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Marc Rich: An Expansion of United States Criminal Jurisdiction over Foreign Defendants, 6 Nw. J. Int'l L. & Bus. 615 (1984)

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NOTE

Marc Rich: An Expansion Of United States Criminal Jurisdiction Over Foreign Defendants

I. INTRODUCTION

In 1983 the United States government sought the production of documents relating to the oil trading activities of Marc Rich & Co., A.G. ("Marc Rich & Co."), in order to obtain an indictment of Marc Rich & Co.'s principal directors and officers for criminal violation of United States tax law.[1] Through the application of an expansive "minimum contacts" analysis, a United States district court and court of appeals asserted their jurisdiction over Marc Rich & Co., a Swiss corporation, even though Marc Rich & Co. did not regularly engage in business in the United States.[2] Both courts then ordered Marc Rich & Co. to produce

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[1] After a long series of court battles, Marc Rich & Co. and its wholly owned U.S. subsidiary, Marc Rich & Co., International, Ltd. ("International") pled guilty in October 1984 to violating U.S. tax and energy laws. On October 11, 1984, the two corporations paid $150,000,000 to the U.S. government and agreed to withdraw any claims to the $21,000,000 they had already paid to the U.S. government in fines for disobeying a court order to turn over certain documents of Marc Rich & Co. which were located in Switzerland. Moreover, Marc Rich & Co. agreed to forego attempting to utilize $40,000,000 in tax deductions to which International would have been entitled.

The tax evasion charges are still pending against Mr. Marc Rich, the chairmen of the board at both Marc Rich & Co. and International, and Mr. Pincus Green, the second in command of International and board member of Marc Rich & Co. The U.S. government attempted to extradite Mr. Marc Rich and Mr. Pincus Green, but the Swiss government would not cooperate because the Swiss determined that the tax and energy offenses with which Rich & Green were charged involved a revenue matter which was not within the four corners of the United States and Switzerland extradition treaty. The U.S. and Swiss extradition treaty, signed in May 1900, covers cases of murder, arson, robbery, embezzlement, forgery, abduction and rape, piracy, destruction of railroad property, and perjury. Wall Street Journal, September 23, 1983 § 1 at 18. Thus, both Mr. Marc Rich and Mr. Pincus Green are "fugitives of justice" according to the United States Attorney's Office. Telephone conversation with Morris Weinberg Jr., Assistant United States Attorney (February 12, 1985).

[2] In the Matter of a Grand Jury Subpoena Directed to Marc Rich & Co., A.G., No. M-11-188,

certain of its documents located in Switzerland.[3] Based upon these documents, a federal grand jury indicted Marc Rich & Co. and Marc Rich & Co.'s wholly owned United States subsidiary, Marc Rich & Co., International Ltd. ("International") for allegedly concealing more than $100 million in taxable income in 1980 and 1981, resulting in one of the largest tax evasion schemes in United States history.[4]

According to the indictment, International diverted income through "sham transactions" by buying oil at artificially high prices from Marc Rich & Co. Marc Rich & Co. does not file United States income-tax returns. The indictment charged that International purchased domestic crude oil under federal price controls and then passed that oil through a "daisy chain" of other oil traders, with Marc Rich & Co. eventually repurchasing the barrels and reselling them at illegally high prices. To avoid paying taxes on the profits from these activities, Marc Rich & Co. set up another series of transactions in which other traders would bill Marc Rich & Co. at much higher prices for oil than Marc Rich & Co. actually paid. These profits were then siphoned off to Marc Rich & Co.'s overseas operations.[5]

The district court's decision in *Marc Rich* is important because it may set forth a new federal standard of jurisdiction in criminal cases.[6] The primary theory of jurisdiction has been the "presence/doing business test"[7] in criminal cases, and the "transaction of business" test in civil

slip op. (S.D.N.Y. Aug. 25, 1982); In Re Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983). Because the district court decision is unpublished, the decision may have less of an impact on other court decisions than it otherwise would have.

[3] *Id.* These documents related to oil trading activities of the company in 1980 and 1981. Though Swiss law forbids the disclosure of business secrets, Marc Rich & Co. submitted the affidavit of a professor of law at the University of Zurich, which stated that in complying with the court order Marc Rich & Co. would probably violate Swiss law. Article 273 of the Penal Code of Switzerland provides that a person who discloses a business secret to a foreign government shall be punished with imprisonment and a fine. In August 1985, the Swiss government announced that it was ending its investigation of AG's violation of the Swiss Espionage Law. Telephone conversation with Martin Auerbach, Assistant United States Attorney (September 30, 1985).

[4] Tully & Worth, *"Secrets of Marc Rich,"* FORTUNE January 23, 1984, p. 44.

[5] Wall Street Journal, September 20, 1983 § 2 at 3. *See* Tully & Worth, *supra* note 4, at 44-49.

[6] *See infra* text accompanying notes 61-67.

[7] Under this theory, a court only has jurisdiction over defendants who maintain continuous and systematic activities within the jurisdiction. *See, e.g.*, In Re Canadian Int'l Paper Co., 72 F. Supp. 1013, 1019-1020 (S.D.N.Y. 1947) (charge of Sherman Act violation; court has jurisdiction. The court specifically stated that the fact that the Canadian company paid for an office in New York and paid salaries to the employees who maintained the offices and that the company had a substantial bank account in New York constituted continuous and substantial activities in New York.); International Harvester Co. v. Kentucky, 234 U.S. 579, 585 (1914) (charge of violating state antitrust law; court has jurisdiction. The court found that the presence of a company agent in the state who solicited orders from customers of that state constituted a continuous course of business).

cases.[8] Before *Marc Rich*, to the best of this author's knowledge, no court had ever applied the more flexible transaction of business test as a basis of jurisdiction in a criminal case.[9] By asserting jurisdiction on this basis, the district court may have substantially improved the government's ability to prosecute foreign[10] defendants for alleged violations of United States law.[11]

Though the court of appeals found a technical error in the district court's assertion of jurisdiction, it implicitly validated the application of the transaction of business test in criminal cases.[12] The court of appeals expressly asserted its jurisdiction over Marc Rich & Co. on the basis of three sets of facts without relating these facts to any particular jurisdictional theory.[13]

First, the court of appeals observed that both the conspiracy to evade the income tax laws and at least some of the conspiratorial acts occurred within the United States.[14] Second, the court of appeals stated that Marc Rich & Co.'s alleged violation of United States tax laws occurred with the cooperation of International, which is authorized to do business in New York.[15] Third, the court of appeals stated that two of the five board members of Marc Rich & Co. and International reside in the United States.[16]

By failing to explain which legal theories of jurisdiction it was applying, the court of appeals added to the confusion regarding criminal jurisdiction over foreign defendants.[17]

Neither Congress nor the Supreme Court has enunciated a uniform

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8 Under the transaction of business theory, the court has jurisdiction over the defendant if the defendant's contact with the jurisdiction forms the basis of the lawsuit. *See, e.g.*, N.Y. Civ. Prac. Law § 302(a)(1); "[T]he statute reveals a legislative intent to confer jurisdiction where the subject matter of the litigation is related to the contacts with the jurisdiction." Marc Rich, No. M-11-188 at 16.

9 State v. Luv Pharmacy, Inc., 118 N.H. 398, 403, 388 A.2d 190, 193-94 (1979). "[W]e are unable to locate and the parties have failed to cite, any case law applying this [minimum contacts] test to criminal proceedings" (charge of violating obscenity laws; court has jurisdiction).

10 The term "foreign" as used in this Note, means a person or corporation whose residence or principal place of business is outside of the United States.

11 Because the transaction of business test is a broader theory of jurisdiction than the presence/doing business test, it will be easier for a court to find that it has jurisdiction when using the former test rather than the latter test.

12 In Re Marc Rich & Co., A.G., 707 F.2d at 667-68.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 Although the Supreme Court enunciated a uniform federal standard of jurisdiction for civil cases in International Shoe Co. v. Washington, 326 U.S. 310 (1945), there is no uniform federal standard of jurisdiction for criminal cases. *See infra* note 18.

federal standard of jurisdiction for use in criminal cases.[18] Lower federal courts have been left to promulgate standards of jurisdiction on their own which comport with the due process requirements of the United States Constitution. Currently, the federal courts apply two theories of criminal jurisdiction. The courts sometimes apply the "corporate presence/doing business" theory of jurisdiction.[19] Under this theory, a court has jurisdiction over only those foreign defendants which can be said to be regularly "doing business" in the United States.[20] Courts have defined doing business to mean that a defendant maintains an office, employees, bank accounts, or other formal indicia of conducting business within the United States.[21]

The second theory of criminal jurisdiction is the "detrimental consequences" test.[22] Under this theory, a United States court has jurisdiction over a foreign defendant if the defendant's actions are intended to and do have a detrimental effect in the United States, even if the defendant does not regularly or ever transact any business within the United States.[23]

The "transaction of business" test constitutes a third theory of jurisdiction used by courts.[24] In the past, courts applied this test in civil cases. Under this test, if a defendant's particular United States business transaction forms the basis of a lawsuit, then the court has jurisdiction

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18 The Supreme Court has not yet decided what the federal standard of criminal jurisdiction should be, nor whether it should be based upon minimum contacts as in civil cases. Comment, *Criminal Jurisdiction Over Foreign Corporations: The Application of a Minimum Contacts Theory*, 17 SAN DIEGO L. REV. 429, 431 (1980).

19 *See supra* note 7.

20 *Id.*

21 *Id.*

22 *See infra* note 23.

23 Strassheim v. Daily, 221 U.S. 280 (1911) (indictment for bribery in Michigan; charge of being fugitive from justice; Michigan court has jurisdiction because "Acts [referring to the bribery and false representations made by the defendant] done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect." *Id.* at 285); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (charge of violation of federal security laws; court has jurisdiction over some of the defendants, since "The person sought to be charged must know or have good reason to know that his conduct will have effects in the state seeking to assert jurisdiction over him." *Id.* at 1341). To be a "knowing" violation of the law, the defendant's violation must either be a direct and foreseeable result of the defendant's actions, or the conduct and its effect must be generally recognized as constituent elements of a crime or tort under the laws of states that have reasonably developed legal systems, according to the American Law Institute. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18 (Proposed Official Draft 1962); *reprinted in* Lenhoff, *International Law and Rules on International Jurisdiction*, 50 CORNELL L.Q. 5, 15. The court in *Leasco* applied the Restatement's detrimental effects test described above. *Leasco*, 468 F.2d at 1333-34. In both *Leasco* and *Strassheim*, the courts impliedly ruled that the violation of a state's laws constitutes a "detrimental effect" within the state.

24 *See supra* note 8.

over the defendant on the basis of that particular transaction alone.[25]

The transacting business test, like the detrimental consequences test, is a form of "specific," as opposed to "general," jurisdiction.[26] Under specific jurisdiction, the assertion of adjudicatory authority is limited to controversies grounded in particular situations, while under general jurisdiction, adjudicatory authority extends in principle to any claim against the defendant.[27]

Under both the transacting business and detrimental consequences tests, however, it can be easier to assert jurisdiction over foreign defendants than under the formalistic presence/doing business analysis.[28] The United States Supreme Court has replaced the presence/doing business test with the "minimum contacts" test for civil cases.[29] The Court has ruled that courts have jurisdiction over foreign defendants in civil matters so long as the defendants have maintained a sufficient minimum of contacts with the state so that the exercise of jurisdiction is "reasonable" and "just".[30]

This Note will first examine how jurisdiction was asserted over Marc Rich & Co. through the district court's application of two theories of jurisdiction[31] (the presence/doing business test and the transacting

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25 Marc Rich, No. M-11-188, slip op. at 16; *see supra* note 8.

26 If a company regularly does business in the United States, then any dispute which a person has with the company, even if unrelated to the company's business in the United States, can be adjudicated in a United States court, because the court has "general jurisdiction" over the company. On the other hand, if a company transacted only a single business transaction in the United States, a United States court would only have jurisdiction over the company for claims arising out of that particular transaction. Von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 280, 286 (1983).

27 *Id.*

28 Under the presence/doing business test, the foreign defendant must maintain systematic and continuous contacts within the United States, *see supra* note 7, whereas under the transacting business test, a single transaction within the United States could support jurisdiction. *See supra* note 8. Under the detrimental consequences test, a court could have jurisdiction over a defendant who has personally had no "contact" with the United States other than the act of violating United States' laws, so long as that violation was a "knowing" one. *See supra* note 23.

29 International Shoe Co. v. Washington, 326 U.S. 310 (1945). The defendant company in *International Shoe* employed salesmen in the state of Washington to exhibit samples and solicit orders from prospective buyers to be accepted or rejected by the company whose principle place of business was in another state. The Court ruled that not only would systematic and continuous activities confer jurisdiction, as in the case before it, but that even a single or occasional act in the state could confer state jurisdiction due to the nature, quality, and circumstances of the act's commission. *Id.* at 318.

30 *Id.* at 320. The court stated that "minimum contacts" are those contacts with a state which are necessary for the assertion of jurisdiction to comply with due process requirements. *Id.* at 316. In determining whether the "contacts" are sufficient, the Court ruled that one factor to consider is the inconvenience to the defendant in responding to the suit in the jurisdiction. *Id.* at 317.

31 *See infra* § IIA of this Note.

business test) and the court of appeals' application of three theories of jurisdiction[32] (the detrimental consequences test, the presence/doing business test, and the transacting business test).[33] This Note will argue that *Marc Rich* underscores the inadequacy of the presence/doing business test in protecting a state's interest in prosecuting alleged violations of its laws.[34] According to the district court, jurisdiction over Marc Rich & Co. would not have existed under the presence/doing business test because Marc Rich & Co. did not maintain the formal indicia of doing business in the United States.[35] Nevertheless, under the transacting business test, the district court managed to find jurisdiction even though Marc Rich & Co. did not regularly conduct business in the United States.[36] Marc Rich & Co. had transacted business in the United States through and with its wholly-owned United States subsidiary, International. These transactions allegedly had violated United States tax laws. Therefore, the district court ruled that "if the subject matter of the investigation is related to the contacts with the jurisdiction, the grand jury's exercise of its subpoena power should not be invalidated by the Court."[37] Though the court of appeals found a technical error with the district court's application of the transacting business test,[38] the court of appeals indirectly validated this test as well as the presence/doing business test and the detrimental consequences test in a perplexing opinion which combined all three theories to assert jurisdiction over Marc Rich & Co.[39] Thus, even the court of appeals was unable to assert jurisdiction over Marc Rich & Co. solely on the basis of the presence/doing business test.

Second, this Note will argue that the district court's and court of appeals' application of any of the three theories of jurisdiction (e.g., the presence/doing business, detrimental consequences, or transacting business theories of jurisdiction) would conform with precedent because the Supreme Court and lower federal courts have applied both the presence/doing business test and the detrimental consequences test as bases of

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32 *See infra* § IIB of this Note.

33 Marc Rich, No. M-11-188, slip op.; In Re Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983).

34 Neither the district court nor the court of appeals was able to assert jurisdiction over Marc Rich & Co. based upon the presence/doing business theory of jurisdiction. *See* Marc Rich, No. M-11-188 slip op.; In Re Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983).

35 Marc Rich, No. M-11-188, slip op. at 14. Marc Rich & Co. asserted that it did no business in the United States nor was it authorized to do so. *Id.* at 4.

36 *Id.* at 16.

37 *Id.*

38 In Re Marc Rich & Co., A.G., 707 F.2d at 667. "We agree with counsel for both sides that Judge Sand should not have looked to New York State's long-arm statute in answering this question." *Id.*

39 *Id. See infra* text accompanying notes 87-90.

criminal jurisdiction.[40] A court could also apply the transacting business test, without conflicting with precedent, so long as it satisfied the due process clause, because there is no uniform federal standard of criminal jurisdiction.[41]

Third, this Note will identify four interests of the United States which a future federal standard of criminal jurisdiction can impact.[42] The relative abilities of each of the three tests to meet these interests will then be discussed.[43] This Note will then argue that a uniform federal standard of criminal jurisdiction should be promulgated and that this standard should be based upon the detrimental consequences test.[44] Application of the detrimental consequences test will serve to balance the United States' interest in prosecuting violations of its laws, maintaining its position as an international center for trade, securing due process of law for potential defendants, and setting an international precedent which will protect United States citizens and corporations from surprise suits in other countries.[45]

Fourth, this Note will discuss the importance of the allocation of the burden of proof of the court's jurisdiction and will review the district court's and court of appeals' allocation of the burden of proof.[46] This Note will argue that the district court was correct in requiring the government to make a *prima facie* showing of jursidiction and that the court of appeals erred in requiring the government to establish a reasonable probability of ultimate success on the issue.[47] The reasonable probability burden of proof is more difficult to satisfy than the *prima facie* burden[48] and should only be applied when the defendant is challenging the grant of a preliminary injunction.[49] Because there is no support for the proposition that ordering compliance with a grand jury subpoena is tantamount to a preliminary injunction,[50] this Note will argue that the court of appeals should not have applied this test.[51]

Fifth, this Note will examine the district court's decision to compel the production of documents despite the prohibition of Swiss secrecy

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40 *See supra* notes 7 and 23.
41 *See supra* note 17.
42 *See infra* § III B of this Note.
43 *Id.*
44 *See infra* § III C of this Note.
45 *See infra* § III B of this Note.
46 *See infra* § IV of this Note.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*

statutes.[52] The Note will argue that case law clearly supports the district court's decision.[53]

II. The District Court's and Court of Appeals' Assertion of Jurisdiction Over Marc Rich & Co.

A. The District Court's Assertion of Jurisdiction Over Marc Rich & Co.

The district court, in determining whether it had jurisdiction over Marc Rich & Co., first applied the presence/doing business test.[54] The court noted that a corporation is deemed to be present in a state if it does business there, not occasionally or casually, but with a fair measure of permanence and continuity.[55] A corporation also may be deemed present in a state due to the activities of its subsidiary, if the subsidiary is in reality merely a department or puppet of the parent or if the subsidiary has acted as the agent of the parent.[56] The court added that in the latter instance only those acts undertaken on behalf of the parent may be considered as factors under the doing business test.[57] Moreover, the court noted, the agency relationship must continue unchanged until the time of service of process in order to satisfy the presence/doing business test's requirement of current presence.[58] Because the government failed to demonstrate that the agency relationship between International and Marc Rich & Co. continued beyond 1980 and 1981, the district court ruled that "if doing business were the only ground for jurisdiction in this case, we would . . . quash the Subpoena."[59]

After the district court rejected the assertion of jurisdiction on the basis of the presence/doing business test, it considered the government's claim that federal criminal jurisdiction could rest on Marc Rich & Co.'s past transactions within the state that were the subject of the grand jury investigation.[60] The district court judge, however, may have failed to realize that the government was proposing that the transaction of busi-

52 *See infra* § V of this Note.

53 *See infra* § V A of this Note.

54 Marc Rich, No. M-11-188, slip op. at 10-11.

55 *Id. See supra* note 7.

56 Marc Rich, No. M-11-188, slip op. at 11. *See also* Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 68-69 (S.D.N.Y. 1979). If the subsidiary is an agent for the parent, the subsidiary's activities can be attributed to the parent. *Id.* at 68. If the subsidiary is a department of the parent, based upon the parent's control of the subsidiary's day-to-day operations, then the subsidiary's activities can also be attributed to the parent. *Id.* at 69.

57 Marc Rich, No. M-11-188, slip op. at 11.

58 *Id.*

59 *Id.* at 14; *see* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 517 (1923).

60 Marc Rich, No. M-11-188, slip op. at 14.

ness test be adopted as a federal standard of criminal jurisdiction.[61] The court sought to determine whether the transaction of business test complied with the New York long-arm statute, instead of viewing the test as a federal standard of criminal jurisdiction.[62]

By analyzing the New York long-arm statute, the district court appeared to view the jurisdictional issue as a purely state law question. It is more likely, however, that the district court's reference to the state long-arm statute was for the purpose of analogy only. Indeed, the district court stated that the state long-arm statute applies to civil cases and acknowledged that the action before it was not a civil cause of action.[63]

In reviewing the statute, the district court determined that the statute "reveal[ed] a legislative intent to confer jurisdiction [only] where the subject matter of the litigation is related to the contacts with the jurisdiction."[64] The court added that because "the grand jury [was] investigating particular transactions in which International allegedly acted on A.G.'s [Marc Rich & Co.] behalf in this state,"[65] the court held that "[t]hese alleged transactions on behalf of A.G. would undoubtedly provide the minimum contacts needed to comport with 'traditional notions of fair play and substantial justice required by due process.' "[66] Thus, the district court rejected Marc Rich & Co.'s argument that only general jurisdiction, through the application of a presence/doing business test, is a valid basis of criminal jurisdiction, and found that the transacting business test conformed with both state law and the Fourteenth Amendment.[67] The district court thus became the first court to apply the transacting business test as a basis for criminal jurisdiction in a federal case.

B. The Court of Appeals' Assertion of Jurisdiction Over Marc Rich & Co.

The court of appeals also ruled that it had jurisdiction over Marc

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61 *Id.* at 15.

62 In responding to the district court's discussion of the New York long-arm statute, the government asserted that the district court may merely have made reference to state law as an analogy. Brief for the United States of America at 8, In Re Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983) (available in the Northwestern University Journal of International Law & Business Office) [hereinafter cited as Governments' Brief].

63 The court stated, "[I]n considering whether the 'transaction of business' is a sufficient basis for the assertion of jurisdiction, we naturally turn to the New York long-arm statute." Marc Rich, No. M-11-188, slip op. at 15. N.Y. Civ. Prac. Law § 302(a)(1).

64 Marc Rich, No. M-11-188, slip op. at 16.

65 *Id.*

66 *Id.*

67 *Id.*

Rich & Co. The court first appeared to assert jurisdiction on the basis of the detrimental consequences test,[68] but later it asserted jurisdiction on the basis of three sets of facts. First, there was a conspiracy to evade United States income tax laws and some of the conspiratorial acts took place within the United States.[69] Second, Marc Rich & Co.'s alleged violation of United States income tax laws occurred with the cooperation of International, which was authorized to do business in New York.[70] Third, two of the board members of Marc Rich & Co. and International resided in the United States.[71] Based upon these circumstances, the court of appeals asserted its jurisdiction over Marc Rich & Co.

First, the court of appeals stated that "both the conspiracy and at least some of the conspiratorial acts occurred in the United States."[72] The court, however, failed to explain which theory of jurisdiction this fact related to. The court of appeals did, however, immediately cite a United States court of appeals decision. In the case cited, *Melia v. United States*,[73] the court ruled that when the defendant made telephone calls, relating to the underlying crime, into Canada, this constituted the performance of acts within Canada in furtherance of the conspiracy. Similarly, a United States court would have jurisdiction had the calls been made to the United States.[74] The court in *Melia* ruled that "[t]he mere presence of a conspiracy within Canada has a detrimental effect within Canada."[75] Thus, it appears that when the court of appeals in *Marc Rich* spoke of conspiratorial acts within the United States, the court was applying the detrimental consequences theory of jurisdiction. By emphasizing the fact that at least some of the conspiratorial acts took place within the United States, however, the court of appeals was also applying the transaction of business test. Under the transaction of business test, if a foreign defendant engages in any activity within the United States which activity serves as the basis for the cause of action, a United States court will have jurisdiction over the defendant.[76]

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68 In Re Marc Rich & Co., A.G., 707 F.2d at 667. "[W]e have subscribed to the 'modern notion' that where a person has sufficiently caused adverse consequences within a state, he may be subjected to its judicial jurisdiction." *Id.*

69 In Re Marc Rich & Co., A.G., 707 F.2d at 668.

70 *Id.*

71 *Id.*

72 *Id.*

73 667 F.2d 300 (2d Cir. 1981) (court extradicted Melia to Canada based upon determination that Canadian courts had jurisdiction over Melia).

74 *Id.* at 304.

75 *Id.*

76 *See supra* note 8; *see also* International Shoe Co. v. Washington, 326 U.S. at 320. "The obligation which is here sued upon arose out of those very activities [which took place in the state of

The second fact which the court of appeals based jurisdiction upon was that Marc Rich & Co.'s alleged violation of United States income tax laws had occurred with the cooperation of International. The court did not explain how this fact related to a particular test or theory of jurisdiction. The court did specifically state, however, that International was authorized to do business in New York. It is clear that a United States court could have jurisdiction over International since it was licensed and regularly did business in New York. Perhaps the court of appeals determined that it had jurisdiction over Marc Rich & Co. because International was acting either as an agent or department of Marc Rich & Co., making International's actions the actions of Marc Rich & Co.

In *Saraceno v. S.C. Johnson & Son, Inc.*,[77] the court declared that a foreign parent corporation could be deemed "present" in New York if "(1) the relationship between the foreign parent and the local subsidiary give rise to a valid inference of an agency relationship or (2) the control by the parent of the subsidiary is so complete that the subsidiary is, in fact, merely a department of the parent."[78] If the subsidiary does all the business in New York which the parent corporation would do if it were in New York by its own officers, then an agency relationship exists.[79] If the parent controls the day-to-day operations of its subsidiary to the extent that the subsidiary's officers and board of directors are reduced to subservient activity, then the subsidiary is a mere department of the parent.[80]

The United States government argued that International acted as Marc Rich & Co.'s agent.[81] The district court ruled, however, that the agency relationship must continue unchanged in order for the court to have jurisdiction of Marc Rich & Co. under the presence/doing business test. Since this relationship between International and Marc Rich, if it existed at all, only existed in 1980 and 1981, the court ruled that it did not have jurisdiction over Marc Rich & Co. on this basis.[82] Thus, when

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Washington] . . . these operations establish sufficient contacts . . . to enforce the obligations which appellant has incurred here." *Id.*

77 83 F.R.D. 65 (S.D.N.Y. 1979). The parent company in *Saraceno* was licensed to do business in New York and the court ruled that the foreign subsidiary was not a mere department or agent of the parent, thus the court granted the foreign subsidiary's motion for dismissal for lack of personam jurisdiction under the presence/doing business test of jurisdiction. *Id.*

78 *Id.* at 68.

79 *Id.* at 67.

80 *Id.*

81 Marc Rich, No. M-11-188, slip op. at 11.

82 *Id.* at 14; *see* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 517 (1923) (the defendant must be "doing business" in the jurisdiction at the time of service of process for jurisdiction to exist under the presence/doing business test).

the court of appeals stated that Marc Rich & Co.'s violation of United States laws occurred with the cooperation of International, the court may have been applying the presence/doing business test of jurisdiction.

Finally, the third fact upon which the court of appeals asserted jurisdiction over Marc Rich & Co. was that two of the board members of Marc Rich & Co. resided in the United States. This fact also appears to have had jurisdictional significance under the presence/doing business test since, in other cases, courts have held that the presence of company officers or directors in a jurisdiction serves as a basis for finding that the company was "present" in the jurisdiction and therefore subject to suits in the jurisdiction.[83]

When the court of appeals asserted jurisdiction over Marc Rich & Co., it did so on the basis of three sets of facts which relate to three separate theories of jurisdiction: the detrimental consequences theory, the presence/doing business theory, and the transacting business theory. Like the district court, the court of appeals was unable to assert jurisdiction solely on the presence/doing business theory. The inability to assert jurisdiction over Marc Rich & Co. on the sole basis of the presence/doing business test underscores the inadequacy of this test, and emphasizes the usefulness of the transacting business test and the detrimental consequences test in meeting the United States' need to preserve its ability to prosecute alleged criminal violations of its laws.

The court of appeals also ruled that the district court erred in looking to New York's long-arm statute to determine whether it had personal jurisdiction over Marc Rich & Co.[84] The court reasoned that because the subject of the grand jury's investigation in the case was the possible violation of federal revenue statutes, the grand jury's right to compel document production from Marc Rich & Co. depended upon Marc Rich & Co.'s contacts with the entire United States and not simply New York.[85] Nevertheless, the court of appeals affirmed the district court's assertion of jurisdiction over Marc Rich & Co. and rejected Marc Rich & Co.'s argument that "ratification of the service upon it of the subpoena would be tantamount to creating a novel federal long-arm rule without congressional authority."[86]

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[83] *See* In Re Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947), which the court of appeals cited to for support of its ruling of jurisdiction. In ruling that it had jurisdiction over the foreign corporation under the presence/doing business test, the court in *In Re Canadian* noted that the Canadian company's president, two vice-presidents, and treasurer resided in the United States. *Id.* at 1020.

[84] In Re Marc Rich, 707 F.2d at 667.

[85] *Id.*

[86] *Id.* at 668-69 (quoting from Marc Rich & Co.'s brief). Marc Rich & Co. had argued that 28

The court of appeals ruled that the district court should not have relied upon the New York long-arm statute to determine whether jurisdiction existed.[87] According to this author's reading of the opinion, however, the court did not base its ruling on the belief that the transacting business test is too broad. The court of appeals, in dicta, asserted that it had jurisdiction over Marc Rich & Co. under the detrimental consequences test,[88] which in some respects can be an even broader basis of jurisdiction than the transacting business test. For example, under the detrimental consequences test, a court may assert its jurisdiction over a foreign defendant who has no contacts with the United States other than an alleged violation of United States law.[89] Under the transacting business test, however, the foreign defendant must have violated United States law within the United States itself.[90]

In this author's opinion, the court of appeals thus rejected the transacting business test because the district court improperly applied the test through the New York long-arm statute,[91] and not because the court considered it to be a radical or unwise extension of federal jurisdiction.

U.S.C. § 1783 (1982) (which governs the subpoena of persons in a foreign country) controlled the case. Section 1783, Marc Rich & Co. contended, is silent as to foreign corporations which are not nationals or residents of the United States, and accordingly, those corporations are not subject to a subpoena regardless of the place and manner of service. *Id.* at 668. Disagreeing with Marc Rich & Co.'s interpretation of the statute, however, the court of appeals stated that § 1783 applied only where the subpoena is served in a foreign country. In the instant case, noted the court, the subpoena had been served upon Marc Rich & Co.'s agents within the United States. *Id.*

Moreover, said the court, "A.G.'s argument puts the cart before the horse. A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *Id.* at 669.

Finally, the government maintained that, "[t]here is in fact no governing federal statute or controlling precedent leaving the District Court, and this Court, free to determine the appropriateness of the assertion of *in personam* power on the facts of this case in light of principles of fairness and applicable federal policies." Government's Brief, *supra* note 62, at 10.

The government argued that § 1783 did not apply since, on its face, the statute deals with individuals who are residents or citizens of the United States, and not with corporations. *Id.* at 11. The government cited a district court decision which rejected the argument that § 1783 applies to corporations. In Re Arawak Trust Co., 489 F. Supp. 162, 165 (E.D.N.Y. 1980). "It is not reasonable to impute to Congress a purpose to immunize from process non-resident foreign corporations conducting substantial and continuous activities here. The purpose of the legislation was rather to provide a means to make service on nationals or residents of this country who were physically outside it." *Id.* at 165. (investigation of fraud; order compelling production of documents denied due to lack of jurisdiction).

87 In Re Marc Rich, 707 F.2d at 668.

88 *Id.* at 667.

89 *See supra* note 23.

90 *See supra* note 8.

91 In Re Marc Rich, 707 F.2d at 667.

III. Analysis of the Three Standards of Jurisdiction

A. Case Law Supports the Application of All Three Standards of Jurisdiction

The courts could have complied with precedent by applying any of the three jurisdiction standards to the *Marc Rich* facts. The United States Supreme Court and lower federal courts have applied both the presence/doing business test and the detrimental consequences test when determining whether criminal jurisdiction exists.[92] The district court and court of appeals could also have applied the transaction of business test without conflicting with precedent.[93] Although in the past courts have used the transacting business test in civil matters, nothing bars the courts from using this or any other test in criminal cases so long as the test does not violate due process of law requirements.[94] Although no court before *Marc Rich* ever directly applied the transaction of business test to determine whether criminal jurisdiction exists, one state supreme court indirectly grounded criminal jurisdiction on this basis,[95] and one federal court of appeals indirectly affirmed the application of this test for criminal jurisdiction.[96] Finally, the United States Supreme Court, albeit in a civil case, found specific jurisdiction over a defendant on the basis of the transaction of business test.[97]

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92 *See supra* notes 7 and 23. The American Law Institute, in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 ratified the detrimental consequences test. The Court of Appeals for the Second Circuit applied the Restatement formulation of the test in Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972)..

93 *See supra* notes 17 and 18.

94 One aspect of due process of law with regard to jurisdictional tests is whether it would be unreasonably burdensome for the defendant to respond to the suit in the particular jurisdiction. *International Shoe*, 326 U.S. at 317. Another aspect is whether the defendant could have reasonably foreseen a suit in the jurisdiction. *Leasco Data*, 468 F.2d at 1342.

95 State v. Luv Pharmacy, Inc., 188 N.H. 398, 406-407, 388 A.2d 190, 195 (1979). Though the court in *Luv* first rejected the application of the transacting business test of criminal jurisdiction due to the possibility that judgment could be rendered against a defendant while absent from the state, it later stated that the commission of illegal acts within a state is a "compelling circumstance of affiliation with the state and a basis of jurisdiction." *Id.*

96 *Leasco Data*, 468 F.2d at 1341. The court in this case specifically stated that the defendant's activity within the United States had not been the basis for the cause of action. The court would not have highlighted the presence or absence of this fact unless it had some legal significance. The court therefore impliedly ruled that had the defendant's activity within the United States been the basis for the cause of action, this would have jurisdictional significance. Thus, the court indirectly affirmed the application of the transaction of business test for criminal jurisdiction, since under the transaction of business test, if the defendant's activity within the United States is the basis for the cause of action, this will support jurisdiction.

97 *International Shoe*, 326 U.S. at 320. In the holding, the Court emphasized that although the defendant's commission of some single or occasional activity within the state did not normally confer jurisdiction upon the court, if these acts within the state formed the basis of the cause of action, a finding of jurisdiction "can in most instances, hardly be said to be undue." *Id.*

B. The Balancing of Interests in Fashioning a Future Federal Standard of Jurisdiction

This author has identified at least four major interests of the United States which might be considered when fashioning a future federal standard of criminal jurisdiction. First, the United States has a strong interest in preserving its right to prosecute alleged violations of its laws.[98] The courts would have to adopt a broad theory of jurisdiction in order to favor this interest because the broader the theory of jurisdiction (in the sense that less activity in the jurisdiction would be necessary to a finding of jurisdiction), the more difficult it will be for foreign defendants to violate United States laws and not be subject to a United States court's jurisdiction. There are, however, three competing interests which would lead a court to conclude that a more limited theory of jurisdiction should be adopted. These are: the United States' interest in maintaining and furthering its position as an international center for trade and in promoting healthy political and economic relations with other countries,[99] the United States' interest in securing due process of law for potential defendants,[100] and the United States' interest in setting an international precedent which will protect United States corporations from unfair or surprise suits in other countries.[101]

The presence/doing business test fails to protect the United States' interest in prosecuting alleged violations of its laws. Under this test, a

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98 *See* In Re Elec. & Musical Indus., 155 F. Supp. 892, 896 (S.D.N.Y. 1957). (grand jury investigation; jurisdiction over defendant supporting subpoena of defendant) "We may still indulge in a heavy handed fiction of corporation personality to protect a parent corporation from service outside of a state in which it is active but there is a clear warning in Scophony that such a fiction is not to be used to protect the parent [corporation] from being served at all particularly in a proceeding under the antitrust laws." *Id. See also* United States v. Scophony Corp., 333 U.S. 795 (1948) (charge of Sherman Act violation; court has jurisdiction); Hyde v. United States, 225 U.S. 347, 363 (1912).

99 *See, e.g.*, In the Matter of Arawak Trust Co., Ltd., 489 F. Supp. 162, 165 (E.D.N.Y. 1980). "Doubtless the use of foreign corporations to facilitate the federal crime is not to be encouraged. On the other hand it is desirable to maintain the United States as a center for commerce throughout the world." *Id.*

100 World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (products liability action; no jurisdiction). The court stated that even if the defendant would suffer minimal or no inconvenience in responding to the suit and even if the state had a strong interest in prosecuting the case, the due process clause, requiring that the defendant reasonably anticipated a suit in that state, can divest the state of its jurisdiction. However, *World Wide Volkswagen* was a civil case in which the plaintiffs could always sue the defendants in a New York state court where the plaintiffs had maintained "minimum contacts."

101 In Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1342 (2d Cir. 1972), the court refused to assert its jurisdiction in order to avoid a reciprocal assertion of jurisdiction by other courts over United States citizens and corporations. The court stated, not only would "accountants operating solely in London . . . be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited; the same would be true, of course, of accountants operating solely in the United States." *Id.*

potential defendant can violate United States law with impunity while easily structuring its activities in order to avoid the systematic and continuous contacts with the United States which are necessary to satisfy the presence/doing business test. The activities of Marc Rich & Co. provide a good example of how a foreign corporation can knowingly violate United States laws and yet escape prosecution in the United States under the presence/doing business test of jurisdiction. The district court explicitly ruled that it lacked jurisdiction over Marc Rich & Co. under the presence/doing business test because the company did not regularly do business in the United States through continuous and systematic contacts or through the maintainance of an office, bank accounts, or other formal indicia of doing business in the United States.[102]

Nevertheless, the presence/doing business test does promote the United States' interest in securing due process of law for potential defendants. If a defendant is doing business in a jurisdiction, it probably has sufficient contacts with the jurisdiction to ensure that responding to a suit in that jurisdiction would not be unduly costly or inconvenient. The concern over inconvenience to the defendant in responding to a suit in the particular jurisdiction, though strong in the past, has in recent years become less important to the courts. Due to technological advances in travel, in the past few decades United States courts have rarely found that they lacked jurisdiction because the defendant would be inconvenienced by responding to the suit.[103] Moreover, if the defendant is a multinational corporation, the company most likely will have the resources to defend lawsuits in countries other than those in which the company is principally located.

Currently, the courts that interpret the due process requirement are not concerned with the cost and inconvenience to the defendant in responding to the suit;[104] rather courts emphasize that in order to satisfy due process of law the defendant must have reasonably anticipated that

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102 Marc Rich, No. M-11-188, slip op. at 14.

103 *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957). "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.* (beneficiary under an insurance contract, a resident of California, sued its insurer, a Texas corporation, for recovery under its insurance policy; the Supreme Court ruled that the California state court had jurisdiction over the Texas corporation) *Id. See also* Hanson v. Denckla, 357 U.S. 235, 250-251 (1958). A Florida court ruled that a trust agreement making a Delaware trust company a trustee of certain securities was ineffective under Florida law. The Supreme Court held that the Florida court lacked jurisdiction over the Delaware company due to a lack of minimum contacts of the defendant in Florida. The Court stated that, due to the less burdensome nature of defending a suit in a foreign tribunal, the Court's rulings on the requirements for personal jurisdiction have "evolved from the rigid rule of Pennoyer v. Neff . . . to the flexible standard of International Shoe." *Id.*

104 *Id.*

his actions could lead to litigation in a particular forum.[105] Because the defendant, under the presence/doing business test, must be engaged in continuous and systematic business in a particular jursidiction, the defendant should reasonably anticipate that these activities could expose it to litigation in that forum.[106] Nevertheless, the presence/doing business test is a form of general jurisdiction.[107] Therefore, the defendant also may be subject to litigation in that jurisdiction for claims based upon the defendant's actions outside of the jurisdiction.[108] Thus, the defendant might not reasonably anticipate litigation of certain claims in the United States.

The continued application of the presence/doing business jurisdiction test in criminal cases probably will promote the United States' interests in maintaining healthy political relations with other countries and in encouraging international trade with United States companies because, for a court to have jurisdiction, the defendant must maintain continuous and systematic contacts with the United States rather than merely single or occasional contacts. Moreover, due to the requirement of continuous and systematic contacts, the application of jurisdiction on this basis by foreign courts over United States citizens or companies would be more desirable to these citizens or companies than the assertion of jurisdiction on the basis of less systematic contacts. The adoption of the presence/doing business test by foreign countries will tend to limit their ability to assert jurisdiction over United States defendants because the test requires continuous and systematic contacts with the foreign jurisdiction by the United States defendant. Thus, if a United States citizen or corporation wants to avoid a lawsuit in a particular country in which it conducts some business, the citizen or corporation can avoid that suit by limiting its activities within the country so that they are not systematic and continuous.[109]

Though the presence/doing business test furthers the United States' interests in securing due process of law for potential defendants, in maintaining the United States' position as a center for international trade, and in promoting good relations between the United States and other coun-

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105 *See supra* note 100.

106 *See supra* note 7.

107 *See supra* note 26.

108 *Id.*

109 Had the district court in *Marc Rich* not applied the transacting business test, it would not have found jurisdiction over Marc Rich & Co. "If 'doing business' were the only ground for jurisdiction in this case, we would . . . quash the subpoena." Marc Rich, No. M-11-188, slip op. at 14. As the court stated at the very beginning of its opinion, "AG [Marc Rich & Co.] claims that it has deliberately structured its business to avoid any contact with the United States . . ." *Id.* at 1.

tries, the test clearly fails to protect the United States' interest in prosecuting alleged violations of its laws. The presence/doing business test fails to protect the United States' interest in prosecuting alleged violations of its laws because, under this test, a foreign defendant, by structuring its activities to avoid systematic and continuous contact with the United States, can transact some business in the United States, violate United States law, and avoid a United States court's jurisdiction.

The transaction of business test also must be rejected as an inadequate federal standard of criminal jurisdiction because it fails to meet the United States' various interests. The transacting business test has one advantage over the presence/doing business test; it allows a court to assert jurisdiction over foreign defendants even if the defendants do not regularly conduct business within the jurisdiction.[110] Thus, the transacting business test would prevent a foreign defendant from violating United States law and from structuring its activities in order to avoid a United States court's jurisdiction.[111]

The transacting business test contains one loophole, however. The foreign defendant must have had some contact with the United States and this contact must have created the basis of the lawsuit.[112] If a foreign defendant violates United States law and the contact it has with the United States does not form the basis of the lawsuit, then a United States court applying this test would be forced to conclude that it lacked jurisdiction over the foreign defendant.[113] Thus, a foreign defendant may be able to structure its activities to avoid United States jurisdiction under the transacting business test as well.

Of the three jurisdiction tests used by the courts, the transacting business test affords a potential defendant the least amount of due process protection because it could require a foreign defendant to respond to a suit which may be very inconvenient and costly. For example, under the transacting business test, jurisdiction may be asserted over a foreign defendant whose only contact with the United States is a telephone call,[114] while under the presence/doing business test, the foreign defendant must regularly conduct business within the United States.[115] In addition, under the transacting business test, jurisdiction may be asserted

110 *See supra* note 8.

111 For example, in *Marc Rich*, Marc Rich & Co. was unable to violate United States law without being subject to United States jurisdiction under the transacting business test. Marc Rich, No. M-11-188, slip op.

112 *See supra* note 8.

113 *Id.*

114 *See* Melia v. United States, 667 F.2d 300, 304 (2d Cir. 1981).

115 *See supra* note 7.

over defendants who may be acting in the United States, but who reasonably believe that the effects of their actions would only reach another country where their actions may be legal. These defendants might unexpectedly find that their actions have been deemed by a court to have illegally affected the United States, and thus they might find themselves subject to a lawsuit in the United States. Thus, there may be cases where the transacting business test might not satisfy the due process requirement that the defendant reasonably anticipate a lawsuit in a particular forum.

The application of the transacting business test for criminal jurisdiction over foreign defendants probably will not adversely affect the United States' interest in maintaining good relations with other countries and in maintaining the United States' position as an international trade center for three reasons. First, United States state courts and federal courts under diversity jurisdiction already apply the transacting business test of jurisdiction to foreign defendants in civil cases.[116] Thus, application of this jurisdictional test to criminal cases probably will not deter foreign business activity in the United States. Second, the current federal standard of jurisdiction in civil cases, the minimum contacts theory of jurisdiction, can also be a broad basis of jurisdiction. It appears, upon a careful reading of the *International Shoe* decision, that the United States Supreme Court ruled that a court could have jurisdiction over a foreign defendant based upon even a single act of the defendant within the jurisdiction, if the act in the jurisdiction served as the basis for the cause of action being litigated in the jurisdiction.[117] Third, United States courts currently apply the detrimental consequences test of jurisdiction in criminal cases, which in some respects can be an even broader theory of jurisdiction than the transacting business test.

The application of the transacting business test in the United States could induce other countries' courts to reciprocally apply this test of jurisdiction to United States citizens or corporations. The United States would not want to have foreign countries adopt the transacting business test for the same reasons foreign corporations do not want to have the United States courts adopt this test. If the transacting business test were adopted by a foreign country's courts, it might subject United States corporations to lawsuits in the foreign country for unintentional violations

116 *See, e.g.*, Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87 (2d Cir. 1975). The court of appeals held that the plaintiff failed to establish that the defendant transacted business in New York, thus the district court did not have personal jurisdiction over the defendant.

117 International Shoe Co. v. Washington, 326 U.S. 310, 319-20 (1945).

of that country's laws,[118] and it might allow jurisdiction to be based upon the insignificant contacts the United States corporation might have with the foreign country.

Thus, while the transacting business test better secures the United States' interest in prosecuting alleged violations of United States laws than the presence/doing business test,[119] it may provide defendants with inadequate due process of law protections. Moreover, the adoption of the transacting business test may also deter some multinational companies from conducting business in the United States, sour the United States' relations with other countries, and induce foreign courts to reciprocally assert a broad-based jurisdictional test against United States citizens and corporations.

The third jurisdictional test which the courts might use, the detrimental consequences test, best balances the interests which must be taken into consideration in fashioning a future federal standard of criminal jurisdiction. The detrimental consequences test best protects the United States' interest in prosecuting alleged violations of its laws, because under this test a United States court will have jurisdiction to hear the case any time foreign defendants allegedly commit a knowing violation of United States criminal laws. Only if foreign defendants violate United States laws without knowing that their actions would constitute a violation of United States law would a United States court lack jurisdiction. Since many crimes require, as an element of the crime, that the accused actually know that its actions constitute a violation of the law,[120] the jurisdictional requirement of "knowingly" violating the law will not impede the government's ability to prosecute criminal violations of United States laws.

Unlike the transacting business test, the detrimental consequences test broadly protects the United States' interest in prosecuting violations of its laws, while adequately protecting the defendants' interests in ob-

118 *See supra* note 8. There is no intent requirement under the transacting business test as there is under the detrimental consequences test.

119 A court could assert jurisdiction over a defendant on the basis of a defendant's single act in the United States under the transacting business test. *See supra* text accompanying note 114.

120 For instance, the Criminal Investigation Division of the Internal Revenue Service (I.R.S.) is very selective in recommending criminal prosecution of tax violations. Of the 136 million tax returns filed each year, the I.R.S. closely examines about 2.2 million and the Criminal Investigation Division recommends on the average, prosecution against only 3,000, obtaining convictions in about 87% of the cases actually prosecuted. Commissioner of Internal Revenue, *Annual Report* 30 (1978) *reprinted in* M. SALTZMAN, I.R.S. PRACTICE & PROCEDURE, § 12.01, n.3 (1983). The I.R.S. will criminally prosecute only in instances of willful misconduct by the taxpayer in which the taxpayer intentionally violated a known legal duty. *Id.* The I.R.S. will examine the taxpayer's education or lack thereof to determine if the violation was intentional. *Id.* § 12.03(3)(b)-(3)(c).

taining due process of law.[121] Indeed, the detrimental consequences test may best satisfy the due process requirement because that test requires that the defendants knowingly violate a jurisdiction's laws.[122] This scienter requirement guarantees that the defendants could reasonably anticipate suit in a particular forum and thus would be assured of their due process protection.[123] Although it is more likely that under the presence/doing business test defendants will be able to respond to suits with less inconvenience and cost than under the detrimental consequences test, some courts have subordinated the issue of inconvenience to the defendant in responding to the suit when the defendant is charged with criminal acts, due to the United States' strong interest in prosecuting this type of case.[124]

Of the three jurisdiction tests used by the courts, the detrimental consequences test appears to be the best for promoting the United States' interest in maintaining good relations with other countries and for encouraging more multinational companies to do business in the United States because it will not subject foreign defendants to suits in the United States for any actions that they have taken within or outside the United States so long as they have not knowingly violated United States law. One result of this test may be that multinational corporations and other foreign defendants might structure their conduct to avoid criminal suits in the United States simply by not knowingly violating United States laws. Thus, the detrimental consequences test might encourage multinational companies to become more active within the United States, because their activities in the United States would not in and of themselves make them vulnerable to suit in the United States as they would under the presence/doing business test.[125]

If United States courts apply the detrimental consequences theory of jurisdiction over foreign defendants, other countries' courts might reciprocally apply this test of jurisdiction over United States citizens or corporations. The United States would probably be pleased if foreign countries adopted this standard because under it, a foreign country could only assert jurisdiction over United States citizens or companies which knowingly violate the foreign country's laws.[126] There is, however, one problem with having foreign courts apply the detrimental consequences test; a foreign court might presume that the defendant knowingly vio-

121 *See supra* text accompanying notes 114-15.
122 *See supra* note 23.
123 *Id.*
124 *See supra* text accompanying note 103.
125 *See supra* note 26.
126 *See supra* note 23.

lated its laws when defendants actually may have been unaware of the fact that their actions constituted a violation of a country's criminal laws.

The American Law Institute has addressed the potential problems associated with the detrimental consequences test by stating that the plaintiff should be required to demonstrate that the defendant's conduct and its effects are generally recognized as elements of a crime or of a tort under the laws of nations with developed legal systems, and that the violation of the law was a direct and foreseeable result of the conduct.[127] If foreign courts adopted this standard, then United States citizens and corporations probably would not object to having foreign courts apply the detrimental consequences test to determine whether jurisdiction exists.

Of the three tests of jurisdiction, the detrimental consequences test best meets the United States' diverging interests, because it not only protects the United States' interest in prosecuting knowing violations of its criminal laws, but it also satisfies due process of law requirements. Moreover, United States citizens and corporations would find the detrimental consequences test to be a desirable theory of jurisdiction for foreign courts to apply to them.

The presence/doing business test inadequately protects the United States' interest in prosecuting alleged violations of its criminal laws because it requires the defendant to maintain continuous and systematic contacts with the United States before jurisdiction will be established. Thus, the presence/doing business test would allow foreign corporations to violate United States law with impunity by structuring their activities so that United States courts would lack jurisdiction. Moreover, while the doing business test best protects the defendant from inconvenient and expensive suits, courts have given the government's interest in prosecuting alleged violations of its criminal laws priority over the defendant's interest in preventing inconvenient and expensive lawsuits.[128] Application of the presence/doing business test of jurisdiction in criminal cases is particularly ill-advised due to the United States' strong interest in prosecuting criminal violations of its laws. Finally, since the presence/doing business test supports general jurisdiction it is more likely to discourage international trade with the United States than would the detrimental consequences test.

The transacting business test also fails to serve the United States' interests. Not only may the transacting business test violate due process of law requirements by establishing jurisdiction over defendants who could not reasonably foresee that their actions could lead to a lawsuit in

127 *See supra* note 23.

128 *See supra* note 103 and accompanying text.

the United States, but it also may allow foreign courts to establish jurisdiction over United States citizens or corporations that had not knowingly violated the plaintiff's country's laws.

C. There Should Be a Uniform Federal Standard of Criminal Jurisdiction Based Upon the Detrimental Consequences Test

To date, lower federal courts have either applied one of the three jurisdiction theories discussed in this Note, or combined all three theories when determining whether they have jurisdiction over foreign defendants.[129] Because United States courts have failed to adopt a specific federal standard of criminal jurisdiction,[130] foreign individuals or companies cannot reasonably anticipate when they will be subject to litigation in the United States. In addition, this uncertainty will prevent foreign companies from structuring their activities to avoid suit in the United States. Foreign companies' inability to know whether their activities in the United States will subject them to the United States courts' jurisdiction might not only deter some multinational companies from engaging in activity in the United States, it might also deny due process of law to those foreign defendants who have engaged in business with United States citizens or companies.

The United States Supreme Court has ruled that due process of law requires "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[131] Potential foreign defendants, however, do not currently enjoy this predictability because neither Congress nor the Supreme Court has developed a uniform federal standard of criminal jurisdiction.[132] Thus, potential defendants must act without knowing whether their actions will render them liable to suit because they do not know what standard of jurisdiction a court might apply. In this sense, the lower federal courts' application of various standards might violate the due process clause because foreign defendants will not be able to reasonably anticipate

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129 *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (court cited to the Restatement (Second) of Conflict of Laws for three bases of finding jurisdiction: (1) doing business in the jurisdiction, (2) causing an effect in the jurisdiction, or (3) doing an act in the jurisdiction. *Id.* at 1340; *see supra* § II B of this Note for a discussion of how the court of appeals in *Marc Rich* combined all three theories of jurisdiction in asserting jurisdiction over Marc Rich & Co.

130 *See supra* note 17-18.

131 *World Wide Volkswagen*, 444 U.S. at 297.

132 *See supra* notes 17-18.

whether their actions will render them liable to suit in the jurisdiction.[133]

Congress or the Supreme Court should develop a uniform standard of criminal jurisdiction to end the existing confusion. This uniform standard should not combine all three jurisdiction theories, in the sense of asserting jurisdiction on the basis of any of the three theories, because this combination would create a very broad standard which would probably harm the United States' interest in maintaining good relations with other countries and in encouraging international trade with the United States. In addition, foreign countries could adopt this trifurcated test and could reciprocally assert it against United States citizens and corporations. Therefore, a uniform federal standard of jurisdiction should be based upon a single theory of jurisdiction which can best meet the United States' varying interests—the detrimental consequences test.

IV. THE DISTRICT COURT'S AND COURT OF APPEALS' ALLOCATION OF THE BURDEN OF PROOF

As important as the standard of jurisdiction is, the government's ability to prosecute alleged violations of the law will be equally affected by the initial showing a court requires a plaintiff to make when a defendant moves to dismiss for lack of jurisdiction. The greater the burden placed on the plaintiff prior to discovery, the less likely it is that the plaintiff will be able to satisfy it. Nevertheless, a plaintiff must make some showing that the court has jurisdiction so that defendants will be protected from frivolous suits.

In *Marc Rich*, the district court ruled that the government had to make a *prima facie* showing[134] of jurisdiction in order to avoid dismissal and to require Marc Rich & Co. to produce the requested documents.[135] The government met this preliminary burden by using affidavits "which support[ed] its allegations that International directed income from the resale of oil purchased from A.G. offshore to A.G. in a manner designed to avoid United States taxes."[136] After the government made this pre-

133 *See supra* note 131.

134 To satisfy this standard, the plaintiff cannot merely allege conclusory statements, but must allege specific facts which would establish jurisdiction and the cause of action. Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 92 (2d Cir. 1975) (defendant charged with breach of contract, conspiracy to divert assets, and misappropriation of a business opportunity; court held jurisdiction did not exist because the plaintiff failed to establish that the defendant transacted business in New York or committed tortious acts in or outside New York which would give the district court jurisdiction over the defendant).

135 Marc Rich, No. M-11-188, slip op. at 10.

136 *Id.* at 16.

liminary "good faith"[137] jurisdiction showing, the district court ruled that Marc Rich & Co. had the burden of persuading the court that the transactions between the two companies took place at arm's length,[138] and that International's losses did not indicate that it was directing income offshore to Marc Rich & Co. in a manner designed to avoid United States taxes.[139] Since Marc Rich & Co. did not meet this burden, the district court ruled that jurisdiction existed and the subpoena would be enforced.[140]

The court of appeals affirmed the district court's decision that the government's affidavits sufficed to show jurisdiction and ordered Marc Rich & Co. to comply with the grand jury's subpoena *duces tecum*.[141] The court of appeals, however, required the government to make more than a *prima facie* showing of jurisdiction in order to meet its burden of proof. Instead, the court of appeals ruled that the government must establish a "reasonable probability of ultimate success" in proving the facts necessary for the exercise of jurisdiction.[142] The court ruled it would order compliance with the grand jury's subpoena only if this showing were made. The court applied the "reasonable probability of ultimate success" test instead of the *prima facie* test because it deemed ordering compliance with the subpoena to be tantamount to the granting of an injunction.[143] The court stated, "when the defendant in a civil case challenges the grant of a temporary injunction on the ground that the court is without personal jurisdiction, the plaintiff is required to establish only a reasonable probability of ultimate success on this issue."[144] The decision upon which the court of appeals relied, however, specifically involved the granting of a preliminary injunction and not an order for the compliance

137 The district court interchangeably spoke of a *prima facie* or good faith showing. The court probably meant *prima facie* when it used the term "good faith".

138 Marc Rich, No. M-11-188, slip op. at 17. The district court did not state how Marc Rich & Co. could prove arms-length transactions with International but did state that because Marc Rich & Co. failed to explain the massive losses incurred by International, Marc Rich & Co. had not met its burden of proof. *Id.*

139 *Id.*

140 *Id.*

141 Marc Rich, 707 F.2d at 670.

142 *Id.*

143 The court of appeals cited Visual Sciences, Inc. v. Integrated Communications, Inc., 660 F.2d 56 (2d Cir. 1981) (stockholders suit, preliminary injunction denied), which applied the reasonable probability test as opposed to the *prima facie* test because the plaintiff sought preliminary injunctive relief which required the court to have personal jurisdiction over the defendants. "In the absence of a full-blown hearing on the merits, plaintiff need make only a *prima facie* showing that the court has jurisdiction . . . A *prima facie* showing will not suffice, however, where a plaintiff seeks preliminary injunctive relief." *Id.* at 58-59.

144 Marc Rich, 707 F.2d at 670.

with a grand jury subpoena *duces tecum*.[145] Moreover, this author has found no cases in which a court ruled that an order compelling the production of documents is tantamount to preliminary injunctive relief. Thus, it appears that the district court's application of the *prima facie* test was correct, and the court of appeals' application of the reasonable probability of ultimate success test was incorrect in *Marc Rich*.

V. THE DISTRICT COURT RESOLVED THE CONFLICTING DEMANDS IMPOSED UPON MARC RICH & CO. BY UNITED STATES AND SWISS LAW IN THE UNITED STATES' FAVOR

Finally, the district court addressed the fact that Swiss law forbade Marc Rich & Co. from producing certain of its documents located in Switzerland.[146] The district court noted that "when compliance with a grand jury subpoena would violate the law of a foreign nation, the court must balance the interests of the United States and the foreign nation."[147] The district court also stated that even if a defendant might be criminally punished by a foreign nation if it complied with the subpoena, courts will nevertheless uphold the subpoena if the interests of the United States are sufficiently strong.[148]

Citing the interests listed in the Restatement (Second) of Foreign Relations Law of the United States,[149] the district court concluded that the United States' interest in investigating violations of its tax laws outweighed the Swiss interest in preventing disclosures of business secrets.[150] It noted that the United States government had substantially shown that Marc Rich & Co. used International to violate United States tax laws by conveying profit outside the United States to Marc Rich & Co. and concluded that permitting Marc Rich & Co. to shield this conduct from the scrutiny of the grand jury would be a "travesty of jus-

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145 *See supra* note 143.

146 Marc Rich & Co. did not bring up this point on appeal. It is unclear why it did not do so.

147 Marc Rich, No. M-11-188, slip op. at 17.

148 *Id.* at 18.

149 Marc Rich, No. M-11-188, slip op. at 18. The interests cited by the court were:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

(citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965)).

150 Marc Rich, No. M-11-188, slip op. at 18.

tice."[151] Moreover, the court found it highly significant that the Swiss government had not intervened to defend any national interest.[152] Therefore, the district court held that the Swiss penal statute did not bar the disclosure sought by the grand jury.[153]

A. Case Law Supports the District Court's Decision to Compel the Production of Documents Despite Possible Violation of Swiss Law

The district court could have turned to any one of three positions to determine whether to order discovery and impose sanctions for noncompliance. The first, and most narrow approach, is embodied in the Supreme Court decision, *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers.*[154] In *Rogers*, the Court balanced three factors in determining whether to order discovery: (1) the importance of the policy underlying the United States statute involved; (2) the importance of the documents requested to the party seeking discovery; and (3) the nationality of the party resisting discovery, insofar as it would affect the party's ability to prevent the foreign government from imposing sanctions.[155] *Rogers* examined the propriety of dismissal of the petitioner's claim in light of the petitioner's good faith efforts to comply with the court's order to produce the documents requested. *Rogers*, however, did not clearly define what would constitute a good faith effort

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151 *Id.* at 18-19.

152 Though prior to the district court's decision, the Swiss government had not intervened, it did so after the district court decision. Moreover, the Swiss government seized some of the remaining documents after Marc Rich & Co. began to comply with the order.

Following the district court decision, Marc Rich and Pinkus Green sought an order from a Swiss court to direct the company to comply fully with the United States' grand jury subpoena. The Swiss court issued a preliminary injunction requiring Marc Rich & Co. to retain the documents until the Swiss court issued a final judgment. On June 27, 1983, Marc Rich & Co.'s attorneys appeared before district court Judge Sand seeking a temporary stay pending a hearing on the motion to vacate or modify the orders of September 1982. The government's attorneys alleged that Marc Rich & Co. had, in essence, really brought this suit against itself in the Swiss courts as a "thinly veiled effort on their part to put themselves in a position so that" the company would not be held in contempt of court when the company did not produce the requested documents." Transcript, J. Sand's Chambers at 108 (June 27, 1983).

An attorney appeared on behalf of the Swiss government to tell the court that Switzerland desired to avoid conflicts between Swiss law and United States law and that it would like a short period to look into the matter during which time sanctions against Marc Rich & Co. would be withheld. *Id.* at 131-33. Judge Sand denied Marc Rich & Co.'s motion and the Swiss government's application. *Id.* at 143. Judge Sand stated that the Swiss government could still seek a formal intervention in the proceedings or appeal to the executive branch of the United States government for relief. *Id.* at 130.

153 Marc Rich, No. M-11-188, slip op. at 19.

154 357 U.S. 197 (1958).

155 *Id.* at 204-206.

or whether good faith necessarily entails affirmative action.[156] Under this approach, a United States court will order discovery if it determines that United States' interests in obtaining the documents are substantial but will order sanctions for noncompliance only if the party fails to make good faith efforts to comply.[157]

The second approach, the one used by the district court in *Marc Rich*, is contained in the Restatement (Second) of Foreign Relations. The Restatement lists five factors which must be considered in determining whether a discovery order should be issued and whether sanctions for noncompliance should be issued: (1) the vital national interests of each of the states; (2) the extent and nature of the hardship that inconsistent enforcement actions would impose on the party; (3) the extent to which the required conduct will take place in the territory of the other state; (4) the nationality of the parties; and (5) the extent enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[158] The Restatement, unlike *Rogers*, considers the vital national interests of both countries, not only those of

156 Comment, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320, 1330 (1983) [hereinafter cited as *Extraterritorial Discovery*]. In *Rogers*, a Swiss company, through the consent of the Swiss government, released over 190,000 documents and presented a plan of disclosure approved by the Swiss government to the district court. The plan was designed to achieve maximum compliance with the production order without violating Swiss secrecy laws. *Rogers*, 357 U.S. at 203.

157 *Extraterritorial Discovery*, *supra* note 155, at 1331. In that Comment, the author proposes a uniform approach which focuses on a well-defined good faith effort to comply with a discovery order as the basis for determining when to impose sanctions for noncompliance. A conclusion that the party has made good faith efforts to comply would be justified by three findings: (1) the absence of any unjustified reliance on foreign nondisclosure laws, (2) the undertaking of affirmative efforts to comply with the discovery order, and (3) the absence of any "courting of foreign impediments." *Id.* at 1347. Under the good faith standard, if a party does not produce the requested documents but makes good faith efforts to produce the documents, a court will not impose sanctions. *Id.* at 1350.

It could be argued, however, that whenever a party places documents in a country with business secrecy laws, the party is "courting foreign impediments" to the disclosure of such documents. Another problem with this standard relates to the quantum of affirmative acts a party must show for a court to conclude the party has made good faith efforts to comply with the production order. Moreover, only if the party knows that noncompliance will definitely lead to sanctions, as under the balancing test, will the party attempt to release its documents and obtain a waiver of sanctions from the country in which the documents are located. Under the good faith test, however, the party and the other country will view the party's "affirmative acts" as having been taken only to satisfy the standard. The other country will therefore assert that it refuses to waive sanctions against the party if it releases the documents requested so that a United States court will refuse to order the production of documents under the good faith test. Thus, the good faith test is not workable because under it, a party's affirmative acts are a tactic to convince a United States court not to compel the production of documents rather than a tactic to convince another government to waive sanctions for producing the documents.

158 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

the United States.[159]

A third, and broader approach, which the district court did not adopt, is embodied in *United States v. Vetco*.[160] *Vetco* combines the Restatement's five factors and a good faith analysis in determining the propriety of ordering discovery and sanctions for noncompliance. The court in *Vetco* required more than a good faith showing to prevent sanctions for noncompliance as the court required in the civil case of *Rogers*, because "an I.R.S. summons issued pursuant to an investigation of potential criminal conduct . . . serve[s] a more pressing national function than civil discovery."[161]

The district court's balancing of the conflicting claims on Marc Rich & Co. and its decision to compel the production of documents in potential violation of Swiss law conforms with legal precedent and sound policy. The court complied with legal precedent by applying the Restatement (Second) of Foreign Relations Law. Had it applied the three factor analysis enunciated by the Supreme Court in *Rogers*, the court would have also ordered discovery since that standard compels discovery when the United States' interest is as strong as it was in *Marc*

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159 *See supra* text accompanying note 158.

Another proposed approach focuses on the impact that conflict of law decisions have on the entire international legal system, as opposed to merely the interest and relations of the two countries involved. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982). Under this approach, when determining which country's law controls, courts have a "duty to consider [the international system's] values of fairness, predictability, and smooth interaction independently of the state's substantive interests as reflected in the relevant laws." *Id.* at 288.

This proposal, however, conflicts with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 Comment b (1971) and RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 comment j (1965), which state that United States courts cannot give effect to international legal requirements if there is clear congressional direction to do otherwise. *Id.* at 291.

This approach emphasizes that United States law in this area can serve as the basis of international precedent and can therefore legitimize similar claims by other nations. The writer cites to two Supreme Court decisions which limited the applicability of the National Labor Relations Act to foreign crews on foreign flag vessels due to fear of legitimizing reciprocal claims. Lauritzen v. Larsen, 345 U.S. 571 (1953) (foreign ship owner sued for injury; court held it had jurisdiction but that the Jones Act was inapplicable); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959) (foreign ship owner sued for injury; court held it had jurisdiction but that the Jones Act was inapplicable). Maier, *supra* at 307.

160 United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.) *cert. denied*, 102 S. Ct. 671 (1981) The I.R.S. summoned a Swiss corporation to produce certain documents located in Switzerland. The court upheld the summons stating that the United States' interest in obtaining the summoned documents was strong, and that Switzerland has a small interest in preventing the release of the documents. In addition, the Swiss company failed to show a substantial likelihood that compliance with the court's order would lead to the successful prosecution of the company by the Swiss. *Id.* at 1333.

161 *Vetco* at 1330.

Rich.[162]

VI. CONCLUSION

The district court's and the court of appeals' decisions, by directly and indirectly validating the transaction of business test as a new federal standard of criminal jurisdiction,[163] have tremendously improved the ability of the United States to prosecute multinational corporations for alleged violations of United States law.[164] At the same time, however, these decisions may be used by other nations' courts as precedent supporting the assertion of jurisdiction over United States citizens or multinational corporations.[165] As previously noted, the transaction of business test may not be the best standard of criminal jurisdiction since it may discourage international trade in the United States and deny due process of law to potential defendants.[166] Nevertheless, the presence/doing business test should not be adopted in its place because it is also flawed in that it inadequately protects the United States' interest in prosecuting alleged violations of its laws.[167]

At the present time, neither Congress nor the Supreme Court has established a uniform federal standard of criminal jurisdiction. As a result, lower federal courts have applied various standards of jurisdiction over foreign defendants.[168] This application of varying standards may not only constitute a denial of due process of law,[169] but it may also discourage foreign trade with the United States, United States citizens, and United States-based corporations.[170]

This Note recommends, therefore, that either Congress or the

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162 *See supra* text accompanying note 157. Moreover, the factor approach, in this author's opinion, is more workable than the uniform good faith approach.

163 *See supra* § II A of this Note.

164 *See supra* § III B of this Note. Unless the defendant has property within the United States jurisdiction, a United States court lacks the leverage necessary to force a nonresident defendant to comply with the court's order. Marc Rich & Co. did have property within the United States—the I.R.S. froze $90 million of Marc Rich & Co.'s U.S. assets, including a substantial interest in Twentieth Century-Fox which the government seized to enforce its $50,000.00 a day sanction for noncompliance with the order for the production of documents. Tully & Worth, *supra* note 4, at 51.

For a discussion of the imposition of sanctions for failure to comply with a discovery order, see Comment, *Discovery—Power to Impose Sanctions for Failure to Make Discovery on Jurisdictional Issues*, 13 MEM. ST. U.L. REV. 109-23 (1982).

Though the trial was set for June 1984, the United States government was unable to extradite Mr. Rich or Mr. Green from Switzerland where they reside. *Id.*

165 *See supra* § III B of this Note.

166 *Id.*

167 *Id.*

168 *See supra* note 129 and accompanying text.

169 *See supra* note 131 and accompanying text.

170 *See supra* § III C of this Note.

Supreme Court consider establishing a uniform federal standard of criminal jurisdiction in order to end the current confusion. Of the three standards of jurisdiction which the lower federal courts have applied,[171] the detrimental consequences test best meets the United States' various interests.[172] Therefore, this Note recommends that the detrimental consequences test should form the basis of any uniform federal standard of criminal jurisdiction.

Debra Pogrund Stark

171 *See supra* note 129 and accompanying text.
172 See supra §§ III B and C of this Note.