
86. *Id.*; see also *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990).

2. *RICO Held Unconstitutional.*—While the consensus seems to be that the RICO statute can withstand a constitutional challenge on vagueness grounds, a federal district court in Ohio has concluded that RICO is unconstitutional both on its face and as applied to a particular set of defendants.[87] The case involved a family dispute regarding the management and disposition of property from a relative's estate. As such, the court reasoned that the case in all likelihood was far removed from the kind of case Congress envisioned as being within RICO's scope of coverage.[88]

The court also determined that the acts alleged in the complaint failed to satisfy the pattern requirement because they were isolated and sporadic.[89] In conclusion, the court stated that:

> [P]ersons of ordinary intelligence in defendant's situation would not have had adequate notice that the mail and wire fraud, interstate transportation of stolen property and money laundering offenses constituted a "pattern of racketeering activity" under RICO. The court finds that the "pattern" requirement is unconstitutionally vague as applied to these defendants. This court is also persuaded to agree with Justice Scalia's suggestion that the "pattern" requirement is unconstitutionally vague as written.[90]

B. THE POST-*H.J.* DEFINITIONS OF PATTERN

Because the *H.J.* Court did not offer a specific definition for pattern, the courts of appeals have been required to reevaluate the standards they used to determine the presence of a pattern. While only a handful of "pattern" cases have been decided since *H.J.*, a survey of the post-*H.J.* decisions illustrates the mixed response by the courts to date.

1. *Emphasis on Duration of Racketeering Activity.*—One court of appeals has seized upon the Supreme Court's statement that the continuity prong of the pattern requirement is "centrally a temporal concept."[91] For the First Circuit, the primary consideration in determining the existence of a pattern is the duration of the criminal activity. In *Fleet Credit Corp. v. Sion*,[92] the court rejected the use of the multifactor test that it had previously adopted implicitly in *Roeder v. Alpha Industries*[93] because it found that "[t]he Supreme Court stated in *H.J.* that to establish continuity, a plaintiff must

87. *Firestone v. Galbreath*, 747 F. Supp. 1556, 1579-81 (S.D. Ohio 1990).
88. *Id.* at 1581.
89. *Id.*
90. *Id.*
91. *See H.J.*, 109 S. Ct. at 2902.
92. 893 F.2d 441 (1st Cir. 1990).
93. 814 F.2d 22 (1st Cir. 1987).

demonstrate that the related predicate acts 'amount to or pose a threat of continued criminal activity.' "[94] To this end, the court determined that:

> This formulation provides a bifurcated framework for determining continuity in a RICO claim. A party may establish continuity by demonstrating that the predicate acts amount to continued criminal activity. Alternatively, a party may establish continuity by demonstrating that the predicate acts, though not continuous, threaten to become so.[95]

Thus the court reasoned that the dispositive issue is whether the alleged predicate acts in a civil RICO case "amount to" or "pose a threat of" continued criminal activity.[96]

2. *Maintaining a Flexible Approach.*—In rejecting the multiple scheme approach, the *H.J.* Court left open the question of whether the multifactor test was an appropriate means of determining the existence of a pattern. Accordingly, several circuits have continued to use the multifactor standard that they had been utilizing before *H.J.* The Seventh Circuit reaffirmed its earlier approach, which involves the weighing of several factors to determine the existence of a pattern. In *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*,[97] the court noted that the *H.J.* Court determined "that Congress intended 'a natural and common sense approach to RICO's pattern element,' and that 'Congress was concerned in RICO with long-term criminal conduct.' "[98] Accordingly, the court concluded that "the factors identified in *Morgan* — with the exception of our focus on the presence of separate schemes — are still useful in analyzing the pattern requirement."[99]

The Third Circuit also has continued to use a fact-oriented, case-by-case analysis, though it seems to give the duration element greater weight. As noted above, the Third Circuit previously used a six-factor test adopted in *Barticheck*.[100] In its initial decision following *H.J.*, the Third Circuit found that *H.J.* required the court to modify its prior approach to the concept of "continuity."[101] The court observed that "the Supreme Court made no explicit reference in *H.J. Inc.* to the number of victims or the number of perpetrators as relevant factors in its discussion of continuity. . . ."[102] Consequently, the Court of Appeals reversed the district court's dismissal of a RICO claim because in its view the fourteen month period of criminal

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94. *Fleet Credit*, 893 F.2d at 446, *quoting H.J.*, 109 S. Ct. at 2900.
95. 893 F.2d at 446.
96. *Id.* at 446-48.
97. 883 F.2d 48 (7th Cir. 1989).
98. *Id.* at 51, *quoting H.J.*, 109 S. Ct. at 2899 and 2902.
99. 883 F.2d at 51.
100. *See* notes 37-39, *supra*.
101. *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989).
102. *Id.* at 758.

activity satisfied the continuity element. In doing so, the court strongly suggested that the duration of the alleged acts may be controlling in determining if continuity is present in a particular case.[103]

The Third Circuit appears to have retreated from this position, however, in *Marshall-Silver Construction Company, Inc. v. Mendel.*[104] Without using the multifactor test, the court sustained the district court's dismissal of a RICO claim because it found that "[o]n these facts, the alleged illegal activity posed no threat of *additional* repeated criminal conduct over a significant period. Moreover, the predicate acts themselves were concluded in less than seven months."[105] Thus, the court found that "[t]his is one of those cases expressly resolved by *H.J. Inc.*, when the Court observed: 'Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement.' "[106]

In *dicta*, however, the court recognized that "*H.J. Inc.* can be read to suggest that 'continuity' is *solely* a 'temporal concept,' " yet the court remarked that "[w]ithout more explicit guidance from the Supreme Court we are reluctant to embrace this reading of *H.J. Inc.*"[107] Instead, the court reasoned that RICO was geared to combat crime that poses a significant societal threat. It also noted that the Supreme Court stressed that Congress had a "a natural and common sense approach to RICO's pattern element in mind," and that "the precise methods by which relatedness and continuity or its threats may be proved cannot be fixed in advance. . . ."[108] Thus the court concluded that "[t]hese observations [by the *H.J.* Court] and the holding of the Supreme Court in *H.J. Inc.* are entirely consistent with our approach in *Barticheck* and our prior opinion in this case [which used the multifactor test]."[109]

Recently, the Third Circuit reiterated this view. In *Kehr Packages, Inc. v. Fidelcor, Inc.*[110], it noted that the multifactor test set forth in *Barticheck* is still relevant to the pattern inquiry after *H.J.*, "however, 'we must focus on these factors as they bear upon the separate questions of continuity and relationship' ".[111] In *Kehr*, the plaintiff alleged that it was fraudulently induced to enter into a loan agreement that provided insufficient working capital through fraudulent promises that additional financing would be provided. Although the complaint alleged predicate acts of mail and wire fraud extending over nineteen months, the Third Circuit affirmed the dismissal of the

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103. *Id.* at 758-59.
104. 894 F.2d 593 (3d Cir. 199).
105. *Id.* at 597 (emphasis in original).
106. *Id., quoting H.J.*, 109 S. Ct. at 2901; *see also Banks v. Walk*, 918 F.2d 418 (3rd Cir. 1990).
107. 894 F.2d at 596 (emphasis in original).
108. *Id., quoting H.J.*, 109 S. Ct. at 2902.
109. *Id.*
110. 13 RLR 677, No. 90-1396 (March 6, 1991).
111. *Id.* at 683.

RICO count. Using a rather common sense approach, the majority held that where mail and wire fraud are the predicate acts alleged, the court should not look to the mere number of acts and their duration, but instead should focus on the duration of the defendant's deceptive or fraudulent acts. Since innocent mailings may continue for a long period of time after the deceptive practices cease, they should not be permitted to transform a defendant's fraud into a pattern. Rather, the defendant's underlying deceptive activity must be examined to determine if it is his regular way of doing business or if his deceptive acts extend over a long period of time. Where the subsequent mailings relate only to a defendant's initial deceptive actions, they do not create a pattern of racketeering by being repeated over the course of time.

It is just such a common sense approach which is the hallmark of the multifactor test. When common sense is allowed to operate, the vagueness concerns expressed by Justice Scalia evaporate. Anyone can tell whether his or her conduct meets such a common-sense oriented approach. Although this approach does not give us the safety net that a bright-line test would provide, it does provide a way of judging whether a pattern is alleged.

The Fourth Circuit in *Walk v. Baltimore & Ohio Railroad*,[112] which the Supreme Court remanded to the Court of Appeals for reconsideration in light of *H.J.*, also has continued to apply the multifactor test. In *Walk*, the Circuit stated that "[w]e do not understand *H.J. Inc.* to have rejected the general, flexible approach our post-*Sedima* precedents had developed for inquiring into the continuity requirement; to the contrary, we read in it an endorsement of that basic approach."[113] The court acknowledged, however, that its approach was subject to modification when dealing with closed-ended schemes.[114]

In its prior consideration of this case, the Fourth Circuit affirmed the district court's dismissal of a RICO claim,[115] but on remand from the Supreme Court the court found that the dismissal was unwarranted.[116] The court stated that on its initial review "we thought the balance tipped against finding a pattern adequately alleged, principally because of the 'closed-ended' nature of the activity. In light of *H.J. Inc.'s* special emphasis that the sheer duration of criminal activity might demonstrate the requisite continuity even in closed-ended situations, we now conclude that the balance tips the other way."[117]

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112. 890 F.2d 688 (4th Cir. 1989).

113. *Id.* at 690.

114. *Id.* at 689.

115. 847 F.2d 1100 (4th Cir. 1988).

116. 890 F.2d at 690.

117. *Id.*

All told, though, the *Walk* court advocated the continued use of a case-by-case analysis. It noted that "[t]he [Supreme] Court's guidance on the pattern requirement, as the Court has twice now recognized and lamented, cannot be in bright-line terms, given the statutory text."[118]

3. *Lack of Definitive Standard.*—Since *H.J.* most of the courts of appeals have not relied upon a specific standard for addressing the pattern of racketeering activity element of RICO beyond the talismanic "relatedness and continuity" test. For instance, the Fifth Circuit has explicitly recognized that *H.J.* narrowed the "two related predicate acts" definition of pattern which was previously used in the circuit.[119] However, in the lone decision to directly consider the pattern issue, the Fifth Circuit offered little guidance on what it was looking for.[120] The court merely restated that *H.J.* requires a plaintiff alleging a RICO claim to show both relationship and continuity.[121] The court found that the relationship element was properly alleged because there was a single goal, similar participants and victims, and the events were not isolated.[122] The court also found that there was not evidence to refute the plaintiff's allegation that the defendant posed a continuing threat of harm to other victims.[123] Based on this understanding of pattern, the court affirmed the trial court's holding that a pattern was properly alleged, though it failed to expressly adopt a standard by which courts in the circuit could identify a pattern of racketeering.

In the two "pattern" cases the Tenth Circuit has considered since *H.J.*, the court has declined to state what is required to establish a pattern beyond the "relatedness and continuity" test. In *Phelps v. The Wichita Eagle-Beacon*,[124] the Tenth Circuit summarily affirmed the district court's dismissal of a RICO claim because the claim failed to properly allege a pattern of racketeering activity. Since the alleged predicate acts involved two purportedly defamatory articles published on the same day, the court found that the plaintiff did not allege either a closed-ended or open-ended continuity.[125] Given the clear facts of the case, the court was able to rule on the pattern issue without being forced to articulate a specific standard of what constitutes a pattern.

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118. *Id.*

119. *Smith v. Cooper/T. Smith Corp.*, 886 F. 2d 755, 756 (5th Cir. 1989) (rejecting *R.A.G.S.* standard under which two related predicate acts may satisfy the pattern requirement).

120. *Landry v. Air Line Pilots Association International AFL-CIO*, 901 F.2d 404 (5th Cir. 1990).

121. *Id.* at 434.

122. *Id.* at 433.

123. *Id.* at 426.

124. 886 F.2d 1262 (10th Cir. 1989).

125. *Id.* at 1273.

Similarly, in *Sil-Flo, Inc. v. SFHC*,[126] the Tenth Circuit affirmed the district court's dismissal of a RICO claim without offering guidance regarding what was required to establish a pattern. In a case involving the sale of a business, the court found that "[a]t most, what has been alleged is a business deal gone sour, accompanied by a breach of fiduciary duty and various other torts by the defendants. There certainly is no open-ended threat of future illegal activity."[127] Thus, the court concluded that in the absence of continuity the district court rightly dismissed the RICO claim.[128] In doing so, the court declined to state generally what is required for a pattern other than "relatedness and continuity."[129]

Like the Tenth Circuit, the Sixth Circuit affirmed a district court decision to dismiss a civil RICO claim based on the clear facts of the case without articulating a legal standard of pattern beyond restating the guidelines provided in *H.J.*[130] Specifically, the Court of Appeals noted that since the complaint at issue alleged a closed-ended scheme over a six month period of time, it failed to allege the continuity of criminal activity required to plead sufficiently a pattern of racketeering.[131]

The court quoted a passage in *H.J.* where the Supreme Court indicated that continuity over a closed period of time must cover a "substantial period of time" and that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement."[132] Consequently, this case, the court concluded, was the kind of criminal activity over a short period which is insufficient to state a claim of pattern of racketeering under *H.J.*[133] While the rationale of the court suggests that the duration of the activity may be disposition regarding the presence of a pattern, it is probably too early to tell what the Sixth Circuit will consider when determining whether a pattern exists.

The District of Columbia Circuit also has not provided a definitive statement on what it is looking for in a pattern. However, in a series of opinions related to the case of *Yellow Bus Lines v. Local Union 639*, the D.C. Circuit has indicated it is willing to take a liberal approach to the definition of pattern. In its first decision in *Yellow Bus Lines*,[134] prior to the Supreme Court's ruling in *H.J.*, the D.C. Circuit found that four alleged predicate acts of extortion and intimidation during a four-day labor strike satisfied the require-

126. 917 F.2d 1507 (10th Cir. 1990).
127. *Id.* at 1516.
128. *Id.*
129. *Id.*
130. *American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352 (6th Cir. 1990).
131. *Id.* at 354.
132. *Id., quoting H.J.*, 109 S. Ct. at 2902.
133. *Id.* at 355.
134. 839 F.2d 782 (D.C. Cir. 1988).

ment for pattern as defined in *Sedima*. "Here, appellees [defendants] are accused of engaging in acts of vandalism and intimidation during a specific time period in pursuit of a unitary goal. We believe this scenario meets the statutory requirements for a 'pattern of racketeering activity.' "[135]

The Supreme Court vacated the D.C. Circuit's opinion and remanded the case for further consideration in light of the Court's ruling in *H.J.*[136] On appeal the D.C. Circuit affirmed its prior holding.[137] While the court recognized that the "continuity" prong of the "pattern" element presented "a close[r] question because of the relatively short duration of the strike, these acts could, if proved, establish 'a distinct threat of long-term racketeering activity, either explicit or implicit.' "[138]

On further appeal, the circuit court, sitting *en banc*, dismissed the RICO claim in *Yellow Bus Lines* on the grounds that there was no "participation" in an enterprise.[139] Therefore, it is still unclear what the D.C. Circuit will require to establish a pattern, though this series of opinions suggests that it might not take much.[140]

Finally, the Second, Eighth, Ninth, and Eleventh Circuits have not squarely dealt with a case raising a "pattern" issue. Hence, these circuits have yet to indicate how they will define a "pattern" in light of the Supreme Court's ruling in *H.J.*

V. THE BEST APPROACH: THE SEVENTH CIRCUIT'S MULTIFACTOR TEST

As highlighted in the previous section, the federal courts were required to reevaluate their approach to the RICO pattern requirement in light of the Supreme Court's ruling in *H.J.* For some circuits, like the Eighth Circuit, this meant coming up with a new, or at least modified standard. For other circuits, however, *H.J.* basically affirmed the approach they had already adopted. The Seventh Circuit is probably the best example of this point.

Since 1986, the Seventh Circuit has utilized the multifactor test. The test involves the weighing of several factors in order to determine whether the facts of a particular case satisfy the pattern element of RICO. Those factors are:

1) the number and variety of predicate acts;
2) the length of time over which the predicate acts were committed;

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135. *Id.* at 789.
136. 109 S. Ct. 3235 (1989).
137. *Yellow Bus Lines v. Local Union 639*, 883 F.2d 132 (D.C. Cir. 1989).
138. *Id.* at 145.
139. 913 F.2d 948, 952-56 (D.C. Cir. 1990).
140. *But see Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 11 RLR 525 (D.C. Cir. 1989) (acts of securities fraud over a three month period did not constitute a closed or open-ended continuity for purposes of establishing a pattern of racketeering activity).

3) the number of victims;
4) the presence of separate schemes; and
5) the occurrence of distinct injuries.

Together these factors, when considered in light of the facts of a particular case, are designed to inform a court whether the alleged criminal activity constitutes a pattern of racketeering. As previously noted, the Supreme Court's guidance in *Sedima* and *H.J.* regarding a "pattern" mostly focused on the relationship prong of the "relatedness and continuity" definition of pattern of racketeering activity. In *H.J.*, for instance, the Supreme Court recognized that Congress's definition of pattern in 18 U.S.C. § 3575(e) solely addressed the relationship of the criminal acts to one another.[141] Consequently, the Seventh Circuit, through the use of the multifactor test, has attempted to develop a standard which encompasses both the continuity and relationship concepts which comprise the definition of a pattern of racketeering.

The seminal case for this test in the Seventh Circuit is *Morgan v. Bank of Waukegan*.[142] It was in *Morgan* that the Seventh Circuit first developed the multifactor test. The court viewed this standard as properly balancing what it saw as a conflict between the relationship and continuity elements of "pattern."

> Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the terms "continuity" and "relationship" are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus exclusively on either continuity or relationship alone effectively negates the remaining prong.[143]

In *Morgan*, the court found that the facts alleged by the plaintiffs regarding a fraudulent investment scheme satisfied the pattern requirement to state a cause of action under the civil provisions of RICO. The court noted that:

> [i]n the instant case, plaintiffs have alleged that defendants committed several acts of mail fraud over a period of several years in furtherance of an overall scheme to defraud plaintiffs. These acts of mail fraud were distinct; some related to two separate foreclosure sales that occurred two years apart, while others related to allegedly fraudulent statements made in connection with the initial loan transaction. While these acts can be viewed as

141. *H.J.*, 109 S. Ct. at 2901.
142. 804 F.2d 970 (1986).
143. *Id.* at 975.

> part of a single grand scheme, they were ongoing over a period of nearly four years in addition to being distinct acts.[144]

Based on these findings, the court concluded that "[u]nder the facts of this case, plaintiffs have satisfied both the continuity and relationship aspects of the pattern requirement."[145]

More importantly, the *Morgan* court created the multifactor test, which the Seventh Circuit has used ever since to determine the existence of a pattern of racketeering activity. The court recognized that the standard was subject to criticism but it nonetheless believed it was the best means of achieving the goals of Congress within the guidelines provided by the Supreme Court.

> [W]e reject the claim that such a test necessarily leads to inconsistent results. A test that depends on a case-by-case analysis will necessarily be a bit rough around the edges at first, but as courts begin to apply it to a greater number of factual patterns, its contours should become clearer. The Supreme Court has invited the lower courts to fashion a pattern requirement that encompasses both continuity and relationship. We feel that a legal test involving a factually-oriented standard, not a set rule, best meets the Supreme Court's directive.[146]

A broad-brush survey of the cases decided using the *Morgan* factors reveals that the federal courts have been able to refine the multifactor test into a standard that is workable and fair.

VI. REFINING THE MULTIFACTOR TEST

The strength of *Morgan's* multifactor test lies in its flexibility. That flexibility has proven quite valuable, given the wide variety of conduct that may form the basis of a RICO claim. As has already been discussed, and by definition, this mode of analysis is highly fact dependant. However, several trends can be distilled from the cases which have utilized the multifactor test.

For instance, courts that apply the *Morgan* standard usually find the mailings or telephone calls, transmitted in the course of a business or securities transaction, do not constitute a pattern of mail or wire fraud.[147] This point was recently underscored by the Seventh Circuit in *United States Textiles,*

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144. *Id.* at 976.

145. *Id.*

146. *Id.* at 977.

147. *See, e.g., Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988) ("this circuit will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims"); *Medallion Television Enterprise, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1362-65 (9th Cir. 1987) (alleged fraud in negotiation of television rights does not constitute a RICO pattern).

Inc. v. Anheuser-Busch Companies, Inc., and reiterated by the Third Circuit in *Kehr*.[148]

> Mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts . . . may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a "pattern" of racketeering activity.[149]

Under the multi-factor test's common sense approach, it is not the quantity or duration of innocent mailings which controls, but the quality and duration of the defendant's deceptive acts. It is the defendant's conduct which is put at issue and examined, not a numerical count of predicate acts. Thus, the multifactor test's common sense approach, while not a bright-line test, assists the courts in distinguishing garden-variety business fraud cases from true RICO actions.

On the other hand, when a complaint alleges conduct that traditionally is punishable under criminal law, such as bribery or embezzlement, courts are more inclined to find that the complaint satisfies the pattern requirement.[150]

Finally, and perhaps most obviously, the courts are influenced by what might be called the rule of high numbers. Simply put, since RICO is designed to combat far-reaching criminal activity, the longer the duration of the activity or the greater the number of victims, injuries, predicate acts or schemes, the greater the chance of having a civil RICO claim sustained on a motion to dismiss.

Based on these observations and the increasing use of the multifactor test, it appears that the courts are successfully coming to grips with the pattern of racketeering requirement of RICO. As the Seventh Circuit observed when it adopted the multifactor test in *Morgan*, "[a] test that depends on a case-by-case analysis will necessarily be a bit rough around the edges at first, but as courts begin to apply it to a greater number of factual patterns, its contours should become clearer."[151]

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148. 911 F.2d 1261, 12 RLR 921 (7th Cir. 1990).

149. 911 F.2d at 1268; 12 RLR at 926, quoting from *Sutherland v. O'Malley*, 882 F.2d 1196 (7th Cir. 1989).

150. *See, e.g., Appley v. West*, 832 F.2d 1021, 1027-1028 (7th Cir. 1987) (embezzlement); *Town of Kearney v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1266-68 (3rd Cir. 1987) (bribery of local government officials); *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 191-94 (9th Cir. 1987) (allegation that bank officer repeatedly received kickbacks).

151. *Morgan*, 804 F.2d at 977.

VII. CONCLUSION

RICO is here to stay. Despite the fact that Justice Scalia essentially challenged the lower courts to find the statute unconstitutional, and the volume of scholarly literature supporting that position, RICO seems entrenched in American criminal and civil law.

Unfortunately this land's highest court has been unable to give any meaningful guidance to the pattern element of RICO, beyond the talismanic "relatedness and continuity" and the statement that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy" the continuity requirement.[152] Even Justice Scalia conceded that the task of defining "pattern" is difficult.

In response to the cues by the Supreme Court Justices for the lower federal courts to reexamine the definition and constitutionality of the pattern of racketeering activity element of RICO, it appears that the courts are finding the statute constitutional and gravitating to the multifactor test for determining the presence of a pattern. In rejecting the multiple schemes standard used by the Eighth Circuit in *H.J.*, the Court did not speak to the multifactor test which was then in use by several of the Courts of Appeals. Whether this silence represented tacit approval of the multifactor test or not, post-*H.J.* case law developments suggest that it is increasingly becoming the test of choice among the circuits.

This article has attempted to provide a push for the courts to continue in that direction. On balance, the multifactor test appears to be the most workable and fair standard yet developed, and in all probability is the best the courts can hope to achieve. While in the context of a motion to dismiss it would be preferable to have a bright-line test for the courts to apply, courts in over hundreds of cases simply have not been able develop one.

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152. *H.J.*, 109 S. Ct. at 2902.

Bankruptcy Courts: The Tax Forum for the 90's

FRANCIS M. ALLEGRA*

The word bankruptcy derives from the Italian phrase "banca rotta," or broken bench, a phrase used in the 14th Century city-states of Italy, where merchants conducted their business from benches. When a merchant failed to honor his debts, his creditors broke his bench over his head.

Splinters would abound were this medieval practice still in vogue today. Businesses and individuals are seeking the protection of the bankruptcy laws in record numbers, and with these filings has come an explosion in the number of bankruptcies presenting tax issues. The Tax Division of the Justice Department expects to participate in approximately 33,000 bankruptcies in Fiscal Year 1992, more than five times the level of only four years ago. These cases present a wide variety of tax issues, ranging from procedural questions concerning the priority of tax liens and other collection matters, to substantive questions involving tax principles typically encountered only in tax refund and deficiency actions. The amount at issue in many of these cases is staggering — nine of the largest tax claims pending before bankruptcy courts involve cumulatively over $9.6 billion.

Where are these cases coming from? Recent statistics indicate that corporate failures are again on the rise. The Administrative Office of the U.S. Courts recently reported that the number of businesses filing for bankruptcy rose 3 percent in 1990 to 64,552, after a decline of 6 percent last year. Overall, corporate bankruptcies have averaged between 19,000 and 25,000 a year since 1982, the greatest level since the Depression. With bankruptcy increasingly being viewed as merely a financial tool, many predict that in the next several years there will be a surge of "mega-bankruptcies" — large corporations seeking to restructure mountains of debt, often the product of leveraged buyouts that were financed with "junk bonds." During the late 1980's, the merger frenzy that swept Wall Street led to over 1,000 such leveraged buyouts. Weighed down by excessive debt, untenable capital structures and inadequate cash flow, many of these corporations are now either teetering precariously on the brink of failure or have already fallen over the precipice.[1]

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1. According to the Administrative Office, among the largest corporate cases filed in 1990 were the following: Campeau, with $9.10 billion in assets; Continental Air, with $7.60 billion in assets; Drexel, Burnham, Lambert, with $3.69 billion in assets; and Southland Corporation, with $2.53 billion in assets.

These corporations have made a prophet out of John S.R. Shad, former Chairman of the Securities and Exchange Commission, who forecasted in 1984 that "[t]he more leveraged takeovers and buyouts now, the more bankruptcies tomorrow."[2]

Personal bankruptcies, particularly those under Chapters 7 and 13 of the Bankruptcy Code, are also predicted to reach unprecedented numbers in the next few years. According to statistics from the Administrative Office of the United States Courts, there were approximately 300,000 individual petitions filed in 1984; in 1990, that figure almost doubled, to just shy of 600,000.[3] The Administrative Office has predicted that more than 800,000 individual bankruptcy cases will be filed in 1992. Again, this trend should continue because the average American's debt-to-income ratio is at all-time highs. A recent environmental scan completed by the Internal Revenue Service revealed that payments on mortgage and consumer debt accounted for 90 percent of the disposable income of all households and that more than 55 percent of all households owe more than they own in assets.[4] With this situation, a significant downswing in the economy could cause bankruptcies to soar.

I. TAX LITIGATION IN THE BANKRUPTCY COURTS

Most corporations and many individuals filing for bankruptcy owe taxes — income taxes, FICA and FUTA taxes, excise taxes. Although most tax liabilities are uncontested, there remains a substantial number of cases in which either the validity or the priority of the Government's tax claim is disputed. Often, it is not debtor, but other creditors that are the source of these controversies. Regardless of their genesis, the projected increases in bankruptcy filings should translate into a new high-water mark for bankruptcy tax practice.

What types of tax issues are presented by these cases? Many involve tension between the bankruptcy and revenue laws that was not anticipated by Congress in enacting the Bankruptcy Code[5] and subsequent statutes, such as the Bankruptcy Tax Act of 1980.[6] Indeed, one might describe the relationship between the tax and bankruptcy laws using the words of Benjamin Disraeli, as "[t]wo nations, who are as ignorant of each other's habits * * * as if they were inhabitants of different planets; who are formed by a different

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2. *See The Last Days of Drexel Burnham*, FORTUNE p. 90 (May 21, 1990).

3. Filings in some states doubled just between 1989 and 1990. For example, New Hampshire experienced a 94 percent increase in filings (from 1,324 to 2,568), while Massachusetts experienced a 88 percent increase (from 5,402 to 10,154).

4. ENVIRONMENTAL SCAN OF THE INTERNAL REVENUE SERVICE (November, 1989).

5. Pub. L. No. 95-598, 92 Stat. 2549 (codified as 11 U.S.C.).

6. Pub. L. No. 99-589, 94 Stat. 3389, 3389-3394.

breeding; are fed by a different food, [and] are ordered by different manners."[7] Litigation in the bankruptcy courts during the next several years will clarify many of the grey areas at the crossroads of these two complex bodies of law.

II. PROCEDURAL TAX ISSUES

Most controversies will involve the priority and protection of Government tax claims. The passage of the 1966 amendments to the Bankruptcy Act[8] and, ultimately, the Bankruptcy Code of 1978,[9] dramatically increased the burden imposed upon the Government in protecting tax revenue. Gone were rules that had afforded Government tax claims absolute priorities and almost universal nondischargeability, such as the Act of March 3, 1797,[10] which succinctly stated that "the United States Government shall be paid first." In their stead, Congress enacted provisions that strike a new balance between the interests of Governmental taxing authorities and the twin goals of rehabilitating debtors and providing fair distributions to creditors. Under this statutory scheme, the Government has been increasingly called upon to justify the validity of tax claims and to pose timely objections to plans of reorganization that do not provide for the appropriate payment of taxes.

One seeking evidence of the importance of these procedural disputes need go no further than the docket of the Supreme Court, which has reviewed several important bankruptcy tax cases in recent years. In *Ron Pair Enterprises, Inc. v. United States*,[11] for example, the Court reversed a Sixth Circuit ruling and allowed the Government to recover post-petition interest on a pre-petition claim that was secured by a tax lien on the property, the value of which exceeded the amount of the claim. More recently, in *United States v. Energy Resources*,[12] the Court held that a bankruptcy court has the authority to order the IRS to apply tax payments made by a chapter 11 debtor corporation to offset trust fund obligations,[13] where the court concludes that the designation is necessary for a reorganization's success. And, in *Begier v. United States*,[14] the Court held that taxes withheld by a bankrupt employer were held in trust by that employer for the Government and were not "prop-

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7. B. Disraeli, SYBIL (THE TWO NATIONS) 17 (1945).

8. Act of July 5, 1966, Pub. L. No. 89-425, 80 Stat. 270.

9. *See* footnote 5, *supra*.

10. 1 Stat. 512, 515; Sec. 5, amended by Act of March 2, 1799, ch. 22, 1 Stat. 627, 676.

11. 489 U.S. 235 (1989).

12. 58 U.S.L.W. 4609 (May 29, 1990).

13. So-called "trust fund taxes" take their name from Section 7501(a) of the Internal Revenue Code, which provides that "[w]henever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States."

14. 58 U.S.L.W. 4674 (June 4, 1990).

erty of the estate" within the meaning of Section 541 of the Bankruptcy Code.[15]

During the current term, the Supreme Court has granted petitions for certiorari in two other procedural cases — *Holywell v. United States*, (No. 90-1484), which involves the tax treatment of liquidating trusts in Chapter 11 bankruptcy cases,[16] and *Nordic Village, Inc. v. United States*, which involves whether the Government is sovereignly immune from suits brought by trustees in bankruptcy to recover a post-petition transfer under Section 549(a) of the Bankruptcy Code.[17] With the overall volume of bankruptcy tax controversies skyrocketing, it is certain that the Supreme Court will be called upon to review more procedural cases in the years to come.

III. SUBSTANTIVE TAX ISSUES

These so-called "procedural" cases, however, represent only part of the story here, as bankruptcy courts are also increasingly resolving pure substantive tax disputes. These disputes run the gambit — from questions of "what is income," to controversies involving the availability of deductions and credits. Many of these substantive tax issues arise under Section 505 of the Bankruptcy Code, which gives the bankruptcy courts broad jurisdiction to determine the amount and legality of pre- and post-petition tax liabilities.[18] Other tax questions arise in determining whether a rehabilitated debtor will be able to satisfy future tax liabilities, a critical aspect in deciding whether a

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15. Section 541(a) of the Bankruptcy Code (11 U.S.C.) provides that "the commencement of a case creates an estate." Subsequent provisions define that estate as including "all legal or equitable interests in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As recognized by the Supreme Court, the legislative history of this provision indicates that the property of the estate does not include amounts corresponding to previously withheld taxes. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977).

16. Specifically, the issue presented in *Holywell* is whether a trustee of a liquidating trust, appointed by the bankruptcy court to receive and dispose of a debtors' assets pursuant to a Chapter 11 plan of reorganization, is required by Section 6012(b)(3) of the Internal Revenue Code (26 U.S.C.), to file federal income tax returns on behalf of the debtors and pay the taxes due. *See Holywell, et al. v. United States*, 911 F.2d 1539 (11th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3482 (Jan. 14, 1991).

17. *See Nordic Village v. United States*, 915 F. 2d 1049 (6th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3837 (June 17, 1991). 11 U.S.C. § 549(a) provides that the trustee may avoid an unauthorized transfer of property of the estate that occurs after the commencement of the case. A parallel provision, 11 U.S.C. § 547(b), permits the trustee to avoid transfers occurring within a prescribed period (generally, 90 days) before the filing of the petition. *See* 4 King, COLLIER ON BANKRUPTCY paras. 547.01, 549.01 (1991 ed.).

18. 11 U.S.C. § 505(a) provides generally that the court "may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." This broad grant of jurisdiction is subject to several exceptions, including that the court may not determine the amount or legality of a tax if it was contested by a judicial or administrative tribunal of competent jurisdiction before the commencement of the bankruptcy case. 11 U.S.C. § 505(a)(2).

proposed plan of reorganization is feasible within the meaning of Section 1129(a)(11) of the Bankruptcy Code.[19] Still other questions are presented in construing provisions designed to prohibit the abuse of the internal revenue laws, such as Section 1129(d) of the Bankruptcy Code, which provides that a bankruptcy court "may not confirm a plan if the principal purpose of the plan is the avoidance of taxes."

Several recent cases will serve to illustrate the types of substantive tax issues being encountered in bankruptcies. For example, the Bankruptcy Court for the Southern District of California recently conducted an estimation proceeding in *In re Imperial Corporation of America* to determine whether federal financial assistance payments made by the Resolution Trust Corporation (RTC) to the Imperial Savings and Loan Association were to be treated as income. The debtor was a holding company which formerly held Imperial Savings Association, a thrift institution placed into receivership by the Office of Thrift Supervision. The bankruptcy court held that $709 million in assistance provided to Imperial Savings by the RTC was taxable income under Section 597(b) of the Internal Revenue Code, which provides that "Federal financial assistance shall be properly taken into account by the institution from which the assets were acquired." This ruling will affect savings and loans throughout the country.

Bankruptcy courts have also issued important rulings concerning the deductibility of expenses incurred in reorganizing a debtor. In *In re Placid Oil Company*,[20] the United States Bankruptcy Court for the Southern District of Texas held that approximately $8 million in professional fees and related expenses incurred by Placid in its Chapter 11 bankruptcy proceeding were not currently deductible by Placid in calculating its post-petition tax liabilities. The court reasoned that these expenses were capital in nature, and hence not currently deductible as trade or business expenses, because they yielded benefits that would be enjoyed by Placid for many years. This ruling, which, of course, is equally applicable to reorganization expenses incurred outside bankruptcy, could affect the result in other cases involving hundreds of millions, if not billions, of tax dollars.[21]

Finally, bankruptcy courts are beginning to resolve a number of issues concerning the availability of net operating losses (NOLs). Section 172 of the Internal Revenue Code permits a taxpayer to carry NOLs forward as a

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19. 11 U.S.C. § 1129(a)(11) provides that a bankruptcy court generally may not confirm a plan of reorganization unless "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization * * * ."

20. 1990 Bankr. LEXIS 1852 (May 15, 1990).

21. For other recent cases involving the treatment of corporate reorganizational expenses, *see, e.g., National Starch & Chemical Corp. v. Commissioner*, 918 F.2d 426 (3d Cir. 1990), *cert. granted, sub nom., Indopco v. Commissioner*, 59 U.S.L.W. 3769 (May 13, 1991); *Stokely-Van Camp, Inc. v. United States*, 21 Cl.Ct. 731 (Cl. Ct. 1990).

deduction against future income. However, a triumvirate of complicated Internal Revenue Code provisions — Sections 108, 269 and 382 — are designed to preserve the integrity of the carryover provisions by prohibiting taxpayers from purchasing corporations with substantial losses to shield income unrelated to the traditional business of the debtor. Generally speaking, these NOL limitations are triggered when there is a substantial change in the ownership of the debtor, as might occur, for example, when creditors agree to exchange their debt for stock in a reorganized debtor.[22] Occasionally, the feasibility of a plan of reorganization hinges on whether such NOLs will be available to offset future income, and bankruptcy courts are thus required to wade into the NOL limitations to determine whether envisioned stock transfers will cause the NOLs to extinguish. While, to date, there are few decisions in this area, the number of cases presenting these issues is growing, and it is likely that in the next several years much of the law involving NOLs will be developed in the bankruptcy courts.

IV. CONCLUSION

As strange as it might seem to the uninformed, these are, indeed, challenging times for those who practice tax law in the bankruptcy setting. The Bankruptcy Code is coming of age and at a time when the Internal Revenue Code itself has attained, in the words of Learned Hand, a "meticulous prolixity" undreamed of even when the 1954 Code was enacted. While bankruptcy courts will not displace the traditional fora for resolving tax disputes — the Tax Court, Claims Court and District Courts — they almost certainly will assume a more prominent role in the development of tax law through litigation. As such, perhaps they will earn the title — "Tax Forum for the 90's."

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22. Section 108 of the Internal Revenue Code generally requires debtors to reduce their net operating losses by the amount of income generated by a discharge of indebtedness. Section 382 of the Code generally provides that if there is a transfer of the control of a corporation, the amount of net losses deductible by the newly-held corporation are limited by a formula that relies on the value of the corporation at the time of its reorganization. Finally, Section 269 of the Code generally provides that if there is change in control of the corporation and "the principal purpose for which such acquisition was made is evasion of avoidance of Federal income tax by securing the benefit of a deduction, credit or other allowance which such person or corporation would not otherwise enjoy, then the Secretary may disallow such deduction, credit, or other allowance." *See* Haims & Schaumberger, *Restructuring the Overleveraged Company*, TAX NOTES 91 (July 2, 1990).

Drug Testing in the Workplace

LINDA R. CARLOZZI*

The war on drugs has moved from the streets into the workplace. Rising concerns in the private and public sectors over drug use have prompted the Congress and various state legislatures to mandate drug testing programs. Proponents of these plans argue that they not only serve necessary law enforcement goals, but also improve the international competitiveness of American businesses. Defending drug testing programs on these grounds, President Bush recently stated that "businesses and employers must make it clear that drug use and employment are incompatible," noting further that a drug-free work environment is necessary "to maintain our edge in an increasingly sophisticated international economy."[1]

The result has been major changes in the law — changes that have imposed significant obligations on employers in an area with sensitive constitutional implications. This article highlights the legal obligations imposed on employers and discusses certain legal and practical problems that will be encountered by employers and their legal advisors in attempting to comply.

I. DRUG TESTING OF FEDERAL EMPLOYEES

Federal Government employees are the most significant group affected by drug testing.[2] On September 15, 1986, President Ronald Reagan issued Executive Order 12,564, requiring each executive branch agency to establish a drug testing program for employees in sensitive positions.[3] Concerns over certain aspects of this Executive Order prompted the Congress to pass drug testing provisions as part of the 1987 Supplemental Appropriations Act of 1987 (the Act).[4] These provisions require executive branch agencies to meet certain prescribed preconditions before using appropriations to fund drug

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1. *Quotelines*, USA TODAY p. A1 (Apr. 19, 1990).

2. According to a recent survey by the House Post Office and Civil Service Subcommittee, approximately 28,800 federal employees from 38 agencies were tested between April 1989 and March 1990. Of the employees tested, only 153, or one-half of one percent, tested positive for drug use. Interestingly, the highest rates of positive tests were among those whom were suspected of drug use. Out of 103 suspected drug users, 36 tested positive. *Price Tag Steep for Urinalysis, Report Shows*, FEDERAL TIMES, Mar. 18, 1991, at 5 (hereinafter *Price Tag*).

3. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986) (hereinafter "Order").

4. Pub. L. No. 100-71, July 11, 1987. The 38 agencies that have implemented drug testing reportedly spent $11.7 million on the testing program, including rehabilitation programs. Each positive drug test of a federal employee reportedly costs the government approximately $77,000. *Price Tag, supra* note 2.

testing programs. The Act requires each agency to develop a drug testing plan in accordance with the Executive Order and also requires the Department of Health and Human Services (HHS) to issue mandatory guidelines for drug testing. The mandatory guidelines specify the types of drugs for which federal employees may be tested and the circumstances under which testing may be conducted.[5]

Under the Act, testing is to be conducted in three instances: (1) as a condition to employment; (2) where there is reasonable suspicion of drug use; and (3) as part of a random testing program. The guidelines require federal agencies to test randomly for marijuana and cocaine, and afford them the discretion to test for opiates, amphetamines, and phencyclidine (PCP).[6] The guidelines include chain-of-custody procedures which are designed to protect the integrity of urine specimens.[7]

Four types of urinalysis testing are authorized: the enzyme multiple immunoassay (EMI) test; the radioimmunoassay (RIA) test; the gas chromatography (GC) test; and, lastly, the mass spectrometer (MS) test.[8] Under the guidelines, if the initial immunoassay results are positive, the presence of controlled substances in the specimen must be confirmed using gas chromatography and mass spectrometry tests (GC/MS), which are commonly recognized as the most reliable tests available.[9] Moreover, agencies must purchase drug testing services only from laboratories certified by HHS or a private accrediting organization recognized by HHS.[10] While all agencies are required to adhere generally to a model plan which meets with the specifications of the Executive Order and the corresponding law, some agencies have slight variations in their plans regarding who may be tested and how frequently the tests may be administered.[11] In addition, some plans specify that all job applicants must be tested, while others require that only individu-

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5. Pub. L. No. 100-71, July 11, 1987. See also, Department of Health and Human Services, FINAL GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS (BNA) (1987) (hereinafter "FINAL GUIDELINES").

6. *Id.*

7. *Id.*

8. Comment, *Drug Testing in the Workplace: A Public Sector Concern*, 32 HOW. L.J. 49 (1989).

9. FINAL GUIDELINES, *supra* note 5.

10. *Id.*

11. *See generally*, United States General Accounting Office, DRUG TESTING, FEDERAL AGENCY PLANS FOR TESTING EMPLOYEES (BNA publication) (1989) (hereinafter "DRUG TESTING"). The drug testing plans vary significantly with respect to who is tested (*e.g.*, one out of every four Navy employees has been selected to be random tested, whereas only two out of one hundred Army employees have been targeted for a random test.) The disciplinary actions also vary among agencies—from rehabilitation for employees who test positive at the Transportation Department, to immediate termination at the Drug Enforcement Agency, FBI or Secret Service. Other variations cited are in the price agencies pay for drug testing. Some differences among agencies are a result of legal challenges or an agency's failure to get its drug testing plans approved by HHS. *Drug Tests Vary Among Agencies*, FEDERAL TIMES, Mar. 4, 1991, at 1.

als in specific positions be tested. The requirements for post-accident testing also vary depending upon the amount of property damage caused as a result of the accident, with monetary figures ranging from $200 to $10,000.[12] Thus, although most agency plans contain similar wording, individuals may be subject to different requirements.

II. DRUG TESTING OF FEDERAL CONTRACTOR EMPLOYEES

Federally-mandated drug testing is no longer limited to Government employees. In November 1988, the Drug Free Workplace Act, which was incorporated into the Omnibus Anti-Drug Abuse Act of 1988, was signed into law. The Drug-Free Workplace Act, which became effective March 1989,[13] requires two groups to keep their workplaces drug-free: (1) direct federal contractors, other than individuals, with contracts valued at $25,000 or more; and (2) direct recipients of federal grants regardless of the dollar amount. Data show that in fiscal year 1987, contracts totaling $25,000 or more represented more than 90% of all contracts awarded.[14] By encompassing these groups, therefore, the law covers almost all federal contractors and grantees.

The basic provisions of the Act require government contractors and grantees to publish a policy statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace is prohibited. Affected employers must further specify the actions that will be taken for violations of these rules.[15] All employees must certify that they understand and will abide by this policy, and must notify the employer of any conviction for a criminal drug offense that occurred at the workplace. The employer is required to notify the government agency of any such conviction. While the Act generally requires convicted employees to be suspended or terminated, it also permits employers the option of providing drug rehabilitation services to such employees through an approved program.[16] Additionally, the Act requires employers to establish a drug-free awareness program in order to educate their employ-

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12. DRUG TESTING, *supra* note 11. The U.S. Marshals Service has a threshold of $200, while at the Department of Agriculture, the threshold for post-accident testing is $10,000. *Id.*

13. Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, Title V, Subtitle D, §§ 5152(a)(1), 5153(a)(1) (1988), codified at 41 USCA §§ 701(a)(1), 702(a)(1) (1989). B. Nogay, THE NEW DRUG-FREE WORKPLACE ACT: THE COMPLETE GUIDE FEDERAL CONTRACTORS AND GRANTEES (BNA publication) (1989)(hereinafter "NEW DRUG-FREE WORKPLACE ACT").

14. NEW DRUG-FREE WORKPLACE ACT, *supra* note 13. In fiscal year 1987, the federal government awarded 415,000 contracts valued at $25,000 or more, cumulatively involving over $178.5 billion. The amount of federal grants totalled $116 billion.

15. *Id.* at 7, 11.

16. *Id.* at 8.

ees about the perils of drug use in the workplace. This program must also inform employees of the employer's drug policies and of available counseling, rehabilitation and employee-assistance programs.

The penalties for violating these provisions are severe: contractors or grantees may have their contracts or grants terminated, or they may be suspended from further consideration for contracts.[17] Even if a contractor or grantor has complied with the requirements of the Act, the contractor or grantee runs the risk of being suspended or debarred if there are a substantial number of employees convicted of drug violations in the workplace. This provision was meant to encompass employers who, while complying with the procedures of the Act, repeatedly fail to maintain a drug-free workplace.[18] Significantly, the Act does not require drug testing by contractors or grantees,[19] and the committee report, noting the constitutional implications of mandatory drug testing of government employees, specifically reserved the issue.[20] This has led many critics to question the legislation's effectiveness in deterring drug use in the workplace.[21]

While the Act is silent on drug testing, major agencies have issued rules requiring grantees or contractors to test for drugs under certain circumstances. The Department of Defense, for example, issued an interim rule on September 28, 1988, requiring prime defense contractors to implement and maintain a program to achieve a drug-free workplace.[22] The rule requires that employees in "sensitive positions" be tested for drugs. In addition, contractors have "discretion" to test employees: (1) who are suspected of drug use; (2) who are involved in an accident; or (3) who were previously in drug counseling or rehabilitation programs.[23] The Act does not preempt the Defense Department's interim rule, and as a result, defense contractors must

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17. Drug-Free Workplace Act of 1988, *supra* note 13, at § 5153(a)(1), 41 USCA § 702(a)(1).

18. NEW DRUG-FREE WORKPLACE ACT, *supra* note 13 at 8. Industry response raised concerns that this provision might encourage harassment of contractors who tried in good faith to comply with the requirements. *Id.* at 9.

19. *Id.* at 10. Certain industry witnesses urged Congress to implement mandatory drug testing programs, while others raised concern that the Act would encourage employers to institute intrusive procedures such as physical searches and mandatory drug testing as means of "complying" with the legislation. *Id.* (testimony of Morton Halperin, Director, American Civil Liberties Union (ACLU), and Allan Adler, ACLU legislative counsel).

20. *Id.* at 13. The committee report clearly states that "mandatory drug testing and other employee search activities are neither required nor approved for purposes of certifying that an employer will provide a drug-free workplace, or has made a good-faith effort to do so."

21. *See,* Note, *Legal and Practical Considerations in Developing a Substance Abuse Program,* 6 LAB. LAW. 859, 862 (1990) (hereinafter, "*Legal and Practical Considerations*").

22. NEW DRUG-FREE WORKPLACE ACT, *supra* note 13 at 18. *See* 48 CFR § 252.223-7504 (1988).

23. *Id. See also, Legal and Practical Considerations, supra* note 21 at 864; 48 CFR § 252.223-7500(c)(4)(ii).

abide by the requirements of the Act, and with the separate requirements of the Defense Department rule.[24]

On December 21, 1988, the Department of Transportation become the second major Federal agency to issue rules affecting private sector employees. This interim final rule requires employers in regulated transportation industries to conduct mandatory, random drug testing of employees in safety-sensitive positions.[25] The regulations cover employees regulated by six federal agencies, each of which has their own set of drug testing procedures. These regulations are by far the most comprehensive that have been implemented to date. Employees covered by these regulations will be subjected to testing as a condition of employment, in routine physicals, upon reasonable suspicion of drug use, and after accidents. In addition, such employees are subject to random testing. [26] The DOT regulations contain detailed testing procedures based upon the requirements of the Department of Health and Human Services (DHHS) regulations discussed above.

III. THE RELATIONSHIP BETWEEN THE NLRA AND MANDATORY DRUG TESTING

Questions have arisen concerning the relationship between the drug testing statutes and the National Labor Relations Act (NLRA). Under the NLRA, an employer whose employees are represented by a labor union is required to bargain with the union over wages, hours and other terms and conditions of employment. The failure to bargain over a mandatory subject of bargaining constitutes a violation of Section 8(a)(5) of the NLRA. The Drug-Free Workplace Act made clear that its requirements would not override the NLRA's provisions regarding collective bargaining agreements.[27] Thus, where employees of a federal contractor or grantee are represented by a labor organization, an agreement concerning a policy against drug abuse must be secured through that labor organization. [28]

Until recently, questions concerning the negotiability of employer substance abuse programs in the private sector have remained unresolved. Some answers were provided by the National Labor Relations Board in the companion cases *Star Tribune, Div. of Cowles Media Co.,* 295 NLRB No. 63 (Jun 15, 1989) and *Johnson Bateman Co.,* 295 NLRB No. 26 (Jun 15, 1989). In *Johnson Bateman Co.,* the Board held that drug and alcohol testing of current employees is a mandatory subject of bargaining because it affects "terms and conditions" of employment subject to negotiation. The Board reasoned

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24. NEW DRUG-FREE WORKPLACE ACT, *supra* note 13 at 23.
25. *Id.*
26. 53 Fed. Reg. 47002 (1988); *see also Legal and Practical Considerations, supra* note 21 at 864.
27. NEW DRUG-FREE WORKPLACE ACT, *supra* note 13 at 22.
28. *Id.*

that testing of current employees is germane to the working environment because such testing is "closely analogous" to physical examinations and polygraph testing, both of which are mandatory subjects of bargaining. Thus, the Board's ruling prohibits an employer from unilaterally implementing a drug testing plan for current employees. By comparison, in *Star Tribune,* the Board held that testing of job applicants is not a mandatory subject of bargaining, because applicants are not employees under the National Labor Relations Act. Moreover, no relationship yet exists between the employer since the applicant has performed no services for the employer. The Board, nonetheless, required the employer to provide the union with information regarding the testing procedures based upon the union's claims that male and female applicants were subject to different procedures. It has thus been established that an employer may be required to supply information regarding the drug testing policies for applicants, including information on the applicants who have submitted to drug tests, or refused to submit to drug tests, in order to ensure that procedures are applied in a non-discriminatory manner.

It is well settled that the policies underlying the NLRA are not to be enforced "single-mindedly," without taking into account "other and equally important Congressional objectives."[29] An employer's obligations under the NLRA thus must be in harmony with federal regulations that mandate benefits or procedures which otherwise would be required subjects of bargaining.[30] In short, an employer is excused from the duty to bargain in matters where the action is legally compelled.[31] This exception includes the drug testing mandated by federal regulations such as those of the Department of Transportation.[32] Nonetheless, the Transportation Department's regulations permit discretion regarding the selection of a Medical Review Officer (MRO), testing procedures, and the type of discipline to be imposed where employees test positive. Accordingly, with respect to these areas, an employer is obligated to bargain with the union.

IV. CONSTITUTIONAL ISSUES

Even before drug testing was mandated for all federal employees, challenges were raised to drug testing plans under the Fourth Amendment of the

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29. *Southern Steamship Company v. NLRB*, 316 U.S. 31, 47 (1942) (holding that the Board had exceeded its authority in ordering reinstatement of strikers whose actions were unlawful under principles of admiralty law).

30. *Murphy Oil, USA Inc.*, 286 NLRB 1039, 1042 (1987) (OSHA regulation and Title VII of the Civil Rights Act of 1964); *Foodway*, 234 NLRB 72, 77 (1978) (Internal Revenue Code); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (Fair Labor Standards Act).

31. *Standard Candy Co., supra* note 30.

32. *Legal and Practical Considerations, supra* note 21 at 894.

Constitution, on grounds that the testing constituted an unreasonable search and seizure.[33] The Supreme Court, however, rejected this challenge, holding in *Skinner v. Railway Labor Executives Association* that the post-accident testing of railway employees did not constitute "unreasonable" searches.[34] In *Skinner* the challenged Federal Railroad Administration regulations compelled blood and urine analysis of specific railroad employees involved in train accidents, and authorized breath or urine tests of railroad employees who violate safety rules. In rejecting the challenge, the Court held that the Government's interest in regulating railroad employees engaged in "safety sensitive tasks" justified "departures from the usual warrant and probable cause requirements." Recognizing that the collection of biological specimens constituted a search, the Court determined that the Government's interest in ensuring safety presented special needs that went beyond normal law enforcement and justified the privacy intrusion.[35]

In *National Treasury Employees Union v. Von Raab*[36] the Supreme Court narrowly upheld the United States Customs Service's drug screening program that required urinalysis of employees seeking transfer or promotion to positions directly involved in drug interdiction or the carrying of firearms. The Court held that no warrant was necessary because the government's interest in ensuring the "unimpeachable integrity and judgment" of those with front line interdiction duties outweighs any privacy interest. In the Court's view, three separate interests justify warrantless urine testing by government officials: (1) ensuring workforce integrity, where there is a clear nexus between the employee's duty and the nature of the alleged violation; (2) protecting the public from disastrous consequences; and (3) protecting truly sensitive information.[37] However, the cost in terms of the loss in personal privacy of maintaining a drug-free workplace is high. In a sharply worded dissent, Justice Scalia, joined by Justice Stevens, stated: "[i]n my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[38] Although neither *Skinner* nor *Von Raab* address the constitutionality of "random drug testing," they, nonetheless, severely limit constitutional challenges to drug testing in the federal government, and they likely expand the possibilities for drug testing in both the private and public sector.[39]

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33. *Skinner v. Railway Labor Executive Association*, 109 S.Ct. 1402 (1989); *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989).

34. 109 S.Ct. 1402 (1989).

35. *Skinner*, 109 S. Ct. at 1416-20.

36. 109 S.Ct. 1384 (1989).

37. *Von Raab*, 109 S. Ct. at 1396.

38. *Von Raab*, 109 S. Ct. at 1398.

39. Note, *Alternative Challenges to Drug Testing of Government Employees: Options After Von Raab and Skinner*, 58 GEO. WASH. L. REV. 148, 149 (1989).

Recently, the Eighth Circuit applied the holdings in *Von Raab* and *Skinner,* ruling that a drug testing plan of police officers was unconstitutional since it was neither uniform nor systematically random.[40] Further, the Court stated that the urinalysis testing measures in *Von Raab* and *Skinner* reveal that the routine nature of the particular plans in these cases minimized their intrusiveness and guarded against their arbitrary application to tested employees. Absent such criteria, the test must be supported by reasonable suspicion arising from specific objective facts and reasonable inferences drawn from those facts. The court concluded that a test based only on unsubstantiated rumors was an inadequate basis under *Skinner* and *Von Rabb.*

V. PRACTICAL IMPLICATIONS

Employers face a myriad of legal questions when implementing drug testing procedures. They must walk a delicate tight-rope. On one side, they must fastidiously comply with complex federal regulations and state procedures; on the other, they face the painful prospect of being sued by their employees for privacy violations, defamation and even intentional or negligent infliction of emotional distress.

How should an employer approach these problems? Obviously, an employer must begin by familiarizing itself with its legal obligations in this area, which is no easy task.[41] Once the relevant legal considerations are identified, the employer must attempt to strike an appropriate balance between federal rights involving labor practices and employment discrimination.[42] Failure to strike the appropriate balance can be disastrous for the employer.

In drafting a drug testing plan, the employer should first determine which employees or applicants will be tested and under what circumstances.[43] Generally broad, random testing programs are more likely to be legally challenged than those predicated solely on "reasonable suspicion."[44] Next, the employer should consider what types of disciplinary action to take against employees who test positive. Strong consideration should be given to establishing rehabilitation and other employee assistance programs for affected employees. These plans not only benefit the employee, but also benefit the employer by encouraging addicted employees to seek help. Most signifi-

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40. *Ford v. Dowd,* (Civ. Action No. 88-2782, 8th Cir., filed May 1, 1991).

41. Nonetheless, as once said by James Thurber, "[i]t is better to know some of the questions, than all of the answers."

42. *Legal and Practical Considerations, supra* note 21 at 898-901. (This article contains an excellent guide for employers in implementing drug-testing plans. In addition, it contains an exhaustive analysis of relevant federal and state laws which is beyond the scope of this article). *See also,* Redeker and Segal, *How to Protect Employers Who Test for Drug and Alcohol Abuse,* 33 PRAC. LAW., No. 3, 13 (1987).

43. *Legal and Practical Considerations, supra* note 21 at 898.

44. *Id.*

cantly, the drug testing plan should contain very specific rules in the testing procedures used to ensure the accountability and integrity of the specimens, including a second test for all positive tests. The procedure should also contain safeguards to maintain the privacy and confidentiality of all employees.

VI. CONCLUSION

The growing impact of drug abuse has created a new frontline in the war on drugs. Today, more than ever before, the job site has become a battlefield in this war. Mandatory drug testing has already become a fact of life which increasingly affects American workers. Drug testing in the private and public sectors is here to stay, and the legal and practical implications of such programs will be debated for years to come. In the years ahead, until the drug war is won, our legal system will grapple with the problem of striking an appropriate balance between an individual's privacy rights and the public's interest in eliminating narcotics abuse in the workplace through mandatory testing. In the absence of definitive guidance, employers must attempt to comply with federal and state regulations in a manner which safeguards the rights of their employees.