

**BETWEEN A ROCK AND A HARD PLACE: THE
LEGAL AND MORAL JUXTAPOSITION OF
SWITZERLAND’S BANK SECRECY LAWS AS
ILLUSTRATED BY THE REVELATION OF
NAZI-ERA ACCOUNTS**

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I. INTRODUCTION

Switzerland’s image of neutrality during World War II, a country surrounded by warring nations and yet heroically

maintaining its own peaceful neutrality,¹ has served the Swiss well. Switzerland's official position of neutrality as well as its renowned tradition for absolute secrecy in banking have allowed this tiny nation to grow from obscurity to international prominence as the worldwide banking center.² In fact, for the past fifty years the Swiss citizens have "boasted to their neighbors about their enviable wealth," but it is now apparent that they were "profiting from blood money."³ Discoveries of long dormant Nazi-era accounts have toppled this seemingly sacred historical dogma of the courageous Swiss persevering despite being surrounded by the Nazis and other Axis powers.⁴

Recently, the international community has become increasingly concerned about long dormant accounts of Holocaust victims.⁵ In addition, more and more evidence has surfaced regarding the pivotal role that the Swiss gold purchases from Germany had in prolonging World War II.⁶ The international furor that was created by these revelations and the ensuing threats of various private sanctions⁷ resulted in an unprecedented opening of the wall of secrecy that has surrounded Swiss banking for the past seventy years.⁸

1. See Alfred Defago, *The Swiss Defense: Slowly But Surely, We Are Confronting Our Past*, WASH. POST, Aug. 24, 1997, at C1 (editorial by the Swiss ambassador to the United States).

2. See *Switzerland—An International Financial Center*, 29 BULL. C.J. DEVINE INST. FIN. 2, 2 (1964).

3. TOM BOWER, NAZI GOLD: THE FULL STORY OF THE FIFTY-YEAR SWISS-NAZI CONSPIRACY TO STEAL BILLIONS FROM EUROPE'S JEWS AND HOLOCAUST SURVIVORS at xiii (1997).

4. See *Swiss Banks Release Records on Holders of Nazi-Era Accounts*, DALLAS MORNING NEWS, July 24, 1997, at A13; *Swiss List Unclaimed WWII-Era Accounts, Find \$15 Million More*, BUFF. NEWS, July 23, 1997, at A2 [hereinafter *Swiss List*].

5. See *Swiss List*, *supra* note 4, at A2 (noting that there is an international body charged with tracking missing Holocaust assets).

6. See Maria Puente, *Report Says Nazis Paid Neutral Nations with Stolen Gold*, USA TODAY, June 2, 1998, at A6.

7. Alan G. Hevesi, the New York City Comptroller, issued the three largest Swiss banks the following warning:

Unless they cooperated in disclosing and settling the dormant accounts of Holocaust survivors and victims' heirs, New York City's pension funds might withdraw the \$1 billion they have under Swiss management, sell their \$47 million worth of shares in Swiss banks, and pull their \$150 million in overnight deposits.

Joan Warner et al., *Raging at the Swiss: Will U.S. Anger Over Nazi Gold Lead to Damaging Sanctions?*, BUS. WK., May 26, 1997, at 138.

8. See *Swiss List*, *supra* note 4, at A2.

Consequently, several questions remain unanswered regarding Switzerland's continued neutrality,⁹ the continued viability of Swiss banking secrecy laws,¹⁰ and the inheritance rights of the heirs of deceased depositors.¹¹ The question of Switzerland's continued neutrality will be determined by its international activities in the next century, just as it has been over the last few centuries.¹² However, the latter questions of banking secrecy and inheritance of the newly discovered funds demand immediate Swiss action and their corrective actions must undergo global scrutiny. This Comment will focus upon these latter two questions and attempt to illustrate the legal morass and political difficulties involved in sorting out these accounts.

In addition, the laws that allowed these abuses to occur will be examined against the backdrop of these recent revelations. Consequently, it will become apparent that the proliferation of legislation protecting the financial confidentiality of a bank's clients inevitably led to various abuses. The discussion of these issues is rather hollow without a brief review of the historical events that set the stage for the controversial actions of Switzerland. This is necessary to grasp the context surrounding both the inception of these accounts and the terms of various Swiss dealings with the Nazis. This background information will be presented in Part II.

In Part III, the problems that the Swiss banks face in distributing these funds will be thoroughly examined. The distribution of a single account is potentially controlled by the probate codes of the several nations in which the heirs reside. Accordingly, this paper will primarily focus on the conflict of laws problem and compare the author's conclusions to the actual practices of the Swiss banks today. Following this, the continued viability of this type of banking secrecy will be examined in light of the stated benefits and

9. See Defago, *supra* note 1, at C1 (calling for a reasoned and informed debate regarding Switzerland's claimed neutrality during World War II).

10. See PESTALOZZI GMUER & HEIZ, BUSINESS LAW GUIDE TO SWITZERLAND ¶ 1135 (1991) (noting that Switzerland believes that maintaining bank secrecy is necessary to ensure its customers' trust in the Swiss banking system).

11. See SCHWEIZERISCHES ZIVILGESETZBUCH, CODE CIVIL SUISSE, CODICE CIVILE SVIZZERO [ZGB, Cc, Cc] art. 560 (Switz.) (noting that the inheritance is vested in the heir or heirs at the death of the deceased).

12. Switzerland has been a neutralized country since 1815. See GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 61 (5th ed. 1986). "[O]n February 13, 1920, the League of Nations 'recognized' the permanent neutrality of Switzerland." *Id.*

potential for abuse, as illustrated by both the current controversy and other evidence of its facilitation of worldwide organized crime.

II. HISTORICAL DEVELOPMENT

In order to grasp the inappropriateness of Switzerland's conduct during the course of World War II, one must understand the historical context in which its actions occurred. After World War I, Switzerland was recognized by the League of Nations as an officially neutral state.¹³ This action buttressed the century-old neutralization of Switzerland that was imposed due to its penchant for producing mercenary armies to terrorize 19th Century Europe.¹⁴ The rise of Nazi Germany provided the first real test of Swiss neutrality.

By November 1940, the Allies had lost thousands of soldiers in German-occupied France, British cities were being destroyed, and sailors of the Royal navy were being lost at sea.¹⁵ Reports were pouring out of occupied Europe of "oppression, arrests, executions and tyranny;" these events were characterized by the press as "Our Darkest Hour."¹⁶ In that same month, two hundred leaders of Switzerland's political and financial institutions petitioned their government to act more favorably towards the Nazis.¹⁷ While other European nations were struggling for their very survival against the apocalyptic power of the Nazi forces, "Switzerland was aligning itself with evil."¹⁸ However, the Allies' flawed perception of the Swiss predicament was much more sympathetic. The traditional interpretation of events centers on the success of Germany's blitzkrieg tactics and the Allies' attitude of German pacification, while Switzerland's "misconduct was relegated as of minor importance."¹⁹

13. *See id.* at 61.

14. *See id.*; Peter Sager, *Swiss Federalism: A Model for Russia?*, 1995 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 163, 163 (noting the use of Swiss soldiers as mercenaries by neighboring European countries).

15. *See* BOWER, *supra* note 3, at xi.

16. *Id.*

17. *See id.* (noting that the Nazi sympathizers in Switzerland had acted prior to any overt aggression directed toward Switzerland from Nazi Germany).

18. *Id.*

19. *Id.*

Due to this military success, Germany effectively isolated Switzerland through its conquests of France and Poland.²⁰ In addition, Germany's allies in Spanish and Italian fascist regimes completed the encirclement.²¹ Thus, Switzerland and its five million people found themselves cut off from the rest of the free world by Axis forces and defenseless against the German war machine.²² While this situation appeared desperate at the time, the Swiss are now being held accountable for their practices and business dealings that they conducted under the auspices of preserving Switzerland as an independent state.²³

A. *Swiss-Jewish Relations in the World War II Era*

During this era, various individuals were facing persecution at the hands of the Nazis.²⁴ Many of them risked criminal penalties and smuggled their assets into Switzerland.²⁵ Not unaware of this practice, Germany began to exert political pressure upon the Swiss to reveal the assets of Jewish fugitives.²⁶ In addition to this external pressure from Nazi Germany, the attitude of Switzerland towards the Jewish people was anything but sympathetic.²⁷

Centuries of indoctrination by their dogmatic Catholic priests caused Switzerland to have "a primitive hatred of the Jews as the killers of Jesus Christ."²⁸ By 1886 Switzerland was the only European country that had not granted civil rights to Jews.²⁹ This paper will illustrate how the undercurrent of Swiss anti-Semitism manifested itself in many ways throughout the course of World War II and, as this Comment will illustrate, in the fifty years thereafter.

20. See MICHAEL FREEMAN, *ATLAS OF NAZI GERMANY: A POLITICAL, ECONOMIC AND SOCIAL ANATOMY OF THE THIRD REICH* 136-42 (2d ed. 1995) (explaining and depicting how Germany used the Blitzkrieg to conquer France and Poland).

21. See *id.* at 140 (depicting occupied Europe by Germany and other Axis powers).

22. See *The Disposition of Assets Deposited in Swiss Banks By Missing Nazi Victims: Hearing Before the Comm. on Banking and Fin. Servs.*, 104th Cong. 99 (1996) [hereinafter *Leach*] (opening statement of Representative James A. Leach, Chairman, House Committee on Banking and Financial Services).

23. See *id.*

24. See Arthur L. Berney, *Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor*, 17 B.C. THIRD WORLD L.J. 275, 275 (1997).

25. See *Leach*, *supra* note 22, at 95.

26. See *id.*

27. See BOWER, *supra* note 3, at 20.

28. *Id.*

29. See *Id.*

B. Swiss Profiteering and Tacit Partnership with Germany During World War II

The legend of Switzerland as a universal asylum from the Nazis³⁰ proved to be little more than a myth for Jews who were fleeing Nazi persecution.³¹ On April 7, 1933, Switzerland slammed the door in the faces of thousands of Jews applying for asylum.³² Jews “fleeing from the Nazis as religious rather than ‘political fugitives’ were denied the status that automatically granted asylum under the Swiss Constitution.”³³ The wealthy Jews who allowed the Swiss to profit from their misfortunes were the fortunate few that the Swiss granted automatic asylum.³⁴

As the Jewish predicament worsened, the Swiss began to forcibly repel Jewish refugees at the Swiss border.³⁵ However, the Swiss found that even these extreme measures were ineffective in questions of deportation.³⁶ In order to facilitate the exclusion of Jewish refugees, Switzerland increased its immigration restrictions.³⁷ Additionally, it had become increasingly difficult to differentiate between Jewish and non-Jewish immigrants.³⁸ Therefore, Germany began marking Jewish passports in a distinctive manner at Switzerland’s request.³⁹ Germany had been hesitant to do so because its policy was “to encourage Jewish emigration.”⁴⁰ However, the Swiss wished to stem the flow of Jewish immigrants, who were considered “unwanted mouths, millstones, even

30. *See id.* at 17 (describing a Jewish family’s relief and feelings of safety upon crossing the border into Switzerland in 1942).

31. *See id.* at 21.

32. *See id.*

33. *Id.* Despite the thousands seeking refuge, “[b]y 1942, just 9,150 foreign Jews were legally resident in Switzerland, only 980 more than in 1931.” *Id.*

34. *See id.* Diplomats who knew of Jewish property and factories that could be purchased cheaply in Germany and occupied Europe tipped off Swiss businessmen. Among the victims of this arrangement was Frederick Weissmann, the owner of a shoe factory in Berlin. “After running [his] business for thirty years [he] was compelled by Germany’s Aryanization laws to sell the factory.” Bally Shoes, the Swiss giant who had made similar acquisitions in Germany, purchased the factory for one mark. Bally, in turn, arranged an entry visa for Weissmann that saved his life. *Id.*

35. *See id.* at 22.

36. *See id.* at 22–23 (explaining that keeping the Jews out of Switzerland was becoming increasingly difficult and that an international conference was convened to discuss the problems associated with Jewish refugees).

37. *See id.* at 21–22.

38. *See id.* at 22.

39. *See id.* at 23.

40. *Id.*

vermin"⁴¹ as compared to all other foreigners requesting entry into Switzerland. In response to persistent Swiss pressure, Germany began stamping Jewish passports with a prominent letter *J*.⁴²

While the Swiss did not wish to allow Jewish immigrants to enter the country, they were more than willing to hold the wealth of these individuals indefinitely.⁴³ This money was typically brought into Switzerland illegally by a third party.⁴⁴ According to the Swiss, they adopted the Federal Banking Law in 1934, introducing new criminal prohibitions to protect bank secrecy and prevent access by prying Nazi officials.⁴⁵ The new law punished any breaches of bank secrecy by fines and incarceration.⁴⁶ While this new law was enacted to protect the confidentiality of bank accounts, it did not protect other Jewish equity within Switzerland.⁴⁷ For example, pursuant to a 1938 Nazi Law, the Life Insurance Company of Basel transferred millions of francs to the German government, effectively cashing in the policies of every Jewish customer.⁴⁸ The company did not even bother to notify the policy holders of its action.⁴⁹

Additionally, the passage of the Federal Banking Law may have acted as an absolute bar to revealing or allowing the confiscation of secreted funds by a grasping Nazi

41. *Id.* at 22.

42. *See id.* at 23 (noting that the infamous "J stamp," a symbol that grew to symbolize the German persecution of the Jewish people, was actually in response to Swiss requests).

43. *See id.* at 11-12 (noting that Swiss banks hold assets indefinitely if no death certificate is produced).

44. *See Swiss Banks and the Status of Assets of Holocaust Survivors or Heirs: Hearing Before the Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 34, 49 (1996) [hereinafter *Baer*] (testimony and prepared statement of Hans J. Baer, Chairman, Bank Julius Baer and Baer Holding Ltd., and Member, Swiss Bankers Association Executive Board).

45. *See* Paolo S. Grassi & Daniele Calvarese, *The Duty of Confidentiality of Banks in Switzerland: Where It Stands and Where It Goes. Recent Developments and Experience. The Swiss Assistance To, and Cooperation with the Italian Authorities in the Investigation of Corruption Among Civil Servants in Italy (the "Clean Hands" Investigation): How Much is Too Much?*, 7 PACE INT'L L. REV. 329, 335-36 (1995). Currently, this 1934 law can be found in Article 47 of the Banking Statute. *See* Jorg Schwarz, *Swiss Banking Secrecy: Not a Legend*, ECON. & FIN. PROSPECTS, Oct.-Nov. 1992, at 3.

46. *See* Grassi & Calvarese, *supra* note 45, at 335.

47. *See* BOWER, *supra* note 3, at 111 (describing how Swiss insurance companies paid the Nazis life insurance benefits owed to Jews).

48. *See id.*

49. *See id.*

Germany.⁵⁰ However, it did not prevent Swiss banks from acting as a clearinghouse for any gold presented by the German government.⁵¹ According to the Eizenstat Report prepared by the United States Under Secretary of Commerce in 1997,⁵² the Swiss purchased significant amounts of gold from Germany in the 1930s and 1940s.⁵³ This gold that the Swiss purchased from Germany was primarily looted from the national depositories of various conquered nations and Nazi victims.⁵⁴

Nevertheless, the Swiss originally claimed that their actions were the result of German coercion.⁵⁵ Unfortunately, this explanation for Swiss compliance does not withstand even a minimal amount of scrutiny.⁵⁶ The immense profit that the banks realized is enough to indicate willing complicity.⁵⁷ It is equally questionable when one notes that this money was made both at the apex of German power as well as during the waning days of the war.⁵⁸ The Swiss trade continued well after most of Europe had been liberated and the Nazis were in a full retreat.⁵⁹ Therefore, it is apparent that these transactions were voluntary acts of capitalism rather than reluctant capitulation by a weaker nation resulting from intense coercion.⁶⁰ It has been determined that some of the looted treasures originated in the houses, accounts, and dental work of German Jews who were slaughtered by Adolf Hitler.⁶¹

50. See Grassi & Calvarese, *supra* note 45, at 336 (arguing that the Swiss Banking Law helped shield the assets of numerous Jewish fugitives).

51. See BOWER, *supra* note 3, at 52–53 (describing how Swiss banks helped conceal financial transactions of seized gold by the Nazis).

52. WILLIAM Z. SLANY, U.S. DEP'T OF STATE, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUDY (1997) [hereinafter EIZENSTAT REPORT] (coordinated by Stuart Eizenstat).

53. See *id.* at iv–v.

54. *Id.* at iv (discussing the plundering of gold from conquered nations and victims into Nazi banks).

55. See Roger C. Altman, *The Triumph of Morality*, L.A. TIMES, Aug. 3, 1997, at M1.

56. See *id.* at v–vi (detailing the full extent of Swiss cooperation with Nazi Germany and their reluctance to cooperate in negotiations and agreements with the Allied powers).

57. See *id.*

58. See *id.* at iv–v (stating that Germany transferred gold to the Swiss National Bank in Bern from the beginning of the war in 1939 until the end of the war in 1945).

59. See *id.* at v (noting that commerce with Germany persisted even after the German threat was diminished).

60. See *id.*

61. See BOWER, *supra* note 3, at 53–54.

Commentators, as well as the general public, often confuse the various sources of the gold in question and the various issues raised by the existence of each set of deposits. In order to understand the situation in its entirety, it is vital to understand this distinction. What has become known as the "Nazi gold" is easily separated into three main categories.⁶² "The first is monetary gold which was looted by the Nazis from the central banks of those countries they occupied."⁶³ This gold was partially recovered "by the Allies, [and was] distributed by the Tripartite Gold Commission of the United States, the United Kingdom and France to 10 claimant countries."⁶⁴ The second category includes "private German and Nazi property which was blocked in Switzerland by the U.S. government and others at the end of the war."⁶⁵ This category includes assets looted from individual victims of the Nazis.⁶⁶ The third category comprises the "heirless and unclaimed assets of Holocaust victims."⁶⁷

The brokerage of these assets was vital to Germany's war effort.⁶⁸ The "neutral" Swiss, both directly and indirectly, aided in financing the German war effort and secured a handsome profit by handling and purchasing the wrongfully confiscated Jewish assets.⁶⁹ This activity illuminates the Faustian decision of the Swiss during World War II, and it explains a great deal about their ability to forestall a Nazi invasion in an era of sweeping German conquests.⁷⁰ While successfully preventing a German conquest and providing a haven to any individual able to bring assets to Switzerland, this country also served as a willing broker for the German

62. See *The Disposition of Assets Deposited in Swiss Banks By Missing Nazi Victims: Hearing Before the Comm. on Banking and Fin. Servs.*, 104th Cong. 27-28 (1996) [hereinafter *Eizenstat Statement*] (statement of Stuart E. Eizenstat, the Under Secretary of Commerce).

63. *Id.* at 28.

64. *Id.*

65. *Id.*

66. See *id.* These include "personal jewelry, life insurance accounts, and most ghoulish, even the teeth of those who were killed in the death camps." *Id.* Investigators established that Switzerland's National Bank had accepted German gold and ingots manufactured from the rings and fillings taken from Jewish victims. See BOWER, *supra* note 3, at 54.

67. *Eizenstat Statement*, *supra* note 62, at 28. These are the "dormant accounts" that have formed the nucleus of the popular controversy. Typically, these accounts were established between 1933 and 1945 with no record of any additional activity. See *id.*

68. See EIZENSTAT REPORT, *supra* note 52, at 4 (observing that the brokerage of the assets enabled Germany to acquire items such as gasoline).

69. See *id.* at 4-5.

70. See Leach, *supra* note 22, at 99.

war machine and conducted sympathetic commerce with Germany.⁷¹ The Swiss conducted these transactions with knowledge of the atrocities committed by Germany⁷² and the origins of the gold.⁷³ Washington, London, and Paris took note of Switzerland's lack of ethics.⁷⁴ However, compared to the atrocities committed by the Nazis, Switzerland's misconduct was seen as of little importance.⁷⁵

After the recent discoveries, there is currently a movement to re-open the 1946 Washington Accords⁷⁶ to determine the degree of Swiss compliance or noncompliance with their treaty obligations under these agreements.⁷⁷ The Washington Accords called for the return of all Nazi funds that had been looted from the national treasuries of countries that Germany defeated.⁷⁸ However, the *Eizenstat Report* states that the Swiss consented to return only a very small percentage of the looted funds held within their vaults and did so only after prolonged negotiations and epic intransigence.⁷⁹ The Swiss argue that they paid for the bullion in good faith with Swiss francs and that they were not merely holding the wealth for the German government.⁸⁰

Through their brokerage efforts, the Swiss converted the German gold and other assets into cash, which was then paid into Germany's account.⁸¹ The Nazis, in turn, used these funds to finance the purchases of more and more war materiel.⁸² As such, the Swiss maintain that the wealth that

71. See *id.* at 95–97.

72. See BOWER, *supra* note 3, at 22.

73. See *id.* at 54 (noting that the Swiss ignored Allied warnings as to the origins of German gold).

74. See *id.* at 54–56 (noting the president of the Banque de France warned that the Swiss bank was accepting looted gold, and both the United States and Britain announced their refusal to recognize the transference of the gold).

75. See *id.* at xi.

76. See Agreement Concerning German Property in Switzerland, Aug. 28, 1952, 13 U.S.T. 1131 [hereinafter Washington Accords].

77. See Al D'Amato, *D'Amato: Swiss Must Account for All Holocaust Assets Held During and After WWII*, available in 1997 WL 4432879 (press release of U.S. Senator Al D'Amato on May 15, 1997).

78. See Washington Accords, *supra* note 76, at 1131.

79. EIZENSTAT REPORT, *supra* note 52, at vii. In fact, "U.S. negotiators concluded by 1950 that the Swiss had no intention of ever implementing the 1946 Washington Accords." *Id.*

80. See *id.*; see also Jennifer A. Mencken, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. INT'L & COMP. L. REV. 463 (1998) (noting that Swiss received gold bullion from Germany in exchange for Swiss francs).

81. See EIZENSTAT REPORT, *supra* note 52, at iv–v.

82. See *id.*

they had acquired was not wrongfully held.⁸³ Rather, they had paid the Germans for liquid assets on the open market and should not be required to relinquish that for which they paid value without some compensation.⁸⁴

Switzerland's arrogant failure to comprehend its own wrongdoing when presented with the evidence of its insidious profiteering has resulted in pressure from the international community to end their pattern of indifference.⁸⁵ The combination of banking secrecy, capitalistic opportunism, lack of escheat laws, and the absence of governmental oversight in the banking area allowed the greatest criminal money-laundering scheme in history to go unnoticed for fifty years.⁸⁶ It is only because of recent revelations from the former Soviet Union and constant worldwide pressure from Jewish organizations that the long-dormant Nazi-era accounts were uncovered.⁸⁷

The historical context adds to the poignancy of this controversy and explains the international focus upon this issue. Had it been discovered that Italy or another Axis power had participated in such conduct, there would have been no international uproar.⁸⁸ Rather, this would simply have been another terrible facet to the Holocaust. However, most governments as well as the citizens of both Switzerland and the United States had long accepted that the Swiss played a heroic role in World War II.⁸⁹ While they did maintain their neutrality and did shelter some refugees,⁹⁰ their conduct was far from heroic and at times rather sinister. Unfortunately for the Swiss, this "historical fact" has not been able to withstand the test of time.

83. *See id.* at vii.

84. *See id.*

85. *See id.* at viii. The United States, Sweden, Portugal, Spain, France, Norway, the Netherlands, Belgium, Brazil, Argentina and Poland have indicated their concern and have established commissions to aid their own citizens with claims on the Swiss accounts. *See id.* at xi.

86. *See BOWER, supra* note 3, at 42-44.

87. *See EIZENSTAT REPORT, supra* note 52, at iv (observing that documents have been declassified and made available to the public).

88. *See BOWER, supra* note 3, at 14-15 (suggesting that Switzerland's behavior is more controversial because of its image as an extremely honest and law-abiding country).

89. *See id.* at 15 (noting that a Swiss diplomat believes that Swiss collaboration with the Nazis was inconceivable).

90. *See, e.g., BOWER, supra* note 3, at 2 (observing that millions of Swiss francs had been deposited in Swiss banks as a safe haven for Europe's Jews. After their murder, their bank records disappeared, and the Swiss were unwilling to divulge information on these secret accounts).

III. INTERNATIONAL DISPOSITION OF UNCLAIMED ACCOUNTS

This whirlwind of controversy may involve a revision of European history and a re-examination of Switzerland's continued neutrality. However, after all the controversy is complete, Switzerland will most likely retain its neutral status.⁹¹ However, it is vital not to forget the more mundane problem that prompted this worldwide outrage.⁹² The issue that is sometimes lost in all of the geopolitical discussion is the distribution of the newly discovered funds.⁹³ It would be very convenient if the depositors were still alive or if they had been Swiss citizens at the time of the deposits. Unfortunately, the accurate disbursement of these funds involves handling multinational claims upon accounts that were often opened under fictitious names or by individuals who died in Nazi concentration camps.⁹⁴

The heirs and claimants of these accounts are citizens of many nations. In fact, several individual descendants often assert distinct claims upon single accounts.⁹⁵ Each of their claims is subject to proof of inheritance.⁹⁶ Even the simple application of a *per stirpes*⁹⁷ distribution to these myriad claimants is enough to confuse even the most experienced bank officer.

91. See VON GLAHN, *supra* note 12, at 61 (noting Switzerland and Laos as the only neutralized states to withstand the test of time).

92. See BOWER, *supra* note 3, at 3 (noting that there are two basic problems for the Swiss: finding the heirless assets and deciding who will receive the money).

93. See EIZENSTAT REPORT, *supra* note 52, at xi-xii.

94. See BOWER, *supra* note 3, at 2-3 (observing that the issue gets complicated because Jews murdered in the Holocaust deposited the money).

95. See Mencken, *supra* note 80, at 462 (noting that for many survivors of the Holocaust and their descendants "their entire lives were bound in a single bookkeeping entry in a bank.").

96. See Baer, *supra* note 44, at 55.

97. *Per stirpes* is defined as follows:

This term, derived from the civil law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, had he or she lived, taking thus by their right of representing such ancestor, and not as so many individuals, it is the antithesis of *per capita (q.v.)*.

A. *Traditional Swiss Banking Practices and the Respective Laws of Succession*

The first portion of this discussion will focus on the Swiss practices for disposing of a deceased depositor's account. Under Swiss law, the account and respective rights appurtenant thereto are automatically acquired by the heirs of a deceased depositor.⁹⁸ The duty of confidentiality is not deemed to be a right that is strictly personal in nature.⁹⁹ Therefore, the rights of the deceased are imputed to the heirs, and the bank may not prevent access to account information simply because of its original duty of confidentiality to the deceased.¹⁰⁰

On the contrary, strictly personal information regarding a particular client must continue to be protected after death.¹⁰¹ However, basic account information is not considered strictly personal and must therefore be revealed to the heirs.¹⁰² The information that the bank must provide is limited to that which is "necessary to establish the value of the estate at the decedents time of death."¹⁰³ Any "[i]nformation relating to events occurring prior to the death" of the original depositor remain confidential unless the heirs attempt to establish that the funds were illegally transferred prior to death.¹⁰⁴ "With respect to legal heirs, the [d]uty of [c]onfidentiality" is inapplicable "in connection with procedures against the estate pursuant to Article 522 of the Civil Code."¹⁰⁵ In these cases, disclosure will occur with respect to transactions that occurred even before the owner's death, unless "the express request of secrecy by the deceased consists of interests superior to the interest of the legal heirs to establish the exact amount of the estate."¹⁰⁶ The code recognizes that the heirs' rights "to obtain [i]nformation based on legal or contractual rights is general" and bestows rights on the

98. See ZGB, Cc, Cc art. 560 (Switz.).

99. See Grassi & Calvarese, *supra* note 45, at 341.

100. See *id.*

101. See *id.*

102. See *id.* at 341-42.

103. *Id.*

104. *Id.* at 342. However, the Swiss have recently reviewed whether to extend this right to information concerning a decedent's acts in instances involving transfers to trust accounts of which the decedent was the beneficiary in order to trace the money to its source in the hope of discovering any potential additional assets. See *id.* at 342 n.58.

105. *Id.* at 342.

106. *Id.*

administrators of an estate and officials who are “responsible for the inventory of estate properties.”¹⁰⁷

Obviously, the application of Swiss law and the recognition of the rights of the heirs depends upon a few fundamental facts, the first of which is proof of the death of the depositor such as a death certificate.¹⁰⁸ The second issue central to this discussion is proof of heirship.¹⁰⁹ Until the bank is certain as to these two questions, it is in the bank’s best interest not to disclose any account information to a person who claims to be the legal heir of a deceased depositor.¹¹⁰ The third issue is precise identification of the bank account.¹¹¹ Unfortunately, these administrative requirements, while reasonable on their face, present some rather insensitive requirements upon Jewish claimants of these accounts.¹¹²

Even though these administrative requirements may prove to frustrate the efforts of families of Holocaust victims,¹¹³ one must decide how the banks should go about assessing the claims of an alleged heir. Accurately identifying the legal heirs of the deceased becomes increasingly difficult because the laws of various countries treat heirship quite differently.¹¹⁴ This conflict of laws issue will be further explored herein, and the practices of the Swiss banks will be contrasted with the requirements of this body of law.

B. International Conflict of Laws Analysis for the Appropriate Succession of the heirs of the Deceased

“[T]reaties, statutes, court decisions, and consular activit[ies]” often focus on distribution of assets left after the death of a foreigner in a foreign country.¹¹⁵ More than a

107. *Id.*

108. See BOWER, *supra* note 3, at 5–6.

109. See *id.*

110. See *infra* Part IV, Section B (discussing the various criminal penalties and civil liabilities associated with breaches of bank secrecy).

111. See BOWER, *supra* note 3, at 5–6.

112. See *id.* at 6. The claimants do not possess documentary evidence of their ancestors’ death, but must rely on anecdotal evidence. See *id.*

113. See *id.* at 312–17 (discussing bank investigations into claims by alleged heirs).

114. For example, common law countries no longer recognize a system of primogeniture while several civil law countries have instituted a system of forced shares. See Deborah A. Batts, *I Didn’t Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1211 (1990).

115. ERNST RABEL, 4 THE CONFLICT OF LAWS: A COMPARATIVE STUDY 246 (1958).

century ago, the United States, France and Switzerland entered into a series of bilateral agreements among themselves that remain valid today.¹¹⁶ These agreements “stabilized court jurisdiction over inheritance claims and competency of consulates to take care of property owned by their nationals.”¹¹⁷ Unfortunately, while these accords were drafted with the best of intentions, they provide very little guidance on the selection of the applicable law for a given controversy.¹¹⁸ The drafters apparently proceeded under the assumption that each “tribunal would apply its own domestic law” to a given controversy.¹¹⁹ However, the courts of various jurisdictions have often ignored this assumption and demanded that the law of the country or state in which the deceased was domiciled to be the applicable law.¹²⁰

Consequently, this international body of law erected several broad approaches regarding inheritance rights. The first such approach is enshrined in the theory of *lex situs*.¹²¹ This system seems antiquated in a world where cash assets are often held in a computer database that can be accessed in any bank branch worldwide. Under this system, the international property of an individual is completely divided, and the physical location of each asset determines the choice of applicable law.¹²² This location-based test was developed in a day of actual cash transfers and was most useful prior to the advent of computerized banking. Its modern usage leads to absurd results and often creates confusion rather than providing sensible uniformity.¹²³

The second, more modern approach is to apply the law of the deceased's final domicile to the assets of the deceased.¹²⁴ If an individual has double nationality, then the applicable law will be divided on the basis of “local domicile, religion,

116. *See id.* at 247.

117. *Id.*

118. *See id.*

119. *Id.* The American-Swiss treaty of 1850, Article VI, says: “Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.” *Id.*

120. *See* RABEL, *supra* note 115, at 248 (noting that the United States has overlooked the law where the property is located). A New York court held that Swiss conflict-of-laws rules mandated that New York law be applied to property of a decedent with dual Swiss and American citizenship. *See In re Schneider*, 96 N.Y.S.2d 652, 661 (Sur. Ct. N.Y. County 1950).

121. *See* RABEL, *supra* note 115, at 249.

122. *See id.* at 253.

123. *See id.* at 257.

124. *See id.* at 249.

race, or caste.”¹²⁵ Lastly, mixed systems exist that allow foreign laws to apply in most situations, but maintain jurisdiction over a narrow set of assets.¹²⁶ These underlying premises are illustrated throughout the entire discussion of both international testamentary disposition and the consequences of intestacy.¹²⁷ This area of the law is generally known as the law of succession.

In the United States, and in “all [other systems] that assign primary importance to the territory in which the assets of the estate are located,” the localization issue becomes particularly relevant.¹²⁸ This question is also important for issues of taxation, escheat, and procedure.¹²⁹ It is important to note that the *situs* for the administration of an estate is not necessarily identical to the *situs* for purposes of civil procedure, seizure, garnishment, or taxation.¹³⁰

C. Recognition of Beneficiaries

The application of differing conflicts-of-law rules creates a schism in the estate that is fundamental to the issue of recognizing beneficiaries.¹³¹ The law chosen “affects the limits and order of intestate succession, especially of the [different] benefits of a surviving spouse or collateral relatives; the form and intrinsic validity of wills; . . . and liability for claims.”¹³² A survey of conflicts systems relating to inheritance reflects that immovable assets are separately treated and subject to local law (*lex situs*) in many jurisdictions.¹³³ Movable assets are typically subject to conflicts-of-law rules and may be distributed accordingly.¹³⁴

“Each law governing a part of the estate designates the order of intestate succession,” along “with all its conditions and effects.”¹³⁵ Therefore, the jurisdiction within which one wishes to settle an estate will dictate the degree of relation

125. *Id.* at 259.

126. *See id.* at 260. For instance, the Swiss will allow foreign law to apply to foreign domiciled citizens, but will apply Swiss law to the disposition of real property situated in Switzerland. *See id.*

127. *See id.* at 354 (discussing conflicts-of-law rules and their influence on the laws of succession and intestacy).

128. *Id.* at 412.

129. *See id.*

130. *See id.* at 412–13.

131. *See id.* at 398.

132. *Id.*

133. *See id.* at 397.

134. *See id.*

135. *Id.* at 399.

recognized under the law.¹³⁶ Accordingly, the formal and substantive requirements for wills are governed separately by each law,¹³⁷ and these conditions must be met in order to probate a will in that jurisdiction. "Ordinarily the court at the place of the deceased's last domicile has jurisdiction over his estate, excepting foreign assets under the control of foreign law."¹³⁸

For these reasons, the determination of localization is of primary importance to the question of heirship. The law of the locality in which either the deceased or his assets resided dictates who may assert a claim against these assets.¹³⁹ This problem is compounded when one considers the strictures of Swiss banking secrecy.¹⁴⁰ Under Swiss law, the bank may disclose to the heirs of the account owner enough information to establish the amount and substance of the assets of the deceased.¹⁴¹ Until the heirs acquire the contractual rights of the deceased, the bank may not disclose information that is of a personal nature.¹⁴² Because the Swiss banks have done the minimum to aid the heirs of the Holocaust victims,¹⁴³ the heirs of an individual who died intestate may never know that the deceased possessed a lucrative account in Switzerland.

All of these factors must be considered when giving attention to situations where one law governs the inheritance but the assets are located in other territories (i.e. Switzerland). Since Swiss law governs the banks, they must deliver all information necessary to establish the amount and substance of the assets of the deceased,¹⁴⁴ but only after the heir satisfies the banks' standards for proving heirship. Recognizing the potential inequities resulting from distributions to claimants residing in various countries, the

136. *See id.* For example, Spanish law recognizes heirs up to the sixth degree for movables, while French courts allow inheritance to the twelfth degree for immovables. *See id.*

137. *See id.* at 400.

138. *Id.* at 410.

139. *See id.* at 412.

140. *See* PESTALOZZI GMUER & HEIZ, *supra* note 10, at ¶¶ 1135-38 (outlining the secrecy laws of Swiss banks).

141. *See* Grassi & Calvarese, *supra* note 45, at 341.

142. *See id.*

143. *See Swiss Banks Release Records on Holders of Nazi-Era Accounts*, *supra* note 4, at A13 (explaining how Swiss bureaucracy and silence kept Jewish assets hidden for many years after the war).

144. *See* Grassi & Calvarese, *supra* note 45, at 341 (explaining that Swiss banks must deliver confidential information regarding assets to the heirs of the deceased).

Swiss have determined that this is the most effective manner of administration.¹⁴⁵

The initial step in examining the law of succession is to establish the status of the beneficiaries. The primary question in this area is whether the beneficiary qualifies to share in the inheritance.¹⁴⁶ In the case of spousal succession, the tribunal will ordinarily not question the validity of a marriage or divorce.¹⁴⁷ This approach is similar to determining the status of the “issue” of the intestate.¹⁴⁸ While more controversial, the predominate practice is to use the normal conflicts laws of the forum to determine which individuals shall be recognized as children of the deceased.¹⁴⁹ However, some believe the law governing the beneficiary should be used to decide whether a certain individual fulfills the conditions necessary to be recognized as a legal beneficiary.¹⁵⁰

This system of beneficiary recognition becomes increasingly complex as the number of descendants increases and their nationality varies.¹⁵¹ This results in the positive conflict of conflicts rules.¹⁵² Typically, the laws of both states will claim the inheritance, and each will distribute all of the assets they can seize within their borders or reach in accordance with their own law.¹⁵³ While this is a simple solution, it does not seem appropriate to initiate the distribution of these Jewish funds with a system that leads to a frenzy of money grabbing. This may only compound the injustices already suffered. Rather, the correct application of

145. See RABEL, *supra* note 115, at 251–52 (explaining how different jurisdictions provide complex and disparate directions on the distribution of these assets). The claimants would be encouraged to forum shop for the jurisdiction that most enhances their claim through the application of forced share laws and distribution schemes. See *id.* at 274–75 (illustrating the various treatments of Swiss assets).

146. See *id.*

147. See *id.* The requirements for marriage or divorce need not meet local standards, only those of the forum in which the union occurred. See *id.* at 355–56.

148. See *id.* at 356.

149. See *id.* The ensuing result is that the tribunal often uses its own standards for determining heirship to designate the appropriate beneficiaries. See *id.*

150. See *id.* at 363.

151. See *id.* at 397 (explaining positive conflict of conflicts rules that apply when citizens of one country die in another country).

152. See *id.*

153. See *id.* This raises the interesting question of whether a descendant of a depositor in a dormant, Nazi-era account should claim his funds in Switzerland or in his home country if a branch of the Swiss bank is located therein.

the various treaties and laws of heirship should drive this effort to distribute the funds wrongfully held by Switzerland for the past fifty years.

Accordingly, through an unprecedented publication of their wartime accounts, the Swiss took the first step in the distribution of these funds.¹⁵⁴ This list has allowed those with anecdotal evidence of an ancestor's account to look for the name or alias of this ancestor without going through the normal administrative hurdles.¹⁵⁵ The Swiss have made this information available in addition to paying various reparations to Jewish Holocaust funds.¹⁵⁶ However, it is unclear whether they possess the ability to effectively disburse these accounts without their characteristic intransigence and delays.

IV. THE CONTINUED VIABILITY OF SWISS BANK SECRECY LAWS

Few commercial practices or requirements have gained such an international reputation as the Swiss banking laws. The secrecy appurtenant to a Swiss bank account has attained almost mythical proportions. Accordingly, the Swiss have fiercely defended the need for complete confidentiality in banking.¹⁵⁷ The typical explanations for protecting account confidentiality address the benefits provided for multinational transactions,¹⁵⁸ the facilitation of legitimate activities in world finance,¹⁵⁹ and the need for this type of banking to allow private citizens to avoid taxation in an ever-shrinking and more intrusive world.¹⁶⁰ The nefarious arrogance of these attitudes reflect a Swiss public policy, manifested in parliamentary action, that reveres privacy and, more importantly, enshrines financial privacy as a constitutional right.¹⁶¹

154. See John M. Goshko, *New Questions Greet Release of Bank List: Swiss Accounts Clouded by Years of Uncertainty*, WASH. POST, July 24, 1997, at A23.

155. See *Swiss List*, *supra* note 4, at A2 (describing the Swiss banks' efforts to publish the names of account holders in 40 newspapers in 28 countries).

156. See BOWER, *supra* note 3, at 328.

157. See HANS J. BAR, *THE BANKING SYSTEM OF SWITZERLAND* 52 (2d ed. 1957).

158. *Id.*

159. *Id.*

160. *Id.* at 51.

161. See Michele Moser, Comment, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 324 (1995).

A. *Strictures of Swiss Banking Secrecy*

While this cultural predisposition for secrecy abounds, the Swiss government has found it appropriate to establish statutory provisions to ensure the protection of these rights.¹⁶² Swiss banking secrecy is protected by the following authoritative sources: “the Penal Code, the Banking Code, the Swiss Constitution, the Civil Code, and the Code of Obligations.”¹⁶³ The myriad sources indicating Switzerland’s extreme penchant for secrecy has resulted in an intricate web designed to close every loophole allowing any access to professional secrets.¹⁶⁴ In addition to this commitment to confidentiality, it is vital to note that unlike other countries, Switzerland does not have escheat laws that require inactive accounts to be transferred to the state.¹⁶⁵ “Therefore, Swiss banks maintain ‘dormant accounts’ indefinitely.”¹⁶⁶ This indefinite accounting ensures that all deposits remain liabilities for the bank, and while some of the funds are absorbed, the bank is always obligated to return the funds should it ever be demanded to do so.¹⁶⁷

The primary source of law protecting the confidential relationship between the client and the bank is the Banking Code, while others, presenting civil and criminal liability to the financier, refer to professional secrecy more generally.¹⁶⁸ The specific Swiss laws dealing with this issue include: “(1) Article 162 of the Swiss Criminal Code; (2) Article 273 of the Swiss Criminal Code; (3) Article 28 of the Swiss Civil Code; and (4) Article 47 of the Swiss Federal Banking Act.”¹⁶⁹

B. *Criminal Provisions*

The original criminal provision protecting banking secrecy is Article 47.¹⁷⁰ Enacted in 1934,¹⁷¹ the duty of

162. *See id.*

163. *Id.*

164. *See* BOWER, *supra* note 3, at 7.

165. *See* Baer, *supra* note 44, at 49.

166. *Id.* The absence of escheat provisions allowed citizens of communist Europe to deposit their funds prior to government seizure and return fifty years later to recover them after the collapse of the Soviet Empire. *See id.*

167. *See id.*

168. *See* Alfadda v. Fenn, 149 F.R.D. 28, 31–33 (S.D.N.Y. 1993); BOWER, *supra* note 3, at 324.

169. *Id.* at 31.

170. Article 47 provides,

(1) Anyone who discloses a secret entrusted to him or her in his or her capacity as an officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Federal Banking

confidentiality of banks is enforced with criminal penalties.¹⁷² Article 47 is unique in that it punishes both intentional and negligent disclosures of confidential information.¹⁷³ In this manner, the Swiss parliament has stressed the importance of protecting client information by providing specific punishments for intentional and unintentional disclosures, as well as “punishing disclosures that occur due to a lack of appreciation of the notion of secrecy.”¹⁷⁴

Several Swiss criminal provisions address professional secrecy.¹⁷⁵ Article 162 of the Swiss Criminal Code “bars the disclosure of commercial secrets by those legally or contractually obligated to maintain their secrecy.”¹⁷⁶ This provision applies to the nonbanking sector of Switzerland, and thereby prevents financiers from disclosing that which the banks themselves can not.¹⁷⁷ Under Article 162, secrecy violations, being formal rather than material offenses, occur whenever the disclosure is made.¹⁷⁸ However, this mandate of

Commission, or as an officer or employee of a recognized [sic] auditing firm, or anyone who has become aware of a secret in this capacity, or anyone who tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding SFr 50,000.

- (2) If the act has been committed by negligence, the penalty shall be a fine not exceeding SFr 30,000.
- (3) The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS, RECUEIL SYSTÉMATIQUE DU DROIT FÉDÉRAL, RACCOLTA SISTEMATICA DEL DIRITTO FEDERALE [SR, RS, RS] art. 47 (Switz.), reprinted in PESTALOZZI GMUER & HEIZ, *supra* note 10, ¶ 1135.

171. *See id.*

172. *See* Grassi & Calvarese, *supra* note 45, at 339.

173. *See id.* at 339 n.43.

174. *Id.* at 340.

175. *See* Moser, *supra* note 161, at 324.

176. *Alfadda v. Fenn*, 149 F.R.D. 28, 31 (S.D.N.Y. 1993).

177. *See* Moser, *supra* note 161, at 324.

He who shall reveal a manufacturing or commercial secret that is supposed to be kept [a secret] in accordance with a legal or contractual obligation, he who shall use this disclosure to his benefit or for the benefit of a third person, will be, upon complaint, punished by way of a fine or imprisonment.

SCHWEIZERISCHES STRAFGESETZBUCH, CODE PÉNAL SUISSE, CODICE PENALE SVIZZERO [STGB, CP, CP] ART. 162 (SWITZ.) (translated by HOUS. J. OF INT'L L.).

178. *See Alfadda*, 149 F.R.D. at 32.

absolute secrecy may be waived by the consent of the person or entity owning the commercial secret.¹⁷⁹

In Article 273,¹⁸⁰ the Swiss Criminal Code outlaws foreign espionage.¹⁸¹ This duty of banking secrecy is imposed under the theory that “a disclosure of domestic information might harm Switzerland economically.”¹⁸² Consequently, “[e]ven if the master of the secret has agreed to the [disclosure,] [such release] may be punishable if the Swiss economic interest in confidentiality prevails over the interest of the disclosing party or the ‘master of the secret.’”¹⁸³ In making this determination, interests such as national security are balanced against the desires of the financier or his consenting client.¹⁸⁴ While this is an onerous burden for the bank, information protected under this statute must have a “Swiss nexus,”¹⁸⁵ making prosecution under Article 273 rather rare.¹⁸⁶ This type of action only occurs in cases of the “first category of secrets, where Swiss national interests are actually endangered by disclosure.”¹⁸⁷

1. *The Swiss Civil Code*

The Civil Code provides a general enumeration of the liabilities associated with breaches of Switzerland’s right to privacy.¹⁸⁸ The Swiss Supreme Court interprets the right to privacy, while not a specifically enumerated right in the constitution, to be an “unwritten fundamental right[,] with constitutional validity and protection.”¹⁸⁹ The right to privacy includes, *inter alia*, “the right of a person or corporation to be free of invasions of privacy, which includes their economic privacy.”¹⁹⁰ As such, a violation of bank secrecy may be a

179. *See id.*

180. *See* StGB, CP, CP art. 273 (Switz.).

181. *See* Moser, *supra* note 161, at 324.

182. *Id.*

183. PESTALOZZI GMUER & HEIZ, *supra* note 10, ¶ 1139.

184. *See id.*

185. *Id.* (noting that the “Swiss nexus” must be a central aspect of the confidential client information).

186. *See* Alfadda v. Fenn, 149 F.R.D. 28, 33 (S.D.N.Y. 1993).

187. *Id.* at 33; *see also* Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 524 (S.D.N.Y. 1987) (recognizing that due to the high standard, this law is almost never litigated).

188. *See* Grassi & Calvarese, *supra* note 45, at 337.

189. Moser, *supra* note 161, at 326.

190. *Id.*

violation of personal privacy, which is protected by Article 28.¹⁹¹

A bank's obligation to its clients under Article 28 depends upon the type of information obtained and the nature of the relationship with the client.¹⁹² Generally, the normal relationship between the bank and its depositor is enough to assume that the bank is in possession of information that the client would not wish revealed.¹⁹³ Swiss banks assume "that [b]ankers receive the same level of trust from their [c]lients as do clerics."¹⁹⁴ This general statutory right of privacy allows the client to sue an indiscreet financier either in tort, for violations of personal privacy, or contract, for breach of the covenant of confidentiality.¹⁹⁵ While this statute allows a private cause of action, few can afford prolonged litigation with a Swiss bank, and therefore the criminal banking laws provide the most direct and severe penalties for breaches of bank secrecy.¹⁹⁶

2. *International Discord over Swiss Banking Secrecy*

This national commitment to secrecy and the protection of the client has an unappealing side as well. The price for this famous commitment to the client is the resulting opportunity for wrongdoers to hide their activities behind a veil of banking secrecy, while clandestinely channeling or laundering illicit funds through Swiss accounts.¹⁹⁷ In the eyes of many, Swiss banking secrecy facilitates illegal money laundering and, in recent years, has brought a great deal of criticism to bear upon the Swiss.¹⁹⁸

191. Article 28 provides that where anyone is injured in his person by an illegal act, he can apply to the judge for his protection from any person who takes an active part in causing the injury. ZGB, CC, CC art. 28 (Switz.).

192. See Grassi & Calvarese, *supra* note 45, at 337.

193. See *id.*

194. *Id.* at 338.

195. See PESTALOZZI GMUER & HEIZ, *supra* note 10, ¶ 1135 (indicating the various deterrents to breaching bank secrecy).

196. "A violation of Art. 47 of the Banking Statute must be prosecuted by the court *sua sponte*, independently of a complaint by the injured party." *Id.*

197. See Kanwar M. Singh, Comment, *Nowhere to Hide: Judicial Assistance in Piercing the Veil of Swiss Banking Secrecy*, 71 B.U. L. REV. 847, 847-48 (1991); see also Moser, *supra* note 161, at 329 n.56 (stating that the ability to accord to "illegal values the appearance of legal profit" is the reason why money launderers prefer to use the Swiss banking system for illicit activities).

198. See Singh, *supra* note 197, at 848; see also Moser, *supra* note 161, at 327 (discussing Switzerland's recognition of its money laundering problem and concern with international criticism).

As a consequence, the United States has perennially been one of the greatest detractors of Swiss banking secrecy.¹⁹⁹ This has a great deal to do with the fact that Swiss banking has been a thorn in the side of U.S. tax collection for many years.²⁰⁰ However, despite decades of negotiations and political pressure, the Swiss have never agreed to open their accounts to the IRS or to the U.S. courts in connection with an investigation of tax evasion.²⁰¹ It is important to note this “epic reluctance” in order to appreciate the unprecedented nature of current Swiss disclosures regarding the World War II accounts.

The question that should arise is why the Swiss have chosen to open their accounts at the urging of apolitical entities when traditional pressures from the international community had previously failed.²⁰² Nations have indicated a growing willingness to disclose confidential communications, and these current activities are simply an outgrowth of this liberalization of Swiss banking.²⁰³ One such treaty grew out of the increasing concerns regarding the use of Swiss banking secrecy to hide criminal activity by organized crime.²⁰⁴

199. See Craig V. Depew, Comment, *Sidestepping Foreign Bank Secrecy Laws: No Sanctuary in the Fifth Amendment and Little in the Interest of Comity*, 10 HOUS. J. INT'L L. 57 (1987) (indicating that U.S. courts use methods to pierce foreign governments' banking secrecy).

200. See Marc G. Corrado, Comment, *The Supreme Court's Impact on Swiss Banking Secrecy: Societe Nationale Industrielle Aerospatiale v. United States District Court*, 37 AM. U. L. REV. 827, 840-41 (1988) (noting that the failure of the Swiss to open their accounts is due to Swiss laws which distinguish between tax evasion and tax fraud).

201. See *id.*; see also John V. Ivsan, Comment, *Informational Liability and International Law: A Post-Ratzlaf Comparative Analysis of the Effect of Treasury Reporting Requirements on International Funds Transfers*, 21 OHIO N.U. L. REV. 263, 285-92 (1994) (indicating that the “epic reluctance” of the Swiss to allow investigation for tax evasion is partly due to a fundamental difference in their views on privacy rights).

202. “In order to maintain its status as a leader in Europe’s financial market, Switzerland needs to restore its tarnished image. The main factors that contribute to the urgency include money laundering problems, organized crime activities, international pressure, and the need to eliminate conflicts.” Moser, *supra* note 161, at 327.

203. “In the world community, there is a trend toward lifting bank secrecy more easily than in the past, particularly in view of the growing need for transnational cooperation in combating international and organized crime.” *Id.* at 332.

204. See Memorandum of Understanding on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings, Nov. 10, 1987, U.S.-Switz., reprinted in 27 I.L.M. 480, 485 (1988) [hereinafter Criminal Matters MOU].

3. *The Mutual Assistance in Criminal Matters Treaty*

In an effort to prosecute members of drug cartels, the Swiss entered into an agreement with the United States.²⁰⁵ The agreement is known as the Mutual Assistance in Criminal Matters Treaty (MACM).²⁰⁶ Under the provisions of this treaty, the Swiss only provide assistance through compelling disclosure if the offense that the United States is investigating is also considered a crime in Switzerland.²⁰⁷

Interestingly, it was not until 1990 that Switzerland passed a law identifying money laundering as a crime.²⁰⁸ On August 1, 1990, the Swiss Parliament passed Article 305 (bis) to the Swiss Penal Code prohibiting money laundering²⁰⁹ and Article 305 (ter) on the lack of due diligence in financial transactions.²¹⁰ Neither of these provisions “create new responsibilities for the banks, [which prior to the passage of

205. *See id.*

206. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, 2021.

207. *See id.* at 2028–29; *see also* Moser, *supra* note 161, at 332–33.

208. *See* Singh, *supra* note 197, at 848.

209. *See* Grassi & Calvarese, *supra* note 45, at 348 n.100. The new law provides the following guidance:

1. Whosoever undertakes actions which lend themselves to defeat the ascertainment of origin, the discovery or collection of assets which, as he knows or must assume, emanate from a crime, will be subject to punishment by imprisonment or a fine.
2. In severe cases punishment is seclusion for up to five years or imprisonment. Added to this penalty of detention is a fine of up to one million francs. A severe case is if the perpetrator: a) acts as a member of a criminal organization; b) acts as a member of a criminal organization whose purpose is the continued practice of money-laundering; c) realizes a large turnover or considerable profit from professional money laundering activities.
3. The perpetrator will also be subject to sentencing if he commits the principal act of violation abroad and such act is also punishable in the place of perpetration.

STGB, CP, CP art. 305(bis) (Switz.).

210. *See* Grassi & Calvarese, *supra* note 45, at 348 n.101. This new prohibition enumerates the elements of another facet of money laundering, that of willful blindness. It states,

Whoever professionally accepts, keeps in safe custody, assists in the investment or transfer of assets which are the property of others and fails to apply the relative due diligence required for establishing the identity of the economic beneficiary, is subject to punishment by imprisonment of up to one year or a fine.

See STGB, CP, CP art. 305(ter) (Switz.).

these laws] were already liable for knowingly accepting money related to criminal activities based on Article 3.2(c) of the Federal Banking Law.”²¹¹ While the Swiss have not interpreted these laws quite as expansively as the United States might wish, these directives do apply to the personnel of all financial institutions.²¹² Interestingly, had such laws been in effect during World War II, the activities of the banks in knowingly trafficking in illicit German funds would have, by definition, been punishable by imprisonment.

Despite their tardiness, the passage of these laws permitted the MACM to be implemented to the fullest extent.²¹³ As mentioned previously, the MACM could not take effect on any money laundering activities until Switzerland specifically prohibited this illicit practice.²¹⁴ Importantly, a decision regarding whether the “dual criminality” test has been satisfied is made by the requested State based on interpreting its own law.²¹⁵ Therefore, rather than analyzing the alleged facts according to the laws of the United States, Swiss courts only need to determine if it is punishable according to the laws of Switzerland.²¹⁶

Under the MACM, U.S. and Swiss law enforcement authorities are required to cooperate with investigations or court proceedings involving criminal offenses²¹⁷ when all disclosure requirements are met.²¹⁸ Included in the assistance that both countries are obligated to furnish is the production and authentication of bank records.²¹⁹ Furthermore, when seeking foreign evidence both the United

211. Grassi & Calvarese, *supra* note 45, at 348–49.

212. *See id.* at 350 (noting that the directives do not apply to criminal justice).

213. *See Singh, supra* note 197, at 848–49. The MACM allows the United States to access Swiss bank accounts for conduct that is criminal in Switzerland and the United States. *See id.* After the passage of Article 305, money laundering is now criminal in both countries. Thus, the United States can access the Swiss bank accounts of money launderers. *See id.*

214. *See id.*

215. *Id.* at 850–51 (noting that MACM is intended to provide for cooperation between the United States and Switzerland while allowing discretion in deciding which elements of an offense are significant enough to warrant judicial intervention).

216. *See id.* at 850.

217. *See Criminal Matters MOU, supra* note 204 at 482.

218. *See Jean-Marc L. Rapp, Recent Developments in United States Insider Trading Prohibition and Swiss Secrecy Laws: Towards a Definitive Reconciliation?*, 5 INT’L TAX & BUS. LAW. 1, 2, 7–10 (1987).

219. *See Criminal Matters MOU, supra* note 204, at 482 (stating that the two countries will cooperate in “producing and authenticating . . . business records.”).

States and Switzerland have committed to using the MACM as a first resort whenever possible.²²⁰ The passage of Article 305 of the Swiss Penal Code and the MACM presented the first significant breach in the Swiss veil of secrecy. It allowed the United States, for the first time, to examine Swiss bank records in connection with an investigation of illegal money laundering.²²¹

In examining the activities regarding this eventual compliance with MACM in light of the current banking controversy, it is evident that the recent activities of the Swiss have occurred over an uncharacteristically short time-span. This fact more than any other should serve to indicate the severe and unique nature of the current situation. One reason the Swiss reaction has been so swift is because it does not involve negotiators bandying about an impersonal concept such as money laundering.²²² Rather, the current situation forces the underlying moral issues to the forefront of the debate.²²³ Prior to and during World War II, the Swiss thought their position of neutrality would serve as a legal shield.²²⁴ However, they did not consider that the force of morality, rather than an esoteric legal examination, would be brought to bear on their activities.²²⁵ The World Jewish Congress "pursued an indefatigable campaign" to bring the truth to light and orchestrated the tidal wave of outrage that followed.²²⁶

"The capitulation of the Swiss banks in the face of this moral outrage is a rare event in a world so dominated by commerce and the power that flows from it."²²⁷ The globalization of markets and the quest for profits seldom leave an opportunity to consider the devastating effects that such profiteering may have upon an entire generation.²²⁸ This

220. *See id.*

221. *See Singh, supra note 197, at 848–49.*

222. *See Roger C. Altman, The Triumph of Morality, L.A. TIMES, Aug. 3, 1997, at M1 (emphasizing that more potent reasons are morality and the impact of worldwide outrage caused by the Nazis being able to hide the stolen assets of Holocaust victims in Swiss banks).*

223. *See id.*

224. *See John M. Ferguson, Swiss Bank Account "Secrecy" Today: More Holes Than Cheese, 12 EMORY INT'L L. REV. 1131, 1135 (1998) (arguing that due to international approval of Switzerland's efforts to obstruct the Nazis, its banking secrecy was accepted prior to and during World War II).*

225. *See Altman, supra note 222, at M1.*

226. *Id.*

227. *Id.*

228. *See id.* (suggesting, for example, that capital markets dismiss the effects of corporate plants closing, their devastating impact on currencies and

is why the unveiling of the “Swiss banking system is so remarkable.”²²⁹ The Swiss banking system was viewed as an impregnable fortress that neither law enforcement nor international public criticism could penetrate.²³⁰ However, as in the fable of the wind and the sun,²³¹ when the Swiss were exposed to the heat of an internal and external inquisition and condemnation, they peeled off the many layers of banking secrecy voluntarily, finding relief in exposure rather than in further concealment.²³²

The ensuing reality is that governments, while typically equipped to deal with other governments, are not equipped to handle worldwide popular scrutiny. In this case, the Swiss had to deal with their own history, popular outrage, and claims of the descendants of account holders who had been killed by the Nazis.²³³ The combined weight proved to be too much to support the buttresses of Swiss neutrality and a tradition of banking secrecy.²³⁴ Rather, the current generation of Swiss has been forced to examine the depth of the abuses that such a closed system allows and to assess whether the benefits of banking secrecy outweigh these lurking opportunities for abuse.²³⁵

V. CONCLUSION

The legitimacy of absolute banking secrecy is on more tenuous ground than ever. No longer is the issue about tax evasion or even about aiding the activities of organized crime. Rather, the spectrum of potential abuses is broader than anyone ever imagined. The existence of laws enshrining financial confidentiality above all else allowed the Swiss to conceal their banking transactions during and after World War II. In addition, these same laws permitted the Swiss to control the deposited assets of individuals who had died in

economies of foreign countries, and their susceptibility to the pressures or concerns of the public).

229. *Id.*

230. *See id.*

231. *See* THE FABLES OF AESOP 39–40 (Book of the Month Club, Inc., ed. 1995). This is a tale of the contest between two natural forces to determine which could make a traveler remove his coat. The blustery wind succeeded only in causing the traveler to pull his coat closer to himself, while the gentle sun coaxed the traveler to voluntarily remove his coat. *See id.*

232. *See* Altman, *supra* note 222, at M1.

233. *See supra* Part II.

234. *See id.*

235. *See* BOWER, *supra* note 3, at 294–326 (relating Swiss attempts to come to terms with the growing international condemnation of their banking policies).

the Holocaust rather than actively seeking their heirs. Consequently, this controversy has spawned little if any discussion of the finer legal points regarding the obligations of a neutral state in times of war. Rather, the focus has been correctly placed on the evils promulgated by the Swiss and their profiteering through their indefensible partnership with Nazi Germany.

The focus of this discussion is the direct result of the efforts of the World Jewish Congress and others that have brought this issue to light.²³⁶ These organizations pressured the U.S. administration to officially investigate the activities of Switzerland.²³⁷ The result of this investigation is the startling *Eizenstat Report*.²³⁸ Many think there is a need for absolute banking secrecy somewhere in the world. However, the *Eizenstat Report* illustrates the devastating effect of this type of clandestine power. As this Comment reveals, the potential evils stemming from banking secrecy and the ease with which such a system can lead to abuses far outweighs any commercial benefits of banking secrecy.

Currently, the Swiss are in the early stages of determining how to appropriately distribute the Nazi-era accounts.²³⁹ The individuals who wish to claim these funds should assess the benefits of filing their claim within Switzerland as opposed to filing within their resident country. When making this determination, the individual claimant must consider his level of relation to the deceased and the number of other potential claimants to the account. The Swiss are uniformly applying their own law to any and all claims filed in Switzerland.²⁴⁰ While this is certainly efficient, it may not be the most helpful approach in every situation. For instance, the Swiss are holding on to issues such as determining succession in order to maintain some control over the disclosure and distribution of these assets. It is vital that the governments of the world maintain a high level of scrutiny over these processes to prevent additional abuses by the Swiss in the name of neutrality and secrecy.

236. See Altman, *supra* note 222, at M1 (noting that Edgar Bronfman, Sr.'s, tenacious leadership of the World Jewish Congress and the persistence of other Jewish groups resulted in a "triumph of morality.").

237. See *id.*

238. See BOWER, *supra* note 3, at 327-28.

239. See Goshko, *supra* note 154, at A23 (relating Swiss attempts to locate correct claimants by utilizing a neutral accounting firm).

240. See BOWER, *supra* note 3, at 304, 312, 315-16, 318 (relating the experiences of several claimants attempting to obtain funds from dormant Nazi era accounts).

This discussion of the various issues and problems arising from the current Swiss banking controversy illustrates several legal and political dualities.²⁴¹ The first is the legal-moral duality.²⁴² Seldom has this occasional juxtaposition been more clearly illuminated than in the actions of the Swiss during and after World War II. They decided to cooperate with the Nazis in order to prevent invasion and apparently thought their actions were legal and consistent with their official position of neutrality.²⁴³ It is obvious from the *Eizenstat Report* that the Swiss thought they were legally permitted to buy and sell Nazi gold without examining its origins and without questioning the use to which the proceeds would be put.²⁴⁴

Interestingly enough, it is this moral question that the Swiss are unable to defend today, and not surprisingly the global community does not care to hear the Swiss attest to the legality of their wartime actions. This intolerance grows from outrage over the concealment of the dormant Jewish accounts. The Jewish community demands that Switzerland acknowledge its wartime conduct and submit to a full accounting of the looted assets.²⁴⁵ To the Swiss government, the original solution “was to buy off an irritation and to get on with business.”²⁴⁶ For the Swiss people, “the cost of . . . delayed remorse [was] truly horrendous.”²⁴⁷

The second duality, acquiescing versus complaining, is related to the first.²⁴⁸ The arguable moral failure of the Swiss during World War II is the typical focus of discussion. Unfortunately, there is also a moral failure in the rest of the world doing too little. The international community has ignored this problem for fifty years.²⁴⁹ Admittedly, there were other issues, such as containing Soviet expansion and rebuilding Europe, that dominated international discussion. However, individuals who tried to claim these funds were greeted by unyielding Swiss banking policies and

241. David Dow, Address at the University of Houston Law Center symposium on *The Swiss Banking Controversy: A Legal Response to a Moral Dilemma* (Oct. 21, 1997) [hereinafter Dow].

242. *See id.*

243. *See* EIZENSTAT REPORT, *supra* note 52, at 4.

244. *Id.*

245. *See* BOWER, *supra* note 3, at 326.

246. *Id.*

247. *Id.*

248. *See* Dow, *supra* note 241.

249. *See* BOWER, *supra* note 3, at 311–12 (statement of U.S. Senator Alfonse D’Amato before the House Banking and Financial Service Committee castigating both the behavior of the Swiss and the complicity of other nations).

unsympathetic governmental agencies, both in Switzerland and at home.²⁵⁰

The third duality, remembering versus forgetting, illustrates much of the previously discussed attitude of inaction.²⁵¹ After World War II, most individuals wished to forget the horrors of the Nazis and return to their pre-war existence. However, it is vital that we remember the source of much of the Nazi wealth and recognize the role that the Swiss had in prolonging the war. Through such accountability, Switzerland can be viewed in an appropriate context when other nations address its continued status as a neutral power or demand the disclosure of various accounts.

The Swiss have taken several steps in an attempt to resurrect their tarnished image as honest bankers. First, they endorse a “[h]umanitarian fund for the victims of the Holocaust.”²⁵² Second, they hosted several conferences on this issue and displayed a remarkably cooperative attitude.²⁵³ These negotiations have resulted in the Swiss contributing over \$110 million to the Holocaust fund.²⁵⁴ Additionally and most noticeably, the Swiss have published the name on every account that was opened during World War II and has remained inactive ever since.²⁵⁵ These historic steps will have to withstand the test of time and the scrutiny of every nation. It is vital that the Swiss and the rest of society remember that oftentimes the conduct of a nation may meet its own internal test for legality, but fail the ultimate challenge of morality.

*“The issue is the truth. The issue is morality.”*²⁵⁶

Thomas A. Sage†

250. See BOWER, *supra* note 3, at 303, 312, 315–16, 318 (relating the experiences of several claimants attempting to negotiate the vagaries of Swiss banking policies without the affirmative support of their home governments).

251. See Dow, *supra* note 241.

252. BOWER, *supra* note 3, at 328.

253. See *id.* at 327–28.

254. See *id.* at 328.

255. See Goshko, *supra* note 154, at A23.

256. BOWER, *supra* note 3, at 329 (quoting Edgar Bronfman, the president of the World Jewish Congress, reminding the press that the primary objective is not pecuniary compensation, but rather a moral reckoning).

† This Comment won the Verner Lipfert McPherson Bernard & Hand writing award.