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Two-Thousand and Three

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Italian Criminal Justice and the Rise of an Active Magistracy

DAVID S. CLARK*

I. ITALIAN POLITICAL CULTURE AND THE RULE OF LAW

In 1993, partly due to massive corruption scandals, the five Italian postwar ruling parties (*pentapartito*) and their final coalition disappeared. A center-right alliance led by media mogul Silvio Berlusconi and his Forza Italia won the March 1994 election.[1] After an interlude of center-left government, Berlusconi again regained power at the beginning of the 21st century.

The 1992-1994 political crisis clearly revealed that the Italian "blocked democracy" was systematically corrupted because illicit governance was routine. The political class (*partitocrazia*) had turned governmental institutions to its own use by "privatizing" the public sphere. Political appointments required a party card. A self-perpetuating cycle of extensive networks of clientelistic exchange (*scambi occulti*) throughout the legal system created a hidden power structure behind what Sabino Cassese called the *stato introvabile* (unfindable state).[2] The civil service was no better. Cassese, minister for public administration during the crisis preceding the March 1994 election, calculated that the average Italian lost three weeks each year trying to deal with the bureaucracy. The government's speed or efficacy in acting depended primarily on the pressure, which ranged from the use of contacts to bribery, that a citizen could exert on public officials.[3]

 Maynard and Bertha Wilson Professor of Law, Willamette University. I am grateful to Luisa Antoniolli and Luca Castellani for providing advice and materials useful in preparing this essay. I thank the USIA Fulbright Senior Scholar Program and the Commissione per gli Scambi Culturali fra l'Italia e gli Stati Uniti for financially supporting my stay with the spring 1999 Fulbright Chair in Comparative Law at the Università degli Studi di Trento Facoltà di Giurisprudenza. I also thank Dean Roberto Toniatti at the Trento Law Faculty for his encouragement and support in carrying out this research. A more extensive treatment of this essay's topic, including statistics on the activities of the Italian police, prisons, and appellate courts, appears in. LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 239-84 (Lawrence M. Friedman & Rogelio Pérez Perdomo, eds. 2004).

1. Paul Ginsborg, *Explaining Italy's Crisis, in* THE NEW ITALIAN REPUBLIC: FROM THE FALL OF THE BERLIN WALL TO BERLUSCONI 19-23 (Stephen Gundle & Simon Parker eds., 1996); Stephen Gundle & Simon Parker, *Introduction: The New Italian Republic* 1-11, *in id.*

2. SABINO CASSESE, LO STATO INTROVABILE: MODERNITÀ E ARRETRATEZZA DELLE ISTITUZIONI ITALIANE (1998). The informal "*Manuale Cencelli*," named after a Christian Democrat operative, provided guidelines on how to allocate positions among parties, and within parties, among *correnti*.

3. Martin Bull & Martin Rhodes, *Between Crisis and Transition: Italian Politics in the 1990s, in* CRISIS AND TRANSITION IN ITALIAN POLITICS 1, 3-6 (Martin Bull & Martin Rhodes eds., 1997) (reprint with the same pagination in 20 W. EUR. POL. 1 (1997); Ginsborg, *supra* note 1, at 23-4; Vittorio Olgiati, *Legal Systems and the Problem of Legitimacy: The Italian Case, in* Legal Systems & Social

Why did judges and prosecutors take such an active part in forcing the mid-1990s political transformation? Was it likely that ordinary citizens' frustration with politicians and the public administration affected the Italian magistracy and its role in the administration of justice? In the context of the criminal justice system, did the magistracy evolve under the postwar Constitution, so that it was able to play such an important part? What do the Italian political developments of the 1990s mean for the rule of law (*Rechtsstaat*) ideal? These questions may be impossible to adequately answer, but this essay will explore the development of an active Italian magistracy and its position in the criminal justice system to provide some tentative suggestions about the Italian styles of law.

Italy embraces a Mediterranean legal culture that distinguishes it from its northern European neighbors. As long as the Alps isolated Italy, or larger external forces such as the Cold War convinced allies to ignore differences in the Italian political and legal systems, it could continue as a "democratic paradox"[4] or a "difficult democracy."[5]

It may be that the most important pressures for change to improve the rule of law came from outside Italy through its connections with the European supranational framework and via other agents of economic globalization. Lawrence Friedman has made a similar general argument that the rule of law is tied to modernization; it is not peculiarly Western nor universal.[6]

The European Union (EU) and the Council of Europe introduced a new style of politics and law into Italy based on northern Protestant, technocratic rules that were inconsistent with more clientelistic, Mediterranean, personalized norms.[7] While the latter tended to subvert the former for much of the post World War II period, inadequate implementation of EU directives and widespread fraudulent abuse of EU aid created an obvious dissonance noticeable to the highly pro-EU Italian population. The 1992 Maastricht Treaty on European Union, with its provisions for economic unity and a single currency, might have exerted the final pressure on Italian politicians who then had to begin meaningful political and economic reforms.

Market globalization and intensified competition also exposed deficiencies in the national Italian legal system and economic capital markets. Foreign investors signaled their lack of confidence in traditional Italian collusive practices

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Systems 87, 91-96 (Adam Podgorecki et al., 1985); Carlo Guarnieri, *The Judiciary in the Italian Political Crisis, in* CRISIS AND TRANSITION IN ITALIAN POLITICS 157 (1997).

4. JOSEPH LAPALOMBARA, DEMOCRACY ITALIAN STYLE 3-24 (1987).

5. FREDERIC SPOTTS & THEODOR WIESER, ITALY: A DIFFICULT DEMOCRACY 169 (1986).

6. Lawrence M. Friedman, *Some Thoughts on the Rule of Law, Legal Culture, and Modernity in Comparative Perspective, in* TOWARD COMPARATIVE LAW IN THE 21ST CENTURY 1075-90 (The Institute of Comparative Law in Japan ed., 1998).

7. All political and legal systems rely on some ascriptive norms and clientelistic relations; it is always a matter of degree.

and informally regulated investments.[8] Finally, the Soviet Union's collapse eroded anti-communist support for the traditional political leaders in the Christian Democrat and Socialist parties.

Alternatively, an indigenous Italian official morality might have precipitated the 1992 political crisis by supporting the rule of law when the vices suggested above became excessive. This morality was found in the 1948 Constitution and in strong popular support for Europeanization. Although substantial tension existed between the everyday practice of favors, connections, and corruption and the loftier official rule of law morality, the latter brought down the venal political class.[9] The increased popularity of referenda was another sign that Italians were taking legal rules more seriously.[10]

II. AN ACTIVE MAGISTRACY'S EMERGENCE: JUDGES AND PROSECUTORS

Italy has attained a strong independent judiciary. This independence extends also to prosecutors, who share the same education and recruitment with judges. Together judges and prosecutors make up the career magistracy. They enjoy autonomy or external independence from the political branches of government as well as certain internal independence from other magistrates.[11] Prior to the 1948 Constitution the minister of grace and justice determined a judge's assignments and other career possibilities, which under fascism led to many abuses. The Constitution's solution authorized the creation of the Superior Magistracy Council (*Consiglio superiore della magistratura* or CSM), which the parliament finally implemented in 1958.[12] It is an elected body that consists of 20 judges and prosecutors (selected by the entire magistracy), ten law professors and lawyers (selected by parliament), the Court of Cassation's first president and procurator general, and the Republic's president serving as presiding chair.[13] The CSM makes most important decisions related to the judicial branch's personnel and internal operation.[14]

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8. Bull & Rhodes, *supra* note 3, at 7-8; *see* Yves Dezalay & Bryant Garth, *Law, Lawyers and Social Capital: "Rule of Law" versus Relational Capitalism*, 6 SOC. & LEGAL STUD. 109-41 (1997).

9. Ginsborg, *supra* note 1, at 24-5, related the story of Mario Chiesa's curtain. Chiesa, the first Socialist caught taking kickbacks, was the director of a retirement home in Milan. His arrest in February 1992 marked the beginning of the corruption scandals known as *Tangentopoli*, and illustrated the symbolic importance of the official morality. Chiesa told the investigating magistrate DiPietro that when contractors came to make illegal payments he would draw the curtain so that no one could see what happened.

10. *Id.* at 24-6.

11. COST., arts. 101(2), 104(1) (Italy).

12. COST. arts. 104-107 (Italy); Legge 195, 24 Mar. 1958, *Norme sulla costituzione e sul funzionamento del Consiglio superiore della Magistratura*, *in* GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA [hereinafter G.U.] no. 75, 27 Mar. 1958.

13. From 1959 to 1975 the CSM had 24 elected members. Guarnieri, *supra* note 3, at 157, 159, 173.

14. MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 102-09 (1967); LEROY G. CERTOMA, THE ITALIAN LEGAL SYSTEM 61-71 (1985). The executive branch minister of grace and justice still has certain power over judicial organization, including a veto over management

Table 1 illustrates the Italian magistracy's growth since 1950, which was disproportionately greater in the South (Mezzogiorno, MG) compared to northern and central (NC) Italy. From a small corps of 4,281 in 1950 the number of career judges and prosecutors grew to 8,275 in 1996 (plus 3,300 *giudici de pace* judges, non-career magistrates added in 1995 to help with the civil caseload crisis). In relative terms, this expanded the number of magistrates (including justices of the peace) from nine to 20 per 100,000 inhabitants. By comparison, there were 22,100 career judges and 5,400 prosecutors in Germany in 1995, or 33 per 100,000 population.[15]

TABLE 1. MAGISTRATES (JUDGES AND PROSECUTORS) IN ABSOLUTE NUMBERS AND PER 100,000 POPULATION, BY REGION AND GENDER[16]

Year	ITALY			NORTH AND CENTER			MEZZOGIORNO		
	Number	Per 100K	% F	Number	Per 100K	% F	Number	Per 100K	% F
1950	4,281	9		2,342	9		1,939	10	
1955	5,517	10		2,827	10		2,330	11	
1960	5,213	10		2,833	10		2,380	11	
1965	5,509	10		3,072	10		2,437	11	
1971[17]	6,701	12	3	4,197	12	4	2,504	13	1
1981[18]	6,965	12	9	4,308	12	10	2,657	13	8

position allocation, entrance exams for probationary magistrates, and other auxiliary personnel administration. Legge 195, *supra* note 12, arts. 14-6; *see* CERTOMA, *supra* note 14, at 66-7.

15. David S. Clark, *Comparing the Work and Organization of Lawyers Worldwide: The Persistence of Legal Traditions, in* LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW 9, 90, 101 (John J. Barceló & Roger C. Cramton eds., 1999).

16. ISTITUTO NAZIONALE DI STATISTICA [ISTITUTO CENTRALE DI STATISTICA before 1990] [hereinafter ISTAT], POPOLAZIONE E ABITAZIONI: FASCICOLO REGIONALE, 13° CENSIMENTO GENERALE DELLA POPOLAZIONE E DELLE ABITAZIONI, 1991, at table 4.5 (1994); *Id.*, 12° CENSIMENTO GENERALE DELLA POPOLAZIONE, 1981, vol. 2 (Dati sulle caratteristiche strutturali della popolazioni e delle abitazioni), book 2 (Fascicoli regionali) table 8 (1984); *Id.*, 11° CENSIMENTO GENERALE DELLA POPOLAZIONE, 1971, vol. 6 (Professioni e attività economiche), book 2 (Professioni) 3, 13, 96-153, 485 (1977); JOHN HENRY MERRYMAN ET AL., LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY 448-51, 506 (1979); STEFANIA PELLEGRINI, LA LITIGIOSITÀ IN ITALIA: UN'ANALISI SOCIOLOGICO-GIURIDICA 220-24 (1997); MAFIA E SOCIETÀ ITALIANA: RAPPORTO '97 156-58 (Luciano Violante ed., 1997); *see* GUIDA ALLA FACOLTÀ DI GIURISPRUDENZA 211 (Sabino Cassese ed. . 2d ed. 1994). These magistrates worked in the ordinary court system. The total excluded vacant (but authorized) positions. The North and Center region included Court of Cassation judges, who decided petitions from throughout Italy.

17. I excluded approximately 505 magistrates (of whom 140 were in MG) who worked in the Constitutional Court, Council of State, Court of Accounts, or certain other judicial positions. The jump in the magistrate number between 1965 and 1971 was overstated in NC (and accordingly understated in MG) by 223 since the sources relied upon defined the two regions differently.

18. I excluded approximately 555 magistrates (of whom 165 were in MG) who worked in the Constitutional Court, Council of State, Court of Accounts, or certain other judicial positions.

Year	ITALY			NORTH AND CENTER			MEZZOGIORNO		
	Number	Per 100K	% F	Number	Per 100K	% F	Number	Per 100K	% F
1991[19]	7,516	13	18	4,386	12	19	3,130	15	17
1996[20]	11,575	20	27	6,683	18		4,892	23	

Successful candidates who take the judicial apprentice (*uditore giudiziario*) examination tend to have top grades as law graduates from Italian universities. To reduce the number of vacant positions in the magistracy some law faculties in the 1980s cooperated with the CSM to offer supplemental courses to prepare graduates for the rigorous exam. Magistrates after their apprenticeship enjoy life tenure until age 70 as civil servants in the upper governmental salary range, with substantial pension rights. In 1963, women became eligible to take the test. The percentage of female magistrates gradually increased to 18 percent in 1991 and to 27 percent by 1997. Traditionally this legal career appealed to young jurists from the South, who have fewer alternatives with corporations or law firms. In 1963, for instance, 77 percent of magistrates were born in Mezzogiorno.[21] In addition, for the entire postwar period a disproportionately greater number of magistrates worked in Mezzogiorno compared to North and Center Italy.[22] Table 2 illustrates the division between prosecutors and judges with their assigned duties in 1993.

TABLE 2. MAGISTRATE POSITIONS IN ITALY IN 1993, BY JOB[23]

Magistrate Position	Number
Court of Cassation Judges	305
Court of Appeal Judges	962
Tribunale Judges	2,790
Pretura Judges	1,847
Specialized Tribunale Judges (Minors, Guardianship)	286
Apprentice Judges	150
SUBTOTAL Judges	6,340
Prosecutors at All Courts	2,148

19. The percentage of female magistrates was for the supervisory corps.

20. PELLEGRINI, *supra* note 16, at 225. These figures included 3,300 *giudici di pace*, who were judges but not career magistrates. They first decided cases in 1995. Paolisa Nebbia, *Judex Ex Machina: The Justice of the Peace in the Tragedy of the Italian Civil Process*, 17 CIVIL JUST. Q. 164, 171 (1998). Justices of the peace were allocated to the two regions in the same ration as the career magistrates' percentages. The justice ministry (1993) reported the female percentage, *at* http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjita.txt (last visited Nov. 10, 2003).

21. P.A. ALLUM, ITALY–REPUBLIC WITHOUT GOVERNMENT? 157, 199-200 (1973); CERTOMA, *supra* note 14, at 71-72, 74. Cassese traced the public administration southernization in general from the 1930s for elite positions and from the 1960s for ordinary posts. SABINO CASSESE, QUESTIONE AMMINISTRATIVA E QUESTIONE MERIDIONALE: DIMENSIONI E RECLUTAMENTO DELLA BUROCRAZIA DALL'UNITÀ AD OGGI 69-118 (1977).

22. *See* Table 1. In actuality there were even more magistrates per capita in the South since NC included 305 judges and 46 prosecutors (*procure generali*) at the national *Suprema corte di cassazione* in Rome in 1993. PELLEGRINI, *supra* note 16, at 220.

23. *Id.* at 220.

Magistrate Position	Number
Ministry of Grace and Justice	128
Anti-Mafia National Office	21
Superior Magistracy Council	2
TOTAL	8,639

Judicial activism in Italy can be traced to the 1960s, when a substantial number of postwar-educated judges replaced the earlier generation appointed under fascism. The 1958 CSM enabling statute caused resentment among younger magistrates, since it continued to permit the practice of allocating larger salaries to higher-level judges on a basis other than seniority. It also left some power over status (promotions and transfers) and discipline outside the plenary CSM, dispersed in the ministry of justice, a CSM special section controlled by higher-level judges, and the Council of State. The Associazione Nazionale Magistrati, controlled by younger judges, criticized the CSM statute, while higher court judges reacted by forming their own Unione dei Magistrati Italiani.

The fault line in the magistracy was drawn by generation and by political ideology, especially as it related to differing ideas of judicial independence. Center-left magistrates opposed continued hierarchical career structures and preferred equal pay for both higher and lower court judges based solely on seniority. They also resented outside political influence tied to continued justice ministry involvement and court review of certain CSM decisions. Between 1963 and 1975 parliament gave in on many of these demands and eliminated competitive examinations for promotion (relying instead on seniority), reduced salary differentials, and gave more power to the CSM. By the mid-1970s, the Italian magistracy had acquired significant political force. The significant number of magistrates who became politicians, such as Luciano Violante, former president of the Chamber of Deputies, further supported this.[24]

The rise of organized political factions (*correnti*) within the magistracy helps to explain the nature of Italian judicial and prosecutorial activism. Younger magistrates realized in the 1960s that the dominant Christian Democrats (DC) supported magistracy leadership through coordinated activity of the justice minister and higher-ranking magistrates. As a result, they turned to the Socialist Party (PSI) during the years in which it shared power in the center-left governing majority for assistance in dismantling the traditional career structure. Strong relationships developed between correnti, political parties, and the media. After many breaks and reconfigurations, the magistracy today is thoroughly factionalized among four groups from left to right: the Magistratura Democrat-

24. ALLUM, *supra* note 21, at 201-04; Guarnieri, *supra* note 3, at 158-60, David Nelken, *Stopping the Judges, in* ITALIAN POLITICS: THE STALLED TRANSITION 187, 197 (Mario Caciagli & David I. Kertzer eds., 1996) (reprint with the same pagination as 11 ITALIAN POLITICS: A REVIEW 187 (1996)); SPOTTS & WIESER, *supra* note 5, at 160; *see* Legge 195, *supra* note 12, arts. 10-13, 17.

ica, Movimento per la Giustizia, Unità per la Costituzione, and Magistratura Indipendente.

After 1968, the Communist Party (PCI) overcame its traditional mistrust of a "bourgeois," repressive judiciary and supported PSI magistracy reforms. By the 1970s, "democratic" judges, particularly in labor cases (including workplace safety), were sympathetic to the workers' movement. Some activist prosecutors gained fame by bringing criminal initiatives (*protagonismo*) against environmental pollution, tax evasion, and bank fraud. With electoral success in 1975, the PCI assisted the PSI in enacting the coup de grace to judicial hierarchy: proportional representation with competing candidate lists for electing the 20 magistrates to the CSM.[25]

Since 1976, all elected CSM magistrates have belonged to a corrente. From that time until 1994, the CSM gained members from the far left Magistratura Democratica and lost those from the far right Magistratura Indipendente, with the centrist Unità per la Costituzione holding a plurality. This magistracy politicization and shift to the left clearly affected the nature of career decisions. Since transfers and promotions were now based solely on seniority, the CSM chose among equal-rank candidates on a faction or party affiliation basis in a reciprocal exchange process. The CSM, thanks to the justice minister's decline, was now the key institutional link between political parties and the magistracy.

This structure helps to explain the rise of prosecutorial and judicial activism. Leftist judges argued in the 1970s for a less positivistic approach to statutory and codal interpretation that could rely on constitutional principles such as equality. Sometimes they easily granted leave in civil or criminal cases to refer an issue to the Constitutional Court, an innovative entity that frequently found provisions in fascist-era codes and statutes unconstitutional, much to the more conservative Court of Cassation's chagrin.[26] Gustavo Zagrebelsky, a Torino law professor who sits on the Constitutional Court, carries on this tradition. Judges also on occasion backed up these ideas with vocal participation in mass meetings and demonstrations.

Furthermore, there was a steady expansion of prosecutorial-judicial intervention in politically sensitive matters, such as terrorism and later organized crime. Parliament in the late 1970s, supported by the Communist Party, granted expanded powers to prosecutors and investigative judges to fight terrorism on both the left and right. Some first instance prosecutor-judges, known as *pretori*

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25. Legge 695, 22 Dec. 1975, Riforma della composizione e del sistema elettorale per il Consiglio superiore della magistratura, in G.U. no. 343, 31 Dec. 1975, art. 5, *amending* Legge 195, *supra* note 12, arts. 25-27; Giuseppe Di Federico, *Italy: A Peculiar Case, in* THE GLOBAL EXPANSION OF JUDICIAL POWER 233, 238-39 (C. Neal Tate & Torbjörn Vallinder eds., 1995); Guarnieri, *supra* note 3, at 160-64, 173.; SPOTTS & WIESER, *supra* note 5, at 158-61. The ten parliament-selected CSM members were also chosen along party lines.

26. *See* John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665 (1967).

d'assalto, used these tools to bring controversial pollution, labor relation, and consumer protection cases. People began to see the magistracy rather than the executive as the instrument for fighting society's ills and for public order. But at the same time the magistracy's substantial ability to act arbitrarily, to allege matters that could not be proved, and to detain for long periods individuals who were later found innocent at trial led to accusations of political partisanship.[27]

In summary, the 1970s saw substantial growth in the magistracy's investigative powers, especially over the police. In the 1980s, these instruments began to be used against mafia organizations, not only in Mezzogiorno but increasingly in the North. This time government parties were less supportive, unlike the PCI, which continued to praise judicial activism. Some prosecutors and judges discovered examples of "hidden power" fueled by administrative and political party corruption. The Socialist Party, led by Bettino Craxi, struck back by instituting constitutional reform via referendum to reign in the magistrates' autonomy and arbitrariness, for instance, by increasing judicial civil liability for malfeasance. President Francesco Cossiga, a Christian Democrat, in 1990 even launched an attack on the CSM. It was in this setting that magistrates in 1992 began the *Tangentopoli* (Bribesville) or *mani pulite* (clean hands) investigations and prosecutions against politicians, administrators, and business leaders, which led to the 1992-1994 political crisis. Eventually 400 magistrates took part in these prosecutions. Emboldened by pro-magistrate public opinion, President Oscar Scalfaro in 1993 and the Carlo Ciampi government from April 1993 to March 1994 cautiously supported the magistrates' efforts.[28]

But public sentiment toward the magistracy has been ambivalent. After all, voters in 1987 overwhelmingly supported the referendum to make magistrates civilly liable for harm that they might cause. In addition, judges were too slow in processing penal cases in the mid-1970s and late 1980s, and civil cases from the late 1980s, resulting in severe caseload crises.[29] The magistracy's poorer reputation in the late 1980s provided the Socialist government with an opportunity to replace the fascist-era, inquisitorial Penal Procedure Code with one that adopted an accusatorial ideology. The magistracy had previously thwarted reform efforts for a new code because judges and prosecutors did not want to lose any of their hard-won, largely unsupervised, investigative powers.[30]

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27. Di Federico, *supra* note 25, at 239; Guarnieri, *supra* note 3, at 160-64; SPOTTS & WIESER, *supra* note 5, at 158-61.

28. ALLUM, *supra* note 21, at 201-04; Ginsborg, *supra* note 1, at 26-28; Guarnieri, *supra* note 3, at 164-66; Nelken, *supra* note 24, at 191, 200, 204; Alessandro Pizzorusso, *The Italian Constitution: Implementation and Reform, in* 34 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 105, 116-17 (Peter Häberle ed., 1985).

29. PELLEGRINI, *supra* note 16, at 242-43.

30. Guarnieri, *supra* note 3, at 164-65. The magistrates also fought against the 1995 preventive detention reform. Nelken, *supra* note 24, at 194, 203.

Italy's magistracy was, and was believed to be, a body primarily focused on penal rather than civil matters. Penal judges, of course, have more political visibility than civil judges.[31] This was particularly true at the Court of Cassation, whose caseload since 1950 was always greater than 70 percent penal. Below Cassation, 57 percent of the remaining judges processed penal cases, leaving 43 percent for civil cases.[32] Of course, most prosecutors worked on penal matters.

III. PROCEDURAL REFORM

Although a few magistrates may undertake matters of great public interest and importance, the ordinary magistracy is primarily concerned on a day-to-day basis with routine criminal cases and civil disputes. The public's opinion about prosecutors' and judges' competence, fairness, and honesty will thus primarily be based on these activities.

The Italian judicial structure in the immediate postwar period looked much like its predecessor at the 19th century's end. Largely modeled on the French judiciary, its form was a hierarchical pyramid with the Court of Cassation on top to maintain national uniformity in the law's interpretation. Beneath were courts of appeal (with collegiate panels) to guarantee lower court factual and legal decision correctness and multiple first instance courts divided by their jurisdiction's importance. These later courts included *uffici di conciliazione* (now *giudici di pace*) for minor civil cases and two court levels (*pretura* and *tribunale*) for both civil and penal matters.[33] As with the French, there were also courts of assize (with their own appellate courts) to adjudicate the most serious criminal cases with a mixed panel of professional and lay judges, subject finally to review in cassation. In addition, appeal from minor jurisdiction courts went either to superior first instance courts or directly to cassation.

Over the second half of the 20th century, the Italian judicial structure was substantially remade. Several factors were responsible. First, the Italian crime rate increased 231 percent from 1950 to 1997. Even with sympathetic judicial and legislative attitudes toward some types of crime, processing many more cases inevitably led to more penal trials and appeals. In addition, civil case filings per capita grew 217 percent over the same period.[34] These caseload pressures convinced jurists and legislators that the overall system should be simpli-

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31. Maria Rosaria Ferrarese, *Può la Magistratura essere considerata istituzione della libertà?, in* DIRITTO, CULTURA E LIBERTÀ: ATTI DEL CONVEGNO IN MEMORIA DI RENATO TREVES 459, 464-71 (Vincenzo Ferrari, Morris L Ghezzi & Nella Gridelli Velicogna, eds., 1997); Maria Rosaria Ferrarese, *Civil Justice and the Judicial Role in Italy*, 13 JUST. SYS. J. 168-69 (1988)[hereinafter *Civil Justice*]; Nelken, *supra* note 24, at 197.

32. Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657, 660 (1997).

33. The Italian structure, unlike the French, does not maintain separate commercial courts.

34. ISTAT, STATISTICHE GIUDIZIARIE PENALI: ANNO 1997, at 34, 439 (1998) [hereinafter ANNO 1997]; ISTAT, ANNUARIO STATISTICO ITALIANO 147 (1998) [hereinafter ANNUARIO 1998]; MERRYMAN ET AL., *supra* note 16, at 162. Excluding conciliazione and justice of the peace courts, there were 623 first

fied, primarily by unifying the first instance level around its core task of initial adjudication. This entailed eliminating uffici di conciliazione and improving pretura distribution, removing penal appellate jurisdiction from tribunali and transferring it to courts of appeal, and ending three-judge collegiate tribunale panels so that only unitary first instance courts remained.[35]

Second, republican democratic ideology—reacting against the Italian fascist experience from 1922 to 1944—argued for both structural as well as procedural changes in the judiciary. One structural change was to add a Constitutional Court with judges sympathetic to republican values. Another was to create the Superior Magistracy Council (CSM) to support an independent third governmental branch. A third change was to surrender at an early stage some national sovereignty to the European system of supranational courts, with standing in Italian litigants to request review of Italian judicial decisions.

This same liberal individual-rights focus supported change in Italian procedure, particularly penal procedure. It was no accident that the only new Italian postwar code was one for penal procedure in 1989. The Italian Constitutional Court, scholarly legal doctrine, and the European Court of Human Rights created substantial pressure for change through their critical decisions and writings about Italian rules and practices. Unlike reform attempts for a new civil procedure code, which lawyers tended to resist,[36] parliament with lawyer support succeeded against a weakened magistracy at the end of the 1980s in authorizing a new penal procedure code.[37]

The 1989 Penal Procedure Code rejected the French inquisitorial model and adopted a more accusatorial criminal process. Aimed to better protect individual rights, the Code reduced prosecutorial power, required trial judges to independently hear evidence where possible, and increased defense counsels' ability to confront adverse witnesses. One might expect this approach to utilize more judicial resources, a serious problem in light of growing caseloads. The Code's drafters foresaw this issue and improved certain alternatives to the traditional

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instance civil filings per 100,000 population in 1950 compared to 1,978 in 1997. ANNUARIO 1998, *supra*, at 147.

35. Decreto legislativo 51, 19 Feb. 1998, Norme in materia di istituzione del giudici unico di primo grado, *in effect* 2 June 1999, in G.U. no. 66, 20 Mar. 1998; Legge 30, 1 Feb. 1989, Costituzione delle preture circondariali e nuove norme relative alle sezioni distaccate, in G.U. no. 30, 6 Feb. 1989; *see* Francesco P. Luiso, *L'ordinamento giudiziario in rivoluzione,* 151 GIURISPRUDENZA ITALIANA 676-78 (1999).

36. Sergio Chiarloni, *Civil Justice and Its Paradoxes: An Italian Perspective, in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 263, 276-81 (Adrian A.S. Zuckerman ed., 1999).

37. Legge 81, 16 Feb. 1987, Delega legislativa al Governo della Repubblica per l'emanazione del nuovo codice di procedura penale, *in* G.U. no. 62, 16 Mar. 1987.

process and adopted summary trial and plea bargaining procedures with sentence reductions to divert cases away from trials.[38]

The Italian magistracy's heavy involvement in the criminal justice process ranges from its initial supervision of judicial police to its discretion over an individual's release from prison. The "judicial police," a concept including most police forces,[39] before 1989 were required to timely report a crime (*notizia di reato*) to a pretura judge (acting also as a prosecutor) or a tribunale prosecutor.[40] Since the 1989 Code, police make this filing with a prosecutor (*pubblico ministero* or *procuratore*) tied to one of these two first instance courts.[41] The Italian style is best illustrated by examining the experience with criminal cases in the two levels of first instance counts.

IV. PRETURE

Preture handle less important criminal matters. Table 3 lists the number of "trials" requested with pretura judges (*pretori*). An entry in this category meant that a *pretore*, acting as both the prosecutor (*pubblico ministero*) and examining judge through the secret instruction stage (*istruzione*), decided to issue a citation for trial.[42] At this public trial the pretore acted as judge while another magistrate (or delegate) assumed the prosecutorial role. The abuse or perceived abuse of accuseds' rights with this mostly secret inquisitorial process was an important reason for the 1989 Code's reform.[43]

Since 1990, upon receiving the crime report, the prosecutor opens a preliminary inquiry. A preliminary inquiry judge (*giudice per le indagini preliminari*), commonly know as GIP, reviews this work and any recommendation the prosecutor makes. The GIP controls evidence taking and guaranties cross-examination within codal time limits that should not normally exceed six months, but may extend to 18 months or even two years for certain crimes. During the in-

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38. *See* Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000).

39. Codice di Procedura Penale, decreto 447 del Presidente della Repubblica, 22 Sept. 1988, *in effect* 24 Oct. 1989, art. 57 [hereinafter NEW C.P.P.],.

40. Codice di Procedura Penale, regio decreto 1399, 19 Oct. 1930, arts. 2, 231-34 (1930) [hereinafter 1930 C.P.P.].

41. NEW C.P.P. arts. 330, 347. The Constitutional Court and dominant scholarly doctrine have interpreted the obligatory prosecution mandate (COST. art. 112.) to require prosecutors to review reported crime files even though no suspect is named.

42. 1930 C.P.P., arts. 220, 230-31, 406-09. Reported instructions always exceeded reported crimes, since instruction transfers to another court were counted again. Most cases filed with prosecutors were dismissed (*decreto di archiviazione*) for reasons such as lack of evidence or the prescription period's lapse.

43. *See* CERTOMA, *supra* note 14, at 243, 245.

vestigative stage, a prosecutor may ask the GIP for dismissal (*richiesta di archiviazione*), use of a special procedure, or trial.[44]

Before the 1989 Code, misdemeanors, and those crimes carrying a three-year maximum incarceration, or with solely monetary punishments, were filed with preture.[45] The 1989 Code increased pretura jurisdiction to cover crimes levying a maximum four-year term plus other important crimes such as aggravated theft and fraud as well as negligent homicide.[46] From 1950 to 1997, the relative number of penal trials requested before pretori per 100,000 population grew 46 percent.[47] Over the same period the relative number of career magistrates expanded a much larger 122 percent,[48] so that more manpower was available to deal with this caseload unless other matters demanded their attention. These other matters included a decline in tribunale filings but an increase in court of appeal and cassation appeals.

TABLE 3. PENAL TRIALS REQUESTED WITH PRETURA JUDGES, IN ABSOLUTE NUMBERS (IN 000) AND PER 100,000 POPULATION, BY REGION[49]

	ITALY		NORTH & CENTER		MEZZOGIORNO	
Year	Number	Per 100K	Number	Per 100K	Number	Per 100K
1950	249	536	112	418	137	697
1955	254	517	118	413	137	660
1960	273	539	135	454	139	660
1965	312	590	170	538	142	666
1970	217	405	116	333	101	538
1976	351	635	210	585	141	725
1980	328	583	186	511	142	715
1983	293	518				

44. NEW C.P.P arts. 326-28, 335, 358, 392, 401, 405-11, 415-17, 549-55; *see* Vittorio Grevi, *The New Italian Code for Criminal Procedure: A Concise Overview*, in 2 ITALIAN STUDIES IN LAW 145, 147-61 (Alessandro Pizzorusso ed., 1994).

45. 1930 C.P.P. art. 31. In 1984 a few additional crimes were added, such as aggravated theft, which increased by about 37,000 the trials filed with preture. Legge 400, 31 July 1984, Nuove norme sulla competenza penale e sull'appello contro le sentenze del pretore, *in* G.U. no. 210, 1 Aug. 1984; ISTAT, ANNUARIO STATISTICO ITALIANO 219 (1986) [hereinafter ANNUARIO 1986].

46. NEW C.P.P. art. 7.

47. *See* Table 3.

48. *See* Table 1.

49. ANNUARIO 1998, *supra* note 34, at 155-56; ISTAT, ANNUARIO STATISTICO ITALIANO 197-98 (1994)[hereinafter ANNUARIO 1994]; ISTAT, ANNUARIO STATISTICO ITALIANO 219 (1986)[hereinafter ANNUARIO 1986]; ISTAT, ANNUARIO STATISTICO ITALIANO 107 (1978)[hereinafter ANNUARIO 1978; ISTAT, STATISTICHE GIUDIZIARIE: ANNO 1990, at 239 (1993)[hereinafter ANNO 1990]; ISTAT, 28 ANNUARIO DI STATISTICHE GIUDIZIARIE: EDIZIONE 1980-81, book 2 (Materia penale; Materia penitenziaria) 286 (1983)[hereinafter EDIZIONE 1980-81]; ISTAT, 20 ANNUARIO DI STATISTICHE GIUDIZIARIE: EDIZIONE 1970-71, at 171 (1973)[hereinafter EDIZIONE 1970-71]; MERRYMAN ET AL., *supra* note 16, at 276, 507.

Year	ITALY Number	Per 100K	NORTH & CENTER Number	Per 100K	MEZZOGIORNO Number	Per 100K
			1989 Penal Procedure Code in Effect			
1990	116	205	61	169	55	267
1991	195	343				
1993	354	620	199	547	155	747
1995	425	742				
1996	434	756				
1997	449	781	238	650	212	1,010

From 1950 until 1965, pretori requested a relatively constant number of trials. By the late 1960s, younger magistrates, pushing for social democratic values, had replaced many pretori who had served during the fascist dictatorship. Collectively these younger magistrates implemented a de facto depenalization policy for "unjust" crimes, even as the crime rate increased, by assigning 31 percent fewer cases per capita to trial by 1970 compared to 1965. This impulse was significantly stronger in North and Center Italy (38 percent reduction) than in Mezzogiorno (19 percent decrease).

Could this action have been a partial cause of Italy's first postwar crime wave from 1971 to 1976, when the per capita crime rate more than doubled? Whether this was true, pretori responded by requesting 57 percent more trials between 1970 and 1976, rising to 635 per 100,000 inhabitants, a level that declined in the 1980s and was not seen again until the second postwar crime wave in the 1990s. Once the 1989 Penal Procedure Code was fully implemented in 1993, the trial rate increased 26 percent by 1997 to 781 per 100,000 inhabitants, the highest postwar level. Even though the crime rate was consistently lower in Mezzogiorno (MG) than in the North and Center (NC), the MG trial rate was always greater, from 67 percent higher in 1950 to 55 percent higher in 1997. The South, at least in this respect, took a more conservative, punitive approach to law and order.

Data on pretori deciding penal trials broadly reflect, but with less volatility,[50] the same patterns described for trials requested. This is also true for the greater relative use of pretura courts in MG than in NC.

50. *See* Table 4.

TABLE 4. PENAL TRIALS DECIDED BY PRETURA JUDGES, IN ABSOLUTE NUMBERS (IN 000) AND PER 100,000 POPULATION, BY AVERAGE FIRST INSTANCE PROCESSING TIME (IN MONTHS) AND REGION[51]

	ITALY			NORTH & CENTER			MEZZOGIORNO		
Year	Number	Per 100K	Time	Number	Per 100K	Time	Number	Per 100K	Time
1950	247	532	9	106	396	9	141	717	9
1955	246	501	5	110	388	6	136	657	4
1960	266	525	6	126	426	6	140	665	6
1965	283	535	8	144	456	7	139	651	8
1970	263	490	7	142	408	6	101	641	7
1976	346	625	14						
1980	315	560	10	179	493	9	136	682	10
1983	283	501	10						
1989 Penal Procedure Code in Effect									
1990[52]	214	377	10	113	312	9	101	493	12
1991	166	293	11						
1993	321	564	13						
1995	322	562	18						
1996	437	761	19						
1997	409	711	21	224	612	16	185	885	27

The overall work rate was steady, usually in the 500s per 100,000 population, except for the 28 percent expansion during the first crime wave, the decline during the 1989 Code changeover, and the 26 percent increase in "trials" decided between 1993 and 1997.

Average processing time for pretura criminal cases proceeding to trial (including the instruction or investigation phase) exceeded one year only in 1976 at the end of the first crime wave, until the 1989 Code procedures collided with the second crime wave in the 1990s. Between 1993 and 1997 average delay lengthened from 13 to 21 months, with MG judges seemingly less willing to utilize the new methods. The irony of this is that one of the new Code's princi-

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51. ANNO 1997, *supra* note 34, at 41-2 (1998); ANNUARIO 1998, *supra* note 34, at 155-56; ANNUARIO 1994, *supra* note 49, at 197; ISTAT, ANNUARIO STATISTICO ITALIANO 217 (1991)[hereinafter ANNUARIO 1991]; ANNUARIO 1986, *supra* note 49 at 219; 107; ANNUARIO 1978, *supra* note 49 at 107; ANNO 1990, *supra* note 49, at 239-40; EDIZIONE 1980-81, *supra* note 49, at 286; EDIZIONE 1970-71, *supra* note 49, at 171-72; MERRYMAN ET AL., *supra* note 16, at 270, 277-78, 507. I calculated average processing time by adding the periods for the prosecutor's preliminary investigation (instruction stage (*istruzione*) prior to 1990), its judicial supervision, plus the pretura trial. Before 1993 I used the method of calculating average delay described in MERRYMAN ET AL., *supra* note, at 609-10; *see* David S. Clark & John Henry Merryman, *Measuring the Duration of Judicial and Administrative Proceedings*, 75 MICH. L. REV. 89 (1976). From 1993, I relied on ISTAT figures. ANNUARIO 1998, *supra* note 34, at 144.

52. I included 99,705 cases decided in preture under the 1930 Penal Procedure Code, estimated by the ratio between instruction and trials in 1983. ANNUARIO 1991, *supra* note 51, at 217. These cases are allocated to regions in the same ratio as the regional data for 1989 Penal Procedure Code cases. The average processing time was for 1989 Code cases.

pal aims was to increase the Italian judiciary's efficiency with plea bargaining and other procedural alternatives to the use of a full trial.[53]

One of the 1989 Code's innovations was the summary "trial" (*giudizio abbreviato*), which grants a defendant the right to request quick resolution of his case based on the GIP's investigative file plus testimony from the defendant. The prosecutor and judge should grant this request if the case can be resolved from the file. In exchange for saving the state judicial resources, a judge must reduce the defendant's sentence by one third if he is found guilty.[54] This procedure actually has been less important in preture, falling from 4,355 to 2,569 cases between 1993 and 1997.[55]

The situation was different in tribunali,[56] where GIP summary trials increased from 6,708 to 7,009 cases, which is about one eighth of the number of traditional trials tribunale judges decided. Persons guilty of more serious crime processed in tribunali might well prefer the one third sentence reduction, which the guilty proportions of 84 percent in 1993 and 86 percent in 1997 suggested.[57]

Another innovation was explicit plea bargaining (*applicazione della pena su richiesta*). The prosecutor and accused may agree to reduce the normal sentence up to one third if the negotiated term does not exceed two years. Moreover, the prosecutor may also offer a conditional suspension of this two-year or shorter sentence.[58] Either the GIP or trial judge, depending on the proceeding stage, must agree to the arrangement (which does not bargain away charged crimes). In fact, an accused may directly ask the judge for such a bargain, even if the prosecutor refuses to concur.[59]

Plea bargaining has become an important part of Italian criminal procedure in less than a decade, although more efficiency could be achieved if this option were further encouraged among prosecutors at GIP preliminary inquiries. In 1993 and 1997 pretura GIPs agreed to only 15,790 and 13,550 bargains respectively. But at trial (usually the first hearing) preture resolved 44 percent of

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53. MG prosecutors, GIPs, and pretori all took longer to process cases than NC magistrates. ANNO 1997, *supra* note 34, at 41-2.

54. NEW C.P.P. arts. 438-42; *see* William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 23-8, 31-3 (1992).

55. GIPs reduced the percentage found guilty in summary trials from 66 to 61 percent between 1993 and 1997. Anno 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197.

56. *See* Table 6.

57. ANNO 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197.

58. Codice Penale [C.P.], regio decreto 1398, 19 Oct. 1930, art. 163; NEW CPP art. 444(3). If the defendant does not commit another crime within five years, the original criminal sentence is extinguished; if he does commit another crime the judge may revoke the suspension. C.P. arts. 167-168; NEW CPP art. 445(2).

59. NEW C.P.P. arts. 444-48; *see* Pizzi & Marafioti, *supra* note 54, at 21-3.

165,844 convictions in 1993 and 42 percent of 201,635 convictions in 1997 by bargain.[60]

Tribunale GIPs more easily accepted the plea bargain alternative to terminate a substantial number of minor cases: 13,800 in 1993 and 16,693 in 1997. Moreover, tribunale judges resolved 37 percent of 32,003 convictions in 1993 and 41 percent of 39,857 convictions in 1997 by bargain.[61]

A final alternative to trial is the penal decree proceeding (*procedimento per decreto penale*), which was used before 1989 but now is more attractive to defendants. Primarily intended for pretura to resolve crimes for which a fine is adequate punishment, prosecutors may offer to terminate such a case with a 50 percent discounted fine. If the accused and GIP agree, the latter executes a conviction decree.[62] Between 1993 and 1997, however, the penal decree number dropped from 170,229 to 128,051.[63]

V. TRIBUNALI AND COURTS OF ASSIZE

Tribunale penal procedure has been more elaborate than that in preture. For instance, before 1989 all instructions in preture were summary, while in tribunali an instruction, depending on the circumstances, might have been summary—conducted by a prosecutor—or formal—conducted by an examining judge (*giudice istruttore*). Tribunale public trials took place before three judges, none of whom was the examining judge. Too often the "trial" was merely a formal reception of the instruction file's written summaries of testimony and other evidence.[64] Since 1989 pretura and tribunale processes came closer together, since both courts used GIPs to control prosecutors' work.[65]

While the relative number of pretura trials requested between 1950 and 1997 rose by 46 percent,[66] tribunale trial requests declined 37 percent from 198 in 1950 to 124 per 100,000 inhabitants in 1997, a low rate that had only occurred during the late 1950s and early 1960s.[67] These opposing overall trends between the two types of courts can be attributed to the jurisdictional shift of certain crimes from tribunali to preture in 1984 and 1989.

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60. The overall ratio of convictions to acquittals (*proscioglimento*, including *assoluzione*) was 2.0 in 1993 and 1.5 in 1997. ANNO 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197.

61. ANNO 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197; *see* Table 6. The overall ratio of convictions to acquittals was 2.4 in 1993 and 2.6 in 1997. ANNO 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197.

62. NEW C.P.P. arts. 459-60; 1930 C.P.P. arts. 506-07; *see* Pizzi & Marafioti, *supra* note 54, at 20-1.

63. ANNO 1997, *supra* note 34, at 43; ANNUARIO 1994, *supra* note 49, at 197. Tribunale GIPs increased the number of decrees imposed during the same period from 5,147 to 8,869. ANNO 1997, *supra*, at 43; ANNUARIO 1994, *supra*, at 197.

64. 1930 C.P.P. arts. 295-96, 389, 423, 437; *see* CERTOMA, *supra* note 14, at 231-45.

65. *See* NEW C.P.P. arts. 549-67.

66. *See* Table 3.

67. *See* Table 5.

TABLE 5. PENAL TRIALS REQUESTED IN TRIBUNALI AND COURTS OF ASSIZE, IN ABSOLUTE NUMBERS (IN 000) AND PER 100,000 POPULATION, BY REGION[68]

Year	ITALY				NORTH & CENTER				MEZZOGIORNO			
	Tribunali		Assize		Tribunali		Assize		Tribunali		Assize	
	Num.	100K	Num.	100K	Num.	100K	Num.	100K	Num.	100K	Num.	100K
1950	92	198			43	162			49	247		
1955	65	133			30	105			35	171		
1960	66	130			32	107			34	162		
1965	104	196			56	176			48	224		
1970	107	199	1.2	2.2	62	178	0.6	1.6	45	239	0.6	3.3
1976	136	246	1.0	1.8	84	235	0.4	1.2	52	265	0.6	2.9
1980	142	252	0.9	1.6	87	240	0.4	1.1	55	274	0.5	2.5
1983	160	283	1.0	1.8								
1988	150	265	0.9	1.6								
1989 Penal Procedure Code in Effect												
1990[69]	62	110	0.6	1.1	36	99	0.2	0.7	26	128	0.4	2.0
1991	51	90	0.4	0.7								
1993	51	90	0.4	0.8	30	83	0.2	0.5	21	101	0.2	1.2
1995	59	103	0.5	0.9								
1996	68	119	0.6	1.0								
1997	71	124	0.7	1.2	38	104	0.3	0.7	33	158	0.5	2.2

Beyond the jurisdictional shift, there were similar caseload patterns between the two courts. Thus during the first crime surge (1970-1976) the relative number of trials requested grew 24 percent. However, unlike preture, which then experienced a downturn in requested trials, tribunale requests reached a postwar high in 1983, which led to the 1984 jurisdiction reform. Similarly, during the second crime wave the relative number of requested trials rose 38 percent. The MG regional preference for trials compared to NC is similar for tribunali as for preture. For courts of assize, which adjudicate the most serious crimes, the relative MG incidence of trials over NC was often double and in 1997 even triple.[70]

The situation for tribunale trials decided was broadly similar to that for trials requested, except that the overall decline for trials decided from 1950 to 1997 was even greater.

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68. ANNUARIO 1998, *supra* note 34, at 155-56; ANNUARIO 1994, *supra* note 49, at 197-98; ANNUARIO 1991, *supra* note 51, at 217; ANNUARIO 1986, *supra* note 49, at 219; ANNUARIO 1978, *supra* note 49, at 107; ANNO 1990, *supra* note 49, at 239; EDIZIONE 1980-81, *supra* note 49, at 171, 286; MERRYMAN ET. AL., *supra* note 16, at 273, 507.

69. I included 20,298 tribunale trials and 331 court of assize trials requested under the 1930 Penal Procedure Code. ANNUARIO 1991, *supra* note 51, at 217. The regional figures include these trials, which were allocated according to the division for 1989 Code trials.

70. An assize court sits with eight judges (the president from the court of appeal, another career judge from a tribunale, and six lay judges) who together decide both factual and legal issues. Its jurisdiction included crimes against the state, homicide, and slavery. 1930 C.P.P. art. 29. In 1989 jurisdiction for crimes against the state was limited to those with at least a ten-year sentence, but was also expanded to cover most other crimes with at least a 24-year sentence. NEW C.P.P. art. 5.

TABLE 6. PENAL TRIALS DECIDED IN TRIBUNALI AND COURTS OF ASSIZE, IN ABSOLUTE NUMBERS (IN 000) AND PER 100,000 POPULATION, BY AVERAGE FIRST INSTANCE PROCESSING TIME (IN MONTHS) AND REGION[71]

Year	ITALY				NORTH & CENTER				MEZZOGIORNO			
	Tribunali		Assize		Tribunali		Assize		Tribunali		Assize	
	Num.	100K	Time	Num.	Num.	100K	Time	Num.	Num.	100K	Time	Num.
1950	107	230	11		52	193	10		55	280	11	
1955	65	131	10		30	104	11		35	169	9	
1960	63	124	14		29	99	15		34	160	14	
1965	43	81	15		24	76	17		19	88	13	
1970	107	199	12	1.3	62	178	11	0.6	45	238	14	0.7
1976	117	211	24	1.1								
1980	148	264	18	0.9	90	248	19	0.4	58	292	17	0.5
1983	146	258	20	0.9								
1988	135	238	33	1.0								
1989 Penal Procedure Code in Effect												
1990[72]	166	293	12	0.8	88	242	10	0.3	78	382	14	0.5
1991	44	78	16	0.4								
1993	50	87	19	0.4								
1995	48	85	24	0.4								
1996	64	111	23	0.5								
1997	59	103	25	0.6	33	91	21	0.2	26	125	30	0.4

In general the pre-1990 pattern was U-shaped, with the low in 1965 at only 81 decided trials per 100,000 inhabitants, while the two arms were at 230 in 1950 and at 293 in 1990. There were two periods of substantially increased productivity from 1965 to 1970 and from 1988 to 1990, which significantly reduced average delay, in both cases bringing average processing time down to one year. Otherwise delay usually exceeded one year (except during the 1950s), reaching crisis points in 1976 (24 months) at the first crime wave's end, in 1988 (33 months) before the caseload shift to preture under the new Code, and finally in 1997 (25 months) during the second crime wave. As with pretori, tribunale judges seemed unable to meet the new Code's efficiency goals faced with the increased trial requests of the 1990s. Moreover, as with MG preture, MG tribunali worked slower than their counterparts in NC under the 1989 Code's procedures.

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71. ANNO 1997, *supra* note 34, at 41-2; ANNO 1990, *supra* note 49, at 239-40; ANNUARIO 1998, *supra* note 34, at 155-56; ANNUARIO 1994, *supra* note 49, at 197; ANNUARIO 1991, *supra* note 51, at 217; ANNUARIO 1986, *supra* note 49, at 219; ANNUARIO 1978, *supra* note 49, at 107; EDIZIONE 1980-81, *supra* note 49, at 171-72, 286-87; MERRYMAN ET AL., *supra* note 16, at 274-75, 507. I calculated average processing time by adding the periods for the prosecutor's preliminary investigation (*istruzione* prior to 1990), judicial supervision, plus the tribunale trial. Before 1993 I used the method of calculating average delay cited supra note 51 (adding three months for instruction to the tribunale trial time from 1950 to 1965). From 1993 I relied on ISTAT figures. ANNUARIO 1998, *supra* note 34, at 144.

72. I included 132,133 tribunale trials and 528 court of assize trials decided under the 1930 Penal Procedure Code. ANNUARIO 1991, *supra* note 51, at 217. The regional figures include these trials, which were allocated according to the division for 1989 Code trials. The average processing time was for both 1930 and 1989 Code cases.

VI. ITALIAN STYLES

Comparatists frequently distinguish between civil law and common law countries by referring to the latter's more prestigious judiciary. In the United Kingdom and United States, for example, this prestige stems from several factors characteristic of developed common law nations.[73] The judiciary is an elite corps. Its membership is small compared to the number of private lawyers, from whose ranks judges generally are appointed late in their careers. Appellate judges explicitly create law and actively confront important social and sometimes political issues, for which they are famous (or notorious) among jurists and occasionally the public. They express their own individual views about legal issues in their written opinions. Judicial independence from executive power is unquestioned.

Foreign jurists often think of Italy as another typical, even derivative, civil law nation. In the 1960s, Italian judges shared several characteristics usual in developed civil law judiciaries. Collectively its size was large relative to the number of lawyers in private practice. Judges entered a civil service career shortly after law school and before they had any significant law practice experience. Judges were not supposed to make law (a task for parliament) and they did not explicitly confront important social issues (although the new Constitutional Court judges might do so). Judges were essentially anonymous since their individual views were hidden in unsigned panel opinions. And some questioned the independence of judges whose career steps were subject to justice ministry or higher magistracy control.

In fact, it is more accurate to assess the Italian legal system in terms of its own characteristic styles. First, we have seen that the magistracy's position within the legal system changed. Since the mid-1960s, judges and prosecutors achieved greater independence vis-à-vis the justice ministry and even against senior magistrates. Since the 1970s, seniority has been the dominant factor in promotion, transfer, and salaries, with minimal attention to productivity. Italian judges (and also prosecutors), as a result, are as independent from governmental pressures as common law judges.

Some of these front line prosecutors and investigative judges, supported by sympathetic colleagues at trial and on appeal, aggressively tackled serious social and political issues. Although pro-worker decisions involved civil cases, most activism occurred in penal cases fighting pollution, terrorism, the mafia, and in the 1990s business and political corruption. Unlike the United States, where activist federal judges in the 1950s and 1960s explicitly shaped civil rights and criminal procedure norms under the Constitution's umbrella, Italian magistrates, guided by obvious political party ideology and internal party-re-

73. Generalizations about the United States refer to the federal judiciary and a few state appellate court systems.

lated magistrate factions, used legal tools provided by fascist-era codes and a few helpful parliamentary statutes that increased their investigative powers.

The average Italian had little trust in the magistracy and criminal justice system for much of the postwar era. On the one hand, since the early 1970s she was not adequately protected from crime, and on the other hand, she could suffer grave abuse of authority from prosecutors and investigative judges.[74]

The successful Italian struggle against terrorism in the 1970s and early 1980s might well have altered the popular consensus about crime and punishment, providing magistrates with greater support. But trust only went so far, as the 1987 referendum to ratify judicial civil liability illustrated. In addition, against most magistrates' wishes, the 1989 Penal Procedure Code promised that its accusatorial procedure would be fairer toward those accused of crime than the 1930 Code's inquisitorial dominance by a pretura prosecutor-judge or tribunale investigating judge. Nevertheless, the 1992-1994 political crisis, with prosecutors and investigative judges pursuing politicians, business leaders, and mafiosi made some magistrates household names that further gained support for the penal process. The magistracy, not the executive, was the government branch that could successively confront social ills.[75]

A second Italian style concerns the prosecutor's special position within the "judicial" branch and his opportunity for inefficiency and abuse of authority. On the one hand, prosecutors are bound by the constitutional principle of compulsory prosecution, reflecting the post-fascist desire to hedge in prosecutorial discretion in the interest of equal law enforcement. This is clearly inefficient. The prosecutor must open a file and request the judge's decision every time some (although insufficient) evidence suggests a crime has occurred, even in a case in which an accused is named that the prosecutor believes is innocent. To cope, prosecutors open the file, but often do nothing more until the limitations period lapses. They then ask the judge to close the case.

To make matters worse, rather than confront the discretion issue realistically within the magistracy, the Italian style to achieve independence dismantled hierarchical control from the ministry of justice and even from the chief of an individual prosecutorial office. Now the 1989 Penal Procedure Code, in promoting an accusatorial model, gave prosecutors expanded investigative powers. Parliament added to these after the mafia killed two prosecutors in 1992 and Constitutional Court rulings further consolidated investigative power away from judges and toward adversarial prosecutors.

Despite the Codes' purported aim to increase fairness for defendants, the current structure may in fact disadvantage those accused of high visibility crimes.

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74. SPOTTS & WIESER, *supra* note 5, at 169.

75. Massimo Pavarini, *The New Penology and Politics in Crisis*, 34 BRIT. J. CRIMINOLOGY 49, 59 (1994).

For instance, prosecutors have discretion when to notify the accused that an investigation has begun, up to immediately preceding the first court appearance. Normally this does not matter, but in politically sensitive cases the media often hear about the "secret" investigation and notification, taking the latter in the former inquisitorial spirit as the equivalent of guilt. After prosecutors opened so many corruption crime files against politicians and business persons beginning in 1992, the 1994 Berlusconi center-right government proposed CSM reform to depoliticize it and legislation to make preventive detention more difficult to utilize. Magistrates opposed further safeguards on preventive detention, but parliament enacted the reforms.[76]

A third Italian style favors leniency toward crime and punishment. This resulted from at least two peculiar social and cultural circumstances. First, there was a strong perception—not only among leftists—that crime was a political and not a legal question. Marxists, although admitting that criminals were working-class enemies, rhetorically supported integrating these socially deprived individuals into society rather than isolating them by penal repression. Others, particularly among lower classes, felt that the criminal justice system was simply a violent, state-sanctioned mechanism to preserve an unequal society. From this standpoint, a criminal could be compared to the resistance fighter, struggling against those in power.

Second, southerners constituted the great majority of prisoners, further exacerbating economic, political, and cultural tensions between the two Italies. The underlying theme was that North and Center, the "legal Italy," should not adopt too harsh a stance toward Mezzogiorno, the "criminal Italy."[77]

After 1991, judges attacked the serious rise in crime by keeping defendants in prison for longer stays so that the total prisoner population reached postwar highs near a full capacity of 50,000. It could also be that magistrates, and Italians in general, now view the social order question differently, with prison reserved not for suppressed southerners, but for undeserving foreigners and drug addicts.

A fourth Italian style concerns judicial inefficiency. In general, the judiciary did a poor job beginning in the mid-1970s to meet the challenge of larger caseloads. This was partly due to magistracy under-staffing, but also to dysfunctional judgeship allocations and lax work habits fostered by the dismantle-

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76. Legge 332, 8 Aug. 1995, *Modifiche al codice di procedura penale in tema di semplificazione dei procedimenti, di misure cautlari e di dirritto di difesa*, in G.U. no. 184, 8 Aug. 1995; DI FEDERICO, *supra* note 25, at 237-39; Guarnieri, *supra* note 3, at 167-69; Nelken, *supra* note 24, at 190, 194, 203. Besides maximum detention periods for each proceeding stage, the new law called for audio or videotaping custodial testimony to prevent police and prosecutorial misconduct. Legge 332, arts. 2, 15, *amending the* NEW C.P.P. arts. 141, 303-304.

77. Pavarini, *supra* note 75, at 51-2.

ment of promotion incentives.[78] Parliament's willingness to intervene with periodic amnesties certainly did not encourage judicial productivity.

Several factors served to reduce the effectiveness of the ordinary judiciary. First, there were in 1993 actually nine percent fewer magistrates in service than positions authorized,[79] while this gap ranged as high as 15 percent in some years. Moreover, the vacancy rate for judicial staff has been considerably higher. Second, judges constituted only 73 percent of the Italian magistracy while by comparison the ratio of judges to total German magistrates was 80 percent in 1995.[80] Third, many Italian judges were also actively involved in outside social, political, and economic activities, including service on government commissions, teaching law courses, or even resolving private arbitrations. Magistrates also took leaves of absence to serve in parliament.[81] Fourth, the CSM was unable for structural and cultural reasons to rationally manage judgeship allocation to those districts or regions where the need was greatest. Fifth, judges did not adequately control the many lawyers barely earning a living, who purposely delayed civil cases to force settlements or obtain more money from their clients.[82]

The cultural and social division between Mezzogiorno and North and Center Italy brings us to the final Italian style. MG certainly was the more legalistic of the two regions, a situation that did not change over the past half century. Thus, more magistrates per 100,000 inhabitants worked in MG compared to NC.[83] MG plaintiffs brought many more civil cases per capita, almost double the NC rate in 1997.[84] But in the 1990s the average NC pretura judge decided 34 percent more civil cases than the average MG pretore, who accumulated proportionately a much larger backlog of files.[85] Consequently, MG residents were more litigious than their northern neighbors, but their judges were less productive (referring to the fourth style).

Mezzogiorno's criminal trial rate at all court levels—preture, tribunali, and courts of assize—was always higher than the rate in North and Center Italy per

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78. Guarnieri, *supra* note 3, at 170, 175 n.29; Nelken, *supra* note 24, at 202-03; PELLEGRINI, *supra* note 16, at 217-40; Giovanni Verde, *La giustizia italiana agli albori del 2000*, 122 IL FORO ITALIANO 85, 86-7 (1999).

79. *See* Table 2.

80. Clark, *supra* note 15, at 101. In addition, about two percent of the non-prosecutor Italian magistrates in fact have non-judicial duties. *See* Table 2.

81. DI FEDERICO, *supra* note 25, at 239; Guarnieri, *supra* note 3, at 165, 174; Nelken, *supra* note 24, at 198; PELLEGRINI, *supra* note 16, at 220-21, 224-25; Verde, *supra* note 78, at 91.

82. CHIARLONI, *supra* note 36, at 276-78; Carlo Vellani, *Riflessione sugli ultimi anni di interventi nel processo civile*, 53 Rivista Trimestrale di Diritto e Procedura Civile 703, 715 (1999).

83. *See* Table 1.

84. ANNUARIO 1998, *supra* note 34, at 147.

85. PELLEGRINI, *supra* note 16, at 217-40. This regional differential was smaller for tribunale judges, where the gap favored NC judges who decided on average six percent more cases than their MG counterpart. *Id.* at 230-33.

capita.[86] This carried through for appeals and eventually for petitions in cassation. In this respect, the South took a more conservative, punitive approach to law and order. For criminal cases MG magistrates worked as efficiently as those in NC until the 1989 Penal Procedure Code's implementation. In the 1990s MG judges seemed less willing to use the Code's new summary procedures and their average processing time (except for appeals) increased significantly over NC judges' productivity and average delay.[87]

In spite of MG's greater civil litigiousness and use of penal trials, its crime rate per 100,000 population was always *lower* than NC's, a gap that even increased during the 1990s crime wave. Alternatively, MG's conviction rate was higher than that in NC and by an increasing level during the 1990s. Thus, MG magistrates dealt more effectively with crime than their more liberal colleagues to the North, which in turn likely fed higher NC crime rates. By 1997, the gap in conviction rates increased to 442 per 100,000 inhabitants for NC versus 626 for MG. Moreover, if one considers the 1997 convicted person's birthplace, the differential expanded to only 294 for those from NC versus 752 for those from MG. The fact that southerners were two and a half times more likely than northerners to be convicted for crime clearly fed northern popular opinion that crime was part of southern culture. Since theft represented most crime since 1970, and the NC crime rate always exceeded that in MG, crime became an important southern export to NC that yielded significant revenue for MG. Ironically, NC was the land of crime, while MG was the land of the law.

The Italian republic in its first 50 years saw massive change. An independent, active magistracy emerged and today plays a significant role in addressing major social issues. Nevertheless, each of the two functions within the magistracy—prosecution and judging— exhibited substantial inefficiencies that in the past two decades caused major crises in the administration of justice. In addition, prosecutors who abused investigative powers and judges who abused preventive detention prompted a reaction in favor of limits to protect individual rights. For most of the postwar era Italian politicians and judges favored leniency toward crime and punishment. This attitude may be changing because crime boomed in the 1990s, more perpetrators were foreigners and drug addicts, and there was the common perception that organized crime had systematically spread from the South to the North. Organized crime in fact has globalized and is involved with illegal immigrants, arms traffic, drugs, and cigarettes. What did not change materially was the cultural and social division between North and Center Italy and Mezzogiorno. NC had wealth and was the engine for growth, but MG (residence for Cosa Nostra, 'Ndrangheta, Camorra, and Sacra Corona Unita) was the land of the law.

86. *See* Tables 3, 5.
87. *See* Tables 4, 6.

The Italian legal system demonstrated the ability to face some of its legal styles' negative aspects. Civil litigation delay by the late 1980s was so long that there was a substantial flight from justice (*fuga dalla giustizia*) and general public disappointment in the civil justice system.[88] This prompted the parliament to enact major structural changes. One solution was to increase the supply of justice by hiring 3,300 (of an eventual 4,700) non-career justices of the peace and the first 400 (of an anticipated 1,000) honorary judges (*giudici onorari*).[89] In 1990 parliament tried to improve efficiency by transforming civil tribunali for most matters from three judge courts to single judge courts.[90] Continued long court delays convinced parliament in 1997 to authorize the justice ministry (which acted in 1998) to merge civil preture into tribunali. Unitary judges using tribunale procedures will staff these courts.[91]

The 1989 Penal Procedure Code's attempt to augment productivity by diverting cases to summary procedures largely failed in the face of the 1990s crime wave. As a result, the justice ministry, at the same time in 1998 that it merged civil preture into tribunali, also abolished penal preture, its special procedure, and accompanying prosecutor offices. It transferred pretura jurisdiction to tribunali and their prosecutor offices. In addition, penal tribunali in 1999 became primarily single judge courts.[92] To further improve case processing efficiency the 1998 statute put certain pretura administrative duties in the public administration.[93] Finally, parliament authorized the justice ministry, whose norms took effect in 2000, to depenalize many misdemeanors and make them merely administrative offenses.[94]

Further magistracy and court system reform could yield productivity gains. First, judges should have a career structure tied to performance and reward, so that a collegiate body representing non-political divisions within the magistracy would control salary increases and promotion. Independence is sustainable only with accountability. Second, careful analysis of regional differences in the de-

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88. Chiarloni, *supra* note 36, at 270-71; *Civil Justice*, *supra* note 31, at 168-69.

89. Decreto legislativo 51, *supra* note 35; Legge 374, 21 Nov. 1991, Istituzione del giudice di pace, in G.U. no. 278, 27 Nov. 1991; *see* Nebbia, *supra* note 20, at 171; Varano, *supra* note 32, at 657-60; Vellani, *supra* note 82, at 708-09; Verde, *supra* note 78, at 86, 89-90; Table 2. Career judges may treat honorary judges, who tend to be less successful lawyers, as second class colleagues with unattractive assignments, which could adversely affect productivity. Chiarloni, *supra* note 36, at 283; Luiso, *supra* note 35, at 678.

90. Legge 353, 26 Nov. 1990, Provvedimenti urgenti per il processo civile, in G.U. no. 281, 1 Dec. 1990, art. 88, amending Ordinamento Giudiziario [hereinafter Ord. Giud.], regio decreto no. 12, 30 Jan. 1941, art. 48.

91. Luiso, *supra* note 35, at 676-77.

92. Three judge panels remain for certain cases and decisions. For example, preventive detention decisions require a three judge panel. Preture will continue to function as such until they have completed their 1999 case backlogs. Decreto legislativo 51, *supra* note 35, arts. 14, 42, 179-181.

93. Decreto legislativo 51, *supra* note 35, amending the Ord. Giud. and C.P.P.

94. Decreto legislativo 507, 30 Dec. 1999, Depenalizzazione dei reati minori e riforma del sistema sanzionatorio . . ., in G.U. no. 306, 31 Dec. 1999.

mand for justice should control the allocation of magistrate posts. The CSM should do what it can to equalize the quality of justice between the North and Center, on the one hand, and Mezzogiorno, on the other. Third, granting the Court of Cassation *discretion* to review civil and penal petitions would reduce the need for judges at that level, so that these posts could be shifted to levels at which delay has been the longest.[95]

For Italy to successfully implement the procedural reforms enacted since 1989 will require a fundamental change in legal style and culture. However, just as North and Center Italy serves as a model to Mezzogiorno, so too does the European Union and the Council of Europe provide discipline to the Italian legal system. Perhaps jurists place too much emphasis on the rule of law ideology. After all, Italian economic success was accomplished, not by governmental programs, but by a strong entrepreneurial spirit together with the diligent efforts of workers and managers. Entrenched individualism meant that Italy functioned best when government and its laws were largely ignored or not involved. Political fatalism built the popular capability to absorb governmental crises and scandals. Italians knew they were on their own and sensed they could protect themselves best by making the legal system minimally effective or bypassing it entirely.[96] Only the 21st century will reveal whether the Italian style can succeed in balancing law and politics so that court system efficiency fulfills its promise of justice to a skeptical citizenry.[97]

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95. Chiarloni, *supra* note 36, at 284-88.

96. Fiorella Padoa Schioppa Kostoris, *Excesses and limits of the public sector in the Italian economy: The ongoing reform, in* THE NEW ITALIAN REPUBLIC: FROM THE FALL OF THE BERLIN WALL TO BERLUSCONI 273, 291 (Stephen Gundle & Simon Parker eds., 1996); SPOTTS & WIESER, *supra* note 5, at 290-92.

97. *See* Domenico Pulitanò, *La giustizia penale alla prova del fuoco*, 40 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 3 (1997).

The Country Above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta

JASON J. KOVACS*

"He probably got lucky," said Hans Grohmann, a United Nations protocol assistant.[1]

"He was in the photo, and it was a mistake," said General Assembly spokeswoman Susan Markham. "He wasn't supposed to be there."[2]

To whom were these U.N. staffers referring? None other than Grand Chancellor Count Carlo Marullo di Condojanni, Prince of Casalnuovo, the Minister of Foreign Affairs of the Sovereign Military Order of Malta (commonly abbreviated as SMOM).[3] Perhaps it might be a stretch to call Count Marullo "Minister of Foreign Affairs," because it is not exactly clear that SMOM is a state, at least according to the United Nations. The U.N. General Assembly refuses to recognize SMOM as a state, and this is what caused a breach of U.N. protocol so vast that the United Nations nearly took the drastic step of airbrushing the Count out of a photo.[4]

It seems that Count Marullo attended the U.N. Millennium Summit in New York in Sept. 2000 as the official delegate of SMOM, and when it came time to take the snapshot of the 180 world leaders, he decided to squeeze in, U.N. protocol notwithstanding. Since 1994, when SMOM was recognized by the United Nations as a non-voting permanent observer,[5] Count Marullo has been on a quest to upgrade SMOM's membership.[6] Despite raising the ire of the U.N. staff, Count Marullo may have won this small skirmish, since he was included in the picture of heads of state alongside the Japanese prime minister and President Bill Clinton.

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* Jason J. Kovacs is a 2003 graduate of Syracuse University College of Law.

1. Edward Wong, *Count Inserts Himself Into History in U.N. Summit Photo*, N.Y. TIMES, Sept. 9, 2000, at B3.

2. Yaroslav Trofimov, *SMOM is a Mouse that Roars for Respect as a Bona Fide Nation*, WALL ST. J., June 28, 2001, at A1.

3. *Grand Chancellor*, *available at* http://www.orderofmalta.org/grancancelliere.asp?idlingua=5 (last visited Nov. 19, 2003). On January 1, 2002, Count Jacques de Liedekerke took over the office of Chancellor from Count Marullo. *Id.*

4. *Count Me In*, FIN. TIMES (London), Sept. 22, 2000, at 23. Secretary-General Kofi Annan rejected the airbrushing idea, considering it too "Stalinist." *Id.*

5. G.A. Res. 48/265, U.N. GAOR, 48th Sess., Supp. No. 49, Vol. 2, at 14, U.N. Doc. A/48/49/Add.1 (1994).

6. Trofimov, *supra* note 2.

The international status of SMOM is a unique question in international law. SMOM is not a state in the traditional sense,[7] in that it has no population or territory of any sort.[8] Instead, it is a Roman Catholic religious order, founded nearly one thousand years ago[9] that has been internationally recognized as having some degree of sovereignty for centuries.[10] After a rough 19th century, in which it saw itself ejected from its home on the island of Malta by Napoleon,[11] SMOM reorganized itself and became rededicated to its original purpose: running hospitals and helping the sick and wounded, especially in times of war.[12] Today, it enjoys diplomatic relations with ninety states,[13] ten short of Count Marullo's goal of 100, which he believes will be enough for SMOM to gain full membership in the United Nations.[14]

In this note, I will discuss the current international status of SMOM. Part I will examine a brief history of the Sovereign Military Order of Malta. Part II will analyze the legal criteria of statehood, and apply this criteria to SMOM. In Part III, I will argue that while SMOM may not fit the traditional criteria of a state, it is instead an international entity *sui generis*, which is entitled to all the benefits and responsibilities of a state in the modern world.

I.

Despite its name, today SMOM has very little to do with Malta. Its headquarters is in Rome, just west of the Spanish Steps,[15] on the beautiful via dei Condotti, above a Hermes boutique.[16] It derives its official name — the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta — from three of the various places it has been based throughout its long history. The story of how SMOM entered these far-flung places, and how it left them, echoes the story of European and Christian history over the past millennium.

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7. A state must have a fixed territory, population, a functioning government, and independence. *See infra* Part II, and GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 51-2 (7th ed. 1996). Gerhard von Glahn views SMOM as a "nonstate subject of international law." *Id.* at 60.

8. Trofimov, *supra* note 2.

9. C. d'Oliver Farran, *The Sovereign Order of Malta in International Law*, 3 INT'L & COMP. L.Q. 217, 219 (1954).

10. *Id.*

11. *Id.* at 220.

12. Arthur C. Breycha-Vauthier & Michael Potulicki, *The Order of St. John in International Law*, 48 AM. J. INT'L L. 554, 554-55 (1954).

13. *Diplomatic Activities*, *available at* http://www.orderofmalta.org/attdiplomatica.asp?idlingua=5 (last visited Nov. 19, 2002).

14. Trofimov, *supra* note 2.

15. Wong, *supra* note 1.

16. Trofimov, *supra* note 2.

A. FROM THE FIRST CRUSADE TO THE FALL OF ACRE

Ever since Christianity supplanted paganism in Europe, Christian pilgrims have been traveling to the Holy Land to visit the birthplace of their religion.[17] The trip to the Holy Land was never easy, and eventually charities were founded to assist tired and sick pilgrims in Jerusalem. The earliest hospice on record was founded by Pope Gregory the Great, which operated in Jerusalem in 603.[18] This hospice can be seen as the spiritual forerunner of SMOM.[19]

More than four hundred years later, as western Europe was emerging from the dark ages and as European trade with the Middle East was increasing,[20] a group of merchants from the Italian city of Amalfi was granted permission from the Egyptian caliphs to build a hospital for Christian pilgrims outside of Jerusalem.[21] The hospital was granted extraterritoriality by the Muslim rulers of Jerusalem (which continued after the arrival of the Crusaders),[22] one of the first signs of SMOM's peculiar international status. Founded by Brother Gerard, who was to be the first Grand Master of SMOM, this hospital would probably be no more than a footnote in history if it was not for the call to arms of Pope Urban II in 1095.[23]

The call for a crusade to retake the Holy Land was met by cries of "*Deus lo vult! Deus lo vult!*,"[24] and by July 1099, Jerusalem was conquered.[25] After the conquest, European kings and nobles, led by the conqueror of Jersualem, Godfrey de Bouillon, endowed the Hospital with various properties and grants in the newly Christianized lands.[26]

Brother Gerard used the Hospital's funds to create a network to help bring pilgrims to the Holy Land, and the hospital soon became an important link in the supply line between Jerusalem and the West.[27] The growth of the Hospital and its network led to Pope Paschal II issuing the bull *Pie postulatio voluntatis* in 1113, which gave formal ecclesiastical recognition to Brother Gerard's organization.[28] From a small hospital in the Holy Land and its corresponding

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17. H.J.A. SIRE, THE KNIGHTS OF MALTA 3 (1994).
18. SIRE, *supra* note 17, at 3.
19. *Id.*
20. *Id.*
21. Farran, *supra* note 9, at 219.
22. JOHN SACK, REPORT FROM PRACTICALLY NOWHERE 136 (1955).
23. SIRE, *supra* note 17, at 3-4.
24. "God Wills It." Sir F. Russel Kendall, Work of the Order, *available at* http://www.holysepulchre.net/work_of_the_order.htm (last visited Mar. 8, 2002).
25. SIRE, *supra* note 17, at 3-4.
26. *Sire*, supra note 17, at 3-4.
27. *Id.*
28. *Id.* at 5. The Bull "placed [the hospital] under the aegis of the Holy See, granting it the right to freely elect its superiors without any interference by other secular or religious authorities. By virtue of the Papal Bull, the Hospital became an Order exempt from the Church." History, *available at* http://www.smominfo.org/storia.asp?idlingua=5 (last visited Mar. 8, 2002). Despite the Bull, there has con-

European network came forth the Order of St. John, the first great Christian order of the Middle Ages. Under the leadership of Brother Gerard, members of the Order took a vow of "poverty, chastity, and obedience."[29] It was around this time that a *de facto* military component to the Order was established,[30] which was necessary for two reasons; not only was the Christian hold on Jerusalem precarious at best, but the energetic Brother Gerard had plans to create an additional overland route to Europe from Jerusalem, which was eventually created (and in due course, lost).[31]

Brother Gerard died in 1120,[32] and was succeeded by Raymond du Puy, a Frankish knight who came to Jerusalem during the First Crusade and never left.[33] Under du Puy's leadership, the Order became increasingly involved in military pursuits and the Order's knights were seen in action from Ascalon, just north of Gaza, to Crac, which was the eastern edge of the crusader state of Tripoli.[34] The various Christian leaders depended on the knights of the Order to defend their fledgling states, and the Order was granted castles in prominent locations to aid their military effort.[35] By the time the Second Crusade took place from 1147 to 1149, the Order was a "recognized part of the military effort for the defense of the Holy Land."[36]

The Order vastly increased its number of hospitals and members under du Puy,[37] who even ventured to Europe to personally oversee this expansion.[38] However, with du Puy's death in 1160, the election of less skilled Grand Masters, a poorly planned invasion of Egypt in 1168, and a division between Christian factions, the tide was turning against the crusader states.[39] The invasion of Egypt resulted in the overthrow of the Egyptian government by the Muslim rulers of Syria, and the unification of these two states proved deadly for the continuing Christian presence in the Holy Land.[40] Saladin, who inherited the leadership of Syria and Egypt from his uncle, Shiracouh, took advantage of

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tinued to be some confusion about the relationship between SMOM and the Holy See, a confusion which has international law implications. A papal inquiry into the inner workings of SMOM in the 1950s answered many questions and also created new ones, as will be discussed.

29. Farran, *supra* note 9, at 219.

30. While the Order became increasingly militarized during the 12th century, it was not until the 1206 Statutes of Margat that a legal basis to the military organization of the Order was created. SIRE, *supra* note 17, at 12. The Pope, who admonished the Order not to forget its original calling to help the sick in 1180, supported the increasing emphasis on the military by the turn of the 13th century. *Id.*

31. SIRE, *supra* note 17, at 6-7.

32. *Id.* at 6.

33. *Id.*

34. *Id.* at 7.

35. *Id.*

36. SIRE, *supra* note 17, at 7.

37. *Id.* at 8.

38. *Id.*

39. *Id.* at 10.

40. *Id.* at 11.

continuing Christian divisions, and recaptured Jerusalem for the Muslims in 1187.[41]

After the fall of Jerusalem, the Order fled north to the city of Acre, which remained in Christian hands.[42] There was no doubt now that the Order was a military one, and "the real base of [its] power was now in [its] huge military estates.[43] The Order's largest hospital outside of Jerusalem lay in Acre, which was growing in economic importance.[44] Acre contained more than 30,000 inhabitants at its height, and was the economic, political, and social capital of the Christian Middle East, in addition to being the headquarters of the Order.[45] However, despite the best efforts of the knights of the Order, a six-week siege resulted in the fall of Acre in 1291, and the resumption of Muslim rule.[46] The Order fled its new home, and one by one, all the Christian cities of the Middle East and Asia Minor collapsed.[47] By 1302, "not a watchtower remained of the long dominion of the crusaders in the East."[48]

B. FROM CYPRUS TO RHODES TO MALTA

The fall of Acre left the Order reeling. Only seven knights survived the massacre in Acre in 1291, and even more importantly, the Order was in search of a role to play after the loss of the Holy Land.[49] The Order's headquarters shifted west, across the sea, to the Kingdom of Cyprus, where it held "extensive possessions, including valuable sugar plantations."[50] The Order began to build up its navy, which was pivotal for the continuing livelihood of the newly island-based Order.[51] Various raids on Muslim territory and attempts to aid the Christian Kingdom of Armenia were launched, with none having any success.[52] In addition, neither the Armenian nor the Cypriot kingdoms were particularly friendly to the Order, and its continuation was in doubt.[53]

But at one of its darkest hours, an ambitious Grand Master saved the day. Foulques de Villaret, the 25th Grand Master, navigated the Order through the treacherous politics of the first decade of the 14th century, and when it was over, the Order was in possession of the island of Rhodes in the eastern Medi-

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41. SIRE, *supra* note 17, at 11-2.
42. *Id.* at 12.
43. *Id.*
44. *Id.*
45. SIRE, *supra* note 17, at 14.
46. *Id.* at 15.
47. *Id.* SMOM would not return to the Holy Land until the opening of its legation in Lebanon in 1954. SACK, *supra* note 22, at 137.
48. *Id.*
49. SIRE, *supra* note 17, at 25.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

terranean.[54] Pope Clement V confirmed the Order's taking of Rhodes in 1307, and by 1310, the Order's headquarters had shifted again, this time to their own island.[55]

The Order thus became the sovereign of Rhodes,[56] which was followed two years later by the Order's possession of the newly collapsed Kingdom of Cyprus.[57] While there was no doubt that Villaret, as Grand Master of the Order, held the status of an independent sovereign,[58] Villaret's support from inside the Order began to wane as he became more of a despot. With the support of the Pope, he was removed as Grand Master and given a less vital role.[59] However, Villaret's tenure as Grand Master cannot be underestimated. At a time when the future of the Order was in doubt, he secured for it an island to rule, restored its international status as a sovereign state, and increased its military and political strength.[60] "It is due to him that in the age of Francis I and Henry VIII all Europe continued to take it for granted that the Order of St. John should be preserved as an independent military and naval force, and that even today the same Order pursues its international hospitaller tasks with the freedom and advantages of a sovereign state."[61]

The Order existed in Rhodes for more than two centuries,[62] and, as the easternmost beachhead of Christianity,[63] the Order focused on controlling the waters of the Aegean and penning in the rising Ottoman Turks.[64] The Order controlled a multitude of small islands off the Turkish coast, and thus, the Order served an important military role defending Venetian, Genoese, and other Christian possessions in the Aegean.[65]

Rhodes was becoming a cosmopolitan island, with knights from all over Europe serving as members of the Order.[66] By 1492, the Order was divided into

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54. SIRE, *supra* note 17, at 27-8. "In the confused state of the Aegean, Villaret seems to have walked a tightrope course between Genoa and Venice: now Genoa helped Byzantium to defend their common claims in Rhodes, now Villaret secured Genoa's support for his expedition of reinforcement; at one moment, the Venetians resisted the Hospitallers' threat to their position in Lango, at the next they were appeased by Villaret's assurances of friendship." *Id.* at 28.

55. *Id.*

56. Farran, *supra* note 9, at 219.

57. SIRE, *supra* note 17, at 28.

58. *Id.*

59. SIRE, *supra* note 17, at 29.

60. *Id.*

61. *Id.*

62. *The Knights on Rhodes, available at* http://www.chivalricorders.org/orders/smom/rhodes.htm (last visited Nov. 12, 2003).

63. The Kingdom of Armenia fell to the Mamelukes in 1337; *see* SIRE, *supra* note 17, at 34.

64. *Id.*

65. *Id.*

66. Farran, *supra* note 9, at 219. The eight langues, also referred to as Priories, were Provence, Auvergne, France, Italy, Aragon, England, Germany, and Castille. Breycha-Vauthier & Potulicki, *supra* note 12, at 555.

eight langues, or tongues, depending on language.[67] It was also at this point in the Order's history when its government began to become more organized. The Grand Master was aided by a council, the Order started printing its own currency, and its government was composed of members from various nationalities.[68] The Order fortified the harbor of Rhodes to protect itself from the Turkish menace,[69] and under its rule, Rhodes prospered.[70] French and Italian merchants lived alongside Greek natives, many of whom followed the knights out of Rhodes after the island fell to the Turks.[71]

The fortification of Rhodes and the growing military strength of the Order was necessary to the Order's survival, considering the rising power to the east. Under the leadership of Mahomet II, the Ottoman Turks captured Constantinople in 1453, which sent shock waves through Europe.[72] Despite his empire's impressive victories, Mahomet II was determined to capture Rhodes, which defiantly sat only miles off the Turkish coast, and unlike other Europeans in the east, was not concerned with material items, but with faith.[73] In 1480, Mahomet II launched a huge invasion of Rhodes, with 70,000 Turks facing off against 600 knights and no more than 2,000 soldiers. Despite the overwhelming numerical advantage for the Turks, the Order prevailed after an eighty-nine day siege, and the Turkish advance was thwarted.[74]

The Order's amazing victory is considered instrumental in stemming the westward movement of the Ottoman Empire. Mahomet II is said to have planned an invasion of Italy for the second half of 1480, but his defeat at Rhodes prevented such an attack from taking place.[75] While the defeat took a toll on Mahomet II,[76] the Grand Master at the time, Pierre d'Aubusson,[77] was hailed as the "greatest soldier in Christendom,"[78] and in the aftermath of the victory, he and the Order received gifts,[79] endowments,[80] and an increase in members and fame.[81] Rhodes was rebuilt, and its city walls were strength-

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67. *Id.*

68. *History, available at* http://www.smominfo.org/storia.asp?idlingua=5 (last visited Mar. 8, 2002). Diplomatic relations were also carried out with other European states. *Id.*

69. SIRE, *supra* note 17, at 37.

70. *Id.* at 39.

71. *Id.*

72. *Id.* at 51.

73. SIRE, *supra* note 17, at 51-4.

74. *Id.* at 51.

75. *Id.* at 54.

76. Mahomet II died the year after the defeat, in the midst of planning for a second seige. He ordered the following engraved on his tomb: "I designed to conquer Rhodes and subdue Italy." *Id.*

77. *Id.* at 51.

78. SIRE, *supra* note 17, at 54.

79. Unique gifts from Mahomet II's sucessor, Bajazet II, included a thorn from Jesus' crown and the right arm of St. John the Baptist. *Id.*

80. Aubusson annexed the Order of the Holy Sepulchre, and all of its endowments. *Id.*

81. *Id.* at 54-5.

ened.[82] When Aubusson died in 1502, the Order was as powerful as it would ever be on the island of Rhodes.[83]

The Turkish defeat of 1480 was bound to be avenged, and with the Turkish annexation of Syria and Egypt in the second decade of the 16th century, Rhodes was almost completely surrounded.[84] The new ruler of the Ottoman Empire, Soliman the Magnificent, was determined to capture Rhodes, and in 1522, he launched an invasion of the island with 200,000 men and 700 ships.[85] The Order had less notice of the attack than it did in 1480, and consequently it only had 500 knights and 1,500 soldiers to defend itself with. Under the leadership of Philippe de Villiers de l'Isle Adam, the knights held out for six months, but ultimately accepted Soliman's offer to leave the island with the "honors of war."[86] Under the agreement, the Catholic Church on Rhodes was to be maintained, the churches were not to be destroyed, and the Order was allowed to leave with their weapons, treasures, and "sacred vessels."[87] L'Isle Adam at first did not want to accept the offer, but did so on the advice of the Council, who feared not accepting it would mean the destruction of the Order.[88] On New Year's Day, 1523, the Order departed its home of more than two centuries, and headed for the Papal States.[89]

L'Isle Adam and the Order spent the period from 1523 to 1530 looking for a suitable home,[90] a quest which was often hamstrung by internecine intra-European political squabbles.[91] Ultimately, the Order found a new patron in the powerful Charles V, Emperor of the Holy Roman Empire, and King of Spain, Hungary, and Bohemia.[92] As the only European monarch with the military strength to battle the Turks, he found an ideological and religious soul mate in the Order.[93]

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82. *Id.* at 55.

83. SIRE, *supra* note 17, at 54.

84. *Id.* at 57.

85. Farran, *supra* note 9, at 219.

86. SIRE, *supra* note 17, at 58.

87. *The Knights on Rhodes*, *available at* http://www.chivalricorders.org/orders/smom/rhodes.htm (last visited Nov. 12, 2003).

88. SIRE, *supra* note 17, at 58.

89. SIRE, *supra* note 17, at 59. It is said that Soliman was distraught to see L'Isle Adam leave Rhodes. *Id.* "It saddens me to have to oblige this brave old man to leave his home." *Id.* "For the rest of his life he was to regret increasingly that he had permitted it." *Id.* However, this sentimentality for L'Isle Adam was not enough to prevent Soliman from attacking the Order again, this time on Malta, 32 years later. *Id.* at 68.

90. Farran, *supra* note 9, at 220.

91. SIRE, *supra* note 17, at 60.

92. *Id.* at 60 Charles V was also known as King Charles I of Spain. *Catholic Encyclopedia: Emperor Charles V*, *available at* http://www.newadvent.org/cathen/03625a.htm (last visited Nov. 12, 2003). He became the King of Bohemia and of the Hungarian state after the Ottoman victory at Mohacs in 1526. SIRE, *supra* note 17, at 60. He was forced to defend Vienna from Soliman's attack in 1529. *Id.*

93. *Id.*

"There has been nothing in the world so well lost as Rhodes," said Holy Roman Emperor Charles V.[94] Immediately after the defeat at Rhodes, Charles V offered the Order the island of Malta, an ancient dependency of the Kingdom of Sicily.[95] The Order received Malta as a "perpetual fief *cum imperio*,"[96] under two main conditions: a falcon would have to be sent annually on All Saints Day to the viceroy of Sicily "in memory and recognition of the benefits which the Order had received," and the Order was to be perpetually neutral in wars between Christian nations.[97]

L'Isle Adam and the Knights took possession of Malta and the neighboring island of Gozo in 1530, and encountered a small, desolate — albeit strategic — island in the middle of the Mediterranean.[98] Only 120 square miles with a population of 12,000, the Order began the task of building up a base in preparation for the reconquest of Rhodes.[99] This idea was buried, however, with a military setback in 1531, which was soon followed by the death of L'Isle Adam in 1534.[100]

Under the leadership of Grand Master Jean de Homedes, who was elected in 1536,[101] the Order fell under the influence of Spain, then the most powerful state in western Europe.[102] Homedes began the task of building up the defenses of Malta, something which would become urgent only a few decades later, when the Turks attacked the Order for a third time.[103] This last great siege of a SMOM possession took place in 1565, when Soliman once again attacked the Order, this time with 200 ships and 50,000 men.[104]

The 1565 siege of Malta ranks as one of the most heroic defenses in military history.[105] For four months,[106] 400 knights and 8,000 soldiers endured the Ottoman attack.[107] In September, when Spanish aid finally arrived, Soliman's forces departed, and Malta was saved.[108]

The siege was a turning point for Soliman and the Order. Soliman's defeat foreshadowed future Ottoman debacles in the next century that heralded the

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94. SACK, *supra* note 221, at 139.
95. SIRE, *supra* note 17, at 60.
96. Farran, *supra* note 9, at 220.
97. *Id.*
98. SIRE, *supra* note 17, at 61.
99. *Id.*
100. *Id.*
101. *Id.* at 63-64.
102. *Id.* at 63.
103. SIRE, *supra* note 17, at 65.
104. Farran, *supra* note 9, at 220.
105. SIRE, *supra* note 17, at 69.
106. *Id.* at 71.
107. Farran, *supra* note 9, at 220.
108. SIRE, *supra* note 17, at 71.

decline of his empire.[109] Malta would be the costliest military loss of his reign.[110] For the Order, however, the victory saved their reputation as the defenders of Christianity.[111] The loss of a second island in less than fifty years might have damaged the Order's reputation beyond repair.[112] Instead, the Knights of the Order delivered a stirring military victory that reverberated through Europe for centuries.[113]

Malta would remain the Order's home for more than 200 years after the last Ottoman siege.[114] The current Maltese capital of Valetta was built by the Order,[115] and was named after Grand Master Jean de la Vallette, who led the Order during the siege of Malta.[116] The Order was recognized as the sovereign of Malta, and sent ambassadors to Rome, Vienna, Paris, and Madrid.[117] In the middle of the 17th century, the Order also controlled a few islands in the West Indies, which were ceded to the Order by France.[118] Despite their success on Malta holding the western front against the Muslim invaders, it would be a Christian nation that would evict the Order from their island home. As John Sack put it, "Malta, won by bravery. . . was lost by cowardice."[119]

C. THE MODERN ERA

The Order's eviction from Malta in 1798 is all the more surprising considering that the 18th century was something of a golden age for the Order. "Magnificently defended, sumptuously built, efficiently regulated and astonishingly prosperous, eighteenth-century Malta was a prodigy state as surely as seventeenth-century Holland or sixteenth-century Venice were."[120] Under the rule of Grand Master Emmanuel de Rohan-Polduc, the crime rate was very low, the university was expanded, care for the poor and the sick was improved, and law

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109. The Order's navy took part in the battle of Lepanto in 1571, which destroyed Ottoman naval power in the Mediterranean. *History, available at* http://www.smominfo.org/storia.asp?idlingua=5 (last visited Mar. 8, 2002).

110. SIRE, *supra* note 17, at 71.

111. *Id.* at 72.

112. *Id.*

113. *Id.* Two centuries later, Voltaire wrote, "*Rien n'est plus connu que le siège de Malte.*" *Id.*

114. Farran, *supra* note 9, at 220.

115. SIRE, *supra* note 17, at 73.

116. Farran, *supra* note 9, at 220.

117. *Id.* This is attributable to the prominence the Order held in the European world, as at that time only "important powers were allowed to accredit ambassadors." *Id.* "As late as 1858, only 3 Great Powers had ambassadors in Paris, while at Vienna only 2 did so." *Id.* at 220.

118. *Id.*

119. SACK, *supra* note 221, at 140. H.J.A. Sire disagrees with this accusation of cowardice, laying blame for the fall of Malta on lackluster leadership of the Grand Master at the time, Ferdinand von Hompesch zu Bolheim. SIRE, *supra* note 17, at 241.

120. SIRE, *supra* note 17, at 231.

and administration were reformed with the *Code Rohan* and the *Diritto Municipale*.[121]

After the French Revolution broke out, the Order began to resort to the name it now goes by, the Sovereign Military Order of Malta, in an effort to distinguish itself from the traditional religious orders which were under persecution in France.[122] This dissociation did not work, and by October 1792, Republican France had seized most of SMOM's assets, thus eliminating 60% of the Order's European revenue.[123] The struggling Order fell under the protection of the Russian Empire, which due to the Second Partition of Poland now held sovereignty over the Polish langue of the Order.[124] Czar Paul I was an admirer of the Order, and signed a treaty with SMOM in 1797.[125] Later that year Grand Master Rohan died.[126]

Rohan was succeeded by Ferdinand von Hompesch zu Bolheim, who named Paul I Protector of the Order.[127] It is debatable whether the pro-Russian tendencies of SMOM served to provoke France to attack it, but Sire believes that it the fall of Malta can be blamed on Hompesch's failure to recognize the dangerous military position SMOM was in during the last years of the 18th century.[128] Whatever the reasons for the attack, the French government at the time, the Directory, ordered Napoleon to seize the island while on his way to Egypt.[129]

Between 500 and 600 French ships sailed to Malta the first week of June, 1798.[130] SMOM had 300 knights and 7,000 soldiers at its disposal, which could have been enough to withstand a siege of several months.[131] Napoleon requested that 80 ships be allowed to enter the harbor to take on water, but this SMOM countered that due to its neutrality, only four ships could be allowed to enter the harbor at one time.[132] Napoleon rejected this compromise, and considered Valletta an enemy city.[133] He promptly attacked the island, and Maltese confusion combined with ineffective leadership led Hompesch to seek an armistice.[134] Hompesch was forced to sign a treaty ceding Malta to France, and he and the knights left Malta with only a handful of souvenirs of their 268 year

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121. *Id.* The *Code Rohan* is a source of current SMOM law. *The Knights of Malta: A Legend Toward the Future, available at* http://www.smominfo.org/pdf/history.pdf (last visited Mar. 8, 2002).

122. SIRE, *supra* note 17, at 234.

123. *Id.*

124. *Id.* at 235.

125. *The Knights of Malta: A Legend Toward the Future, available at* http://www.smominfo.org/pdf/history.pdf (last visited Mar. 8, 2002).

126. SIRE, *supra* note 17, at 235.

127. *Id.* at 236.

128. *Id.*

129. *Id.* at 238. The date of the Directory's secret decree was April 12, 1798. *Id.*

130. *Id.* at 239.

131. SIRE, *supra* note 17, at 239.

132. SIRE, *supra* note 17, at 239-40.

133. *Id.*

134. *Id.* at 239-41.

stay.[135] One of Hompesch's final decrees before the knights left was to transform Malta into a democracy.[136]

Hompesch traveled to Trieste, where he abdicated the office of grand master in favor of Paul I, which was of doubtful constitutionality.[137] After Paul I's death in 1801, his son Alexander I renounced his claim as Grand Master, and in 1803 Pope Pius VII appointed Giovanni Tommasi as Grand Master.[138] Tommasi settled SMOM in Catania, Italy, where it fell into a decline that would last most of the 19th century.[139] SMOM had no territory, and starting in 1805, with Tommasi's death, the pope refused to confirm the choice of a grand master, leaving SMOM to languish under the interim regime of lieutenants-general until 1879, when Pope Leo XIII confirmed the election of John Ceschi di Santa Croce as grand master.[140]

Meanwhile, SMOM's former abode on Malta fell into the hands of the British, who by the 1802 Treaty of Amiens signaled that they would return the island to SMOM.[141] However, the aggressiveness of Napoleonic France demonstrated to the British the strategic value of Malta,[142] and by the 1814 Treaty of Paris Malta formally became a British possession.[143] Any hope of a reversal was dashed by the Congress of Vienna the next year.[144]

SMOM arrived in Rome in 1834. Lieutenant Carlo Candida established the Order's headquarters at the Palazzo di Malta, 68 Via Condotti, where it currently sits today.[145] SMOM began the task of reorganizing itself after a disastrous 36 years since the fall of Malta.[146] It abolished the ancient langues, and set

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135. *Id.* at 242. Only the hand of St. John and the icon of Our Lady of Filermo (a relic that was given to Paul I by Hompesch that was later lost after the Russian Revolution; it was the inspiration behind *The Maltese Falcon*) were allowed to go with Hompesch. *Id.* The rest of SMOM's treasures were put on Napoleon's ship, *L'Orient*, and were supposed to accompany him to Egypt. After Admiral Horatio Nelson sank *L'Orient* on August 1, 1798, the treasures sank to the bottom of Aboukir Bay, where they sit today. *Id.*

136. *Id.*

137. Farran, *supra* note 9, at 221. Paul I became Grand Master *de facto*, but not *de jure*, as he was not a knight, nor Roman Catholic, nor single, nor did he have papal approval. *Id.* at 221 n. 18.

138. SIRE, *supra* note 17, at 245.

139. Farran, *supra* note 9, at 221.

140. *Id.*

141. *Id.*

142. SIRE, *supra* note 17, at 246.

143. Farran, *supra* note 9, at 221.

144. *Id.*

145. *The Knights of Malta: A Legend Toward the Future, available at* http://www.smominfo.org/pdf/history.pdf (last visited Nov. 10, 2001). In addition to catania, SMOM also temporarily settled in the Italian cities of Messina and Ferrara. *History, available at* http://www.smominfo.org/storia.asp?idlingua=5 (last visited Mar. 8, 2002).

146. *The Knights of Malta: A Legend Toward the Future, available at* http://www.smominfo.org/pdf/history.pdf (last visited Mar. 8, 2002).

up National Associations of Knights.[147] The right to elect its own Grand Master was reestablished in 1879.[148]

D. THE ORDER OF MALTA TODAY

After arriving in Rome, SMOM refocused on its original purpose, that of charity work and helping those in times of war or disaster.[149] The sick, wounded, and hungry have been aided by SMOM in countless places in the past century, and SMOM continues to do so today.[150]

Even though it lost its last formal territory in 1798, states have continued to maintain full relations with SMOM.[151] In 1803 France and Austria reestablished diplomatic relations,[152] and, despite SMOM's decline in the 19th century and the turbulence of the first half of the 20th century, in 1954 seven states recognized the Order.[153] That number has skyrocketed in the last 47 years to 90 states.[154] It is the stated goal of the current Grand Chancellor that the number will increase to 100.[155]

A relatively recent dispute concerning the internal structure and government of SMOM took place in the early 1950s. When the 76th Grand Master died in 1951, the Holy See exerted its authority over SMOM in order to determine exactly where the Order stood in relation to the Holy See.[156] A special tribunal was established by pontifical decree in 1952, and it issued a judgment the next year.[157] Essentially, the tribunal recognized SMOM as "sovereign and an inter-

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147. *The Knights of Malta: A Legend Toward the Future*, *available at* http://www.smominfo.org/pdf/history.pdf (last visited Mar. 8, 2002) *Id.* The first modern national association was established in Germany in 1859, followed by Britain (1875), Italy (1877), Spain (1886), France (1891), and Portugal (1899). *Id.* At present, there are 42 national associations. *Id.*

148. Farran, *supra* note 9, at 221.

149. *Id.*

150. Some examples of SMOM's work include helping the victims of the 1908 Messina earthquake, the 1911 Italian-Turkish war, both world wars, the 1956 Hungarian Revolution, the Vietnam War, and Albania in 1999. *The Knights of Malta: A Legend Toward the Future*, *available at* http://www.smominfo.org/pdf/history.pdf (last visited Mar. 8, 2002). SMOM also runs several hospitals in Europe and has provided emergency humanitarian relief in Africa and Latin America. *Medical and Humanitarian*, *available at* http://www.smominfo.org/attmu.asp?idlingua=5 (last visited Mar. 8, 2002). SMOM's diplomatic relations helped to release two Czechs who were arrested in Cuba for meeting anti-communist dissidents in early 2001. (Both Cuba and the Czech Republic recognize SMOM.) Yaroslav Trofimov, *SMOM is a Mouse that Roars for Respect as a Bona Fide Nation*, WALL ST. J., June 28, 2001, at A1.

151. Farran, *supra* note 8, at 221.

152. *Id.*

153. *Id.* at 223.

154. *Diplomatic Activities*, *available at* http://www.smominfo.org/attdiplomatica.asp?idlingua=5 (last visited Mar. 8, 2002).

155. Trofimov, *supra* note 2, at A1.

156. Breycha-Vauthier & Potulicki, *supra* note 12, at 560. "The relationship between the Pope and the Grand Master has never been clear and it is probable that as many arguments could be found to prove that the Order was a religious organization as to show that it was a lay one." *Id.*

157. *Id.* at 561.

national person," which, however, was not equivalent to a state.[158] It also characterized SMOM as a religious order, which was subject to canon law, and, hence, the Holy See, in certain situations. However, the tribunal also said that nothing it decided "should be considered as affecting the various rights and privileges, express or customary," of SMOM.[159] Various proposals for modernizing and democratizing SMOM were also made, and some of them have been implemented.[160] SMOM has made efforts to enter the modern world and to broaden its reach, with the election of the first Grand Master from the British Isles, Andrew Bertie, in 1988.[161] SMOM has also opened its doors to those without a noble heritage,[162] as well as to women.[163]

Its long history and capacity for change has prompted one observer in 1931 to say that "unlike so many other ancient institutions [SMOM] has never outlived its usefulness."[164] More than seven decades later, this statement is more true than ever.

II.

While some scholars believe that international law provides no adequate definition for the term "state,"[165] there is general consensus that the Montevideo Convention on the Rights and Duties of States[166] provides the best definition of a state as a person of international law.[167] Article I of the Convention defines a state as an entity that should possess a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.[168]

The Montevideo definition of statehood, while basic and succinct, is only a starting point on the road to a generally applicable definition.[169] Independence is often viewed as a requirement for statehood as opposed to a capacity to enter into relations with other states.[170] Ian Brownlie follows this view,[171] and adds other factors to be considered when analyzing statehood: a degree of perma-

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158. Farran, *supra* note 9, at 231.

159. Farran, *supra* note 9, at 231-32.

160. *Id.*

161. Barth Healey, *Distinction from an Ancient Order*, N.Y. TIMES, Sept. 25, 1988, at 65. Bertie is the current Grand Master of SMOM.

162. *Id.*

163. Richard Owen, *Knights of Malta to Admit Women*, TIMES (London), Jan. 14, 1998, at 14.

164. Farran, *supra* note 9, at 232.

165. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 408 (1999).

166. Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

167. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 36 (1979).

168. Montevideo Convention, *supra* note 166, at art. 1. *See also* Restatement (Third) of Foreign Relations Law § 201 (1987) for an almost identical definition of statehood.

169. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70 (5th ed. 1998).

170. *See, e.g.*, VON GLAHN, *supra* note 7, at 52.

171. BROWNLIE, *supra* note 169, at 71.

nence,[172] a willingness to observe international law,[173] a certain degree of civilization,[174] sovereignty,[175] and function as a state.[176]

When SMOM was sovereign of Rhodes, and later Malta, there was no question that it was a state subject of international law. It was only after its eviction from Malta in 1798 that international law scholars have had to debate whether SMOM's loss of territory included a loss of state sovereignty.

Today, while SMOM has a functioning government and the ability to engage in relations with other states, it has no territory or permanent population.[177] Thus, under the Montevideo Convention, and almost any traditional definition of statehood, it fails to qualify as a state.

One could argue, however, that SMOM does have a territory and a population, albeit an extremely small one. The U.N. General Assembly has declared that a small population and a small size are not legitimate objections to statehood.[178] If that is the case, is SMOM automatically a sovereign state? The clear answer is no, because "it is ultimately the international community that determines whether a political entity qualifies as a sovereign state."[179]

Take the example of the Turkish Republic of Northern Cyprus (TRNC). It clearly meets the Montevideo definition of statehood; the TRNC has territory, a population, a government, and it engages in international relations. However, the last requirement is the problem. Only one state, Turkey, recognizes it. If, however, additional states were to formally recognize the TRNC, its claim to statehood would be advanced. "Once a sufficiently large and influential sector of the international community viewed the TRNC as sovereign, one might conclude that its sovereign statehood in fact existed."[180]

Thus, what can be surmised from the example of the TRNC is that there is another requirement that must be met before a state can be welcomed into the family of nations as a full member; other members of the family must "voice acceptance in substantial numbers before membership is legitimately obtained."[181]

Despite its (near) lack of territory and population, most legal scholars agree that SMOM is a subject of international law. Gerhard von Glahn views SMOM

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172. *Id.* at 75.
173. *Id.*
174. *Id.* at 76.
175. *Id.*
176. BROWNLIE, *supra* note 169, at 77.
177. *Id.* at 65.
178. G.A. Res. 2709, U.N. GAOR, 25th Sess., Supp. No. 28, Vol. 1, at 99, U.N. Doc. A/8248 (1970), *cited in* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 33 n.2 (1995).
179. MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 62 (1995).
180. *Id.* at 58.
181. *Id.* at 62.

as a "non-state subject of international law."[182] Some scholars even go as far as to acknowledge that, despite its lack of territory, SMOM is a state.[183] Obviously, to treat SMOM as a state, or even as a non-state subject of international law, requires something in addition to the traditional definition of statehood: custom and general practice.[184]

III.

While it is clear that SMOM does not fit the traditional criteria of a state, "what is undeniable is the fact that the Order has still an international legal personality, independent of specific territorial sovereignty."[185] In a rather unique clause in its constitution, SMOM declares that "the order is a subject of international law and exercises sovereign functions."[186] But because an entity declares itself to be a subject of international law does not necessarily make it so; there are a plethora of islands, organizations, and out-of-the-way places that claim they are independent states, but very few of them have been welcomed into the world community.[187]

SMOM bridges the gap between faux states like Sealand and traditional states like Ghana and Bolivia. Indeed, SMOM closely resembles one of its neighbors, the Vatican, whose own international status has been questioned and discussed by international scholars.[188] As Robert John Araujo writes, " no state can confer sovereignty on another entity that is binding on other States. . . these other states must accept the sovereignty of the entity in question."[189] The establishment of diplomatic relations and participation in "diplomatic conferences and treaty negotiations as an equal" is one way of determining whether a state

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182. VON GLAHN, *supra* note 7, at 60.

183. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 969 (2000) (book review).

184. Yung Wei, *Recognition of Divided States: Implication and Application of Concepts of "Multi-System Nations," "Political Entities," and "Intra-National Commonwealth,"* 34 INT'L LAW. 997, 1003 (2000).

185. Breycha-Vauthier & Potulicki, *supra* note 12, at 556.

186. Sovereign Mil. Order Malta Const., art. 3, para. 1, *available at* http://www.smominfo.org/pdf/constitution.pdf (last visited Mar. 8, 2002).

187. *See, e.g.*, the Principality of Sealand's "government" web site, *available at* http://www.sealandgov.com (last visited Nov. 12, 2003). The Principality occupies an artificial island six miles off the coast of the United Kingdom, constructed for defensive purposes during World War II, and subsequently abandoned by the U.K. In the 1960s it was taken over by a family and declared to be an independent state. More recently, Sealand has been proposed as a site for Internet companies hoping to escape governmental regulation. *See* Simson Garfinkel, *Welcome to Sealand. Now Bugger Off.*, Wired, August 2000, *available at* http://www.wired.com/wired/archive/8.07/haven.html (last visited Nov. 12, 2003).

188. *See, e.g.*, Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291 (2001).

189. *Id.* at 322.

has been accepted as sovereign.[190] A look at foreign courts and tribunals can also determine whether a state's sovereignty has been accepted.[191] From its diplomatic relations and from these opinions it is clear that SMOM is an international entity *sui generis*.

A. DIPLOMATIC RELATIONS

A territory of about forty acres and a population consisting of church employees has not prevented the Vatican City from being accepted as a state by the world community.[192] Lauterpacht believes that despite these facts, the Vatican City has achieved statehood due to its "almost universal recognition. . . by other states."[193] Other scholars share this view,[194] and today, with 172 states recognizing the Vatican City,[195] it is hard to make an argument that it is not a de facto state.[196]

Breycha-Vauthier wrote that SMOM's international status was undeniable in 1954, when seven states recognized SMOM.[197] With 90 states recognizing SMOM today, its status as a sovereign entity should be even more clear. While far less than the number of states recognizing the Vatican, it is considerably more than Taiwan, a de facto, but not de jure state, in the eyes of most of the world.[198] As James Crawford has written, "recognition by other States is of considerable importance especially in marginal or borderline cases."[199] Recognition is especially important in SMOM's case, which is probably the epitome of a quasi-state yearning for acceptance in the international community.

Even after the collapse of SMOM control over Malta, SMOM still considered itself to be a sovereign state, and other states recognized this fact. France and Austria continued to exchange ambassadors with SMOM, and treaties with various states continued to be negotiated. In 1869, SMOM started participating in the conferences of the International Red Cross, and continues to do so on a regular basis.[200] In 1884, Italy recognized the "aims and emblems of the Order,

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190. *Id.* at 323.

191. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 70-2 (1947).

192. *Id.* at 48.

193. LAUTERPACHT, *supra* note 191, at 48.

194. *See, e.g.*, CRAWFORD, *supra* note 167, at 154.

195. Araujo, *supra* note 188, at 324.

196. *But see* Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835 (1996) (arguing that the Vatican City does not fit the traditional criteria of statehood under international law, and thus should be treated as a non-governmental organization).

197. Breycha-Vauthier & Potulicki, *supra* note 12, at 556.

198. Taiwan is recognized by 27 states. *See* Friedman, Richard E., *Sovereignty and Independence: The Mainland China-Taiwan-United States Triangle*, *available at* http://www.nationalstrategy.com/nsr/v9n2Fall-Winter99/China-Taiwan-US.htm (last visited Feb. 11, 2002).

199. CRAWFORD, *supra* note 167, at 154, *cited in* Araujo, *supra* note 188, at 324.

200. Breycha-Vauthier & Potulicki, *supra* note 12, at 558.

its right of active legation, and the right to confer titles."[201] In a decree of November 28, 1929, Italy reconfirmed the title of the Sovereign Order in ceremonies and at public functions.[202]

In the past, SMOM has participated in many international humanitarian organizations and conferences,[203] and today is a member of many such organizations,[204] most notably gaining admission to the United Nations as a non-voting permanent observer in 1994.[205] SMOM issues its own passports, one of the hallmarks of a sovereign state, and these have been accepted even by state that do not formally recognize SMOM, such as the United States.[206]

SMOM's acceptance as a member of the family of nations by 90 states and its membership in various international organizations can be seen as a recognition of the Order's sovereignty. While "no state can confer sovereignty on another state that is binding on other States,"[207] SMOM's involvement in international affairs, despite its lack of territory and population, signifies that SMOM is an international entity *sui generis*.

B. SMOM IN THE COURTS

There are a number of European court cases dealing with SMOM, and they are an excellent source of confirmation that SMOM does indeed have an international legal personality. Due to SMOM's location in Rome, most of these cases are from Italian courts. SMOM was victorious in nearly all of these cases, which span the 20th century, and even when it did not win, its status as an international entity was upheld.

In 1931, the Italian Court of Cassation held that Italian courts were not competent to review a SMOM decision in regard to eligibility requirements for a

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201. Nanni and Others v. Pace and The Sovereign Order of Malta, 8 Ann. Dig. 2, 6 (Italy, Ct. of Cassation, 1935).

202. *Id.*

203. SMOM participated in a League of Nations conference in 1927 that established the International Relief Union (IRU). SMOM was recognized by the IRU as an international relief organization, and in 1936 signed an agreement with it that put SMOM's hospitals at the service of the IRU free of charge. Breycha-Vauthier & Potulicki, *supra* note 12, at 559.

204. SMOM has permanent missions to the United Nations, the Commission of the European Union, the U.N. Education, Science, and Culture Organization, the Food and Agricultural Organization, the U.N. High Commissioner for Refugees, the International Committee of the Red Cross, the World Health Organization, the Council of Europe, the International Organization for Migration, the International Committee of Military Medicine and Pharmacology, the Organization of Central American States, and the International Institute for the Unification of Private Law. *Diplomatic Activities, available at* http://www.smominfo.org/attdiplomatica.asp?idlingua=5 (last visited Mar. 8, 2002).

205. G.A. Res. 48/265, U.N. GAOR, 48th Sess., Supp. No. 49, Vol. 2, at 14, U.N. Doc. A/48/49/Add.1 (1994).

206. Guy Stair Sainty, *The Order of Malta, Sovereignty, and International Law, available at* http://www.chivalricorders.org/orders/smom/maltasov.htm (last visited Mar. 8, 2002).

207. Araujo, *supra* note 188, at 322.

benefice.[208] Candidates who were excluded from the Recanati-Giustiniani benefice based on religious or family reasons filed suit in the Court of Appeal of Venice, alleging the right to be considered for the benefice.[209] The Court of Appeal ruled in their favor, but the Court of Cassation reversed, stating that "the examination of claims of eligibility for the benefice is the exclusive right of the Order. . . Because the qualifications of fitness. . . have been inserted by the Order itself."[210] The Court of Cassation did not rely on SMOM's international status for its holding, but it did state that its status as an international entity did "confer special powers on the Order, corresponding to the needs of its autonomy."[211]

Four years later, the Court of Cassation again decided a case dealing with SMOM and a benefice, but this time relied on international law in holding that SMOM did not need Italian permission to endow an ecclesiastical benefice.[212] Mattia Count Pace requested, and received, an ecclesiastical benefice in favor of his family from SMOM in 1863.[213] Sixty years later, Pace's grandson, Guisseppe Pace, was approved by SMOM to succeed to the benefice, on the condition that he acquire portions of land lost by his father.[214] Guisseppe Pace's efforts were frustrated by a lower court that held that the Pace benefice was "null and void" on the grounds that it was not approved by the Italian state, under an 1850 law that required state approval of gifts or endowments of religious institutions.[215] Guisseppe Pace could not claim restitution, according to the lower court, on the grounds that his family never held legal title to the land in question.[216]

The Court of Cassation reversed, and stated that under Italian law, SMOM was not a religious institution, and therefore the law of 1850 did not apply, primarily because of the "essential juridical character of the Sovereign Order of Jerusalem and Malta resulting from its origins, its historical development, and the position held by it in the international community."[217] The court in *Nanni* traced SMOM's history and international relations, especially with Italy, and stated that SMOM, "by virtue of a customary norm of international law, received by our own internal law, exempt from the necessity of obtaining the permission of the government for the acquisition of immovable property for its

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208. Sovereign Order of Malta v. Brunelli, Tacali and Others, 6 ANN. DIG. 88 (Italy, Ct. of Cassation, 1931).

209. *Id.* at 89.

210. *Id.*

211. *Id.*

212. Nanni and Others v. Pace and The Sovereign Order of Malta, 8 ANN. DIG. 2 (Italy, Ct. Of Cassation, 1935).

213. *Id.* at 3.

214. Nanni, *supra* note 212, at 3.

215. *Id.*

216. *Id.*

217. *Id.* at 3-4.

own institutional purposes."[218] The court cited several declarations of the Italian government from the previous half century, and confirmed SMOM's place in the Italian legal system as an "international person."[219]

Other states have also recognized SMOM's international status in their court systems. A Hungarian Supreme Court case from 1943 upheld the diplomatic immunity of a SMOM knight, who was sued for damages.[220] The Supreme Court relied on a "decision of the [Hungarian] Ministry of Justice, issued in accordance with the Foreign Office," that SMOM diplomats were entitled to immunity.[221]

A decade later, SMOM's bid to be exempt from Italian jurisdiction in respect to its commercial activities failed, but not before SMOM's status as an independent and sovereign state was confirmed.[222] SMOM was involved in a commercial transaction that ended up before the Court of First Instance of Rome.[223] SMOM asserted absolute immunity from Italian courts, which the court rejected.[224] The Tribunal of Rome affirmed the lower court, and stated that SMOM was not immune from Italian jurisdiction, despite its standing as a "sovereign state. . . [and] an international legal personality."[225] The court went on to compare SMOM's status to those of governments-in-exile during World War II, and discussed SMOM's international activities, such as its foreign relations (with 24 states, as the court noted) and its participation in international conferences. Based on these facts, the court stated that "there is no doubt as to the character of [SMOM] as a sovereign entity and therefore of its right to be treated by other States as *par inter pares*."[226] The court based its jurisdiction over SMOM on international civil procedure rules and on the fact that the "action concerns goods situated on Italian territory."[227]

Two years later, the same court held that Italy lacked jurisdiction over SMOM with regard to an employment contract.[228] A doctor who was employed by SMOM alleged breach of his employment contract, but in *Scarfo*, the Tribunal of Rome dismissed the case, reasoning that in hiring the doctor SMOM had

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218. *Id.* at 4.

219. Nanni, *supra* note 212, at 6.

220. Case No. 798/1943, May 12, 1943 (Supreme Ct. of Hungary, 1943), *cited in* István Arató, *Hungarian Jurisprudence Relating to the Application of International Law by National Courts*, 43 AM. J. INT'L L. 536, 537 (1949).

221. István Arató, *Hungarian Jurisprudence Relating to the Application of International Law by National Courts*, 43 AM. J. INT'L L. 536, 537 (1949).

222. Sovereign Order of Malta v. Soc. An. Commerciale, 22 I.L.R. 1 (Italy, Trib. of Rome, 1954).

223. *Id.* at 1.

224. *Id.* at 2.

225. *Id.*

226. Soverign Order of Malta, at 3.

227. *Id.* at 5.

228. Scarfo v. Sovereign Order of Malta, 24 I.L.R. 1, (Italy, Trib. of Rome, 1957).

acted in a sovereign capacity.[229] The court stated that there were limitations on the sovereignty of SMOM, but these existed primarily because SMOM lacked a territory and population.[230] Commenting on SMOM's diplomatic relations, its government, its court system, and the recent Vatican tribunal which confirmed its standing as an independent political entity,[231] the court stated that "there can be no doubt that [SMOM] is a sovereign entity and a subject of international law."[232]

Maria Serafina Piccoli was involved in two cases in the 1970s which determined SMOM's immunity in Italian courts and whether SMOM's judgments could be enforced in Italy. Piccoli was a secretary for nearly 15 years in a SMOM-run hospital in Salerno.[233] She claimed that she was not paid a fair salary, and filed a claim for back pay.[234] The Court of Cassation rejected Piccoli's claims, and stated that SMOM "constitutes a sovereign international subject and, though deprived of territory, is equal in all respects to a foreign state with which Italy has normal diplomatic relations. There is therefore no doubt that. . . it is entitled to the legal treatment due to foreign States and therefore jurisdictional immunity."[235]

Piccoli was left without a remedy in Italian courts, but she was granted a favorable judgment in a SMOM court, and then returned to the Italian judiciary four years later to get the judgment enforced. The Court of Appeal of Rome gave full effect in 1978 to a decision of the Magisterial Tribunal of First Instance of the Sovereign Military Order of Malta, a SMOM court, in a case dealing with enforcing Piccoli's foreign judgment for monetary damages.[236] Piccoli requested that the Court of Appeal of Rome declare a Magisterial Tribunal of First Instance judgment was effective in Italy.[237] The court gave the judgment effect in Italy, reasoning that the "Order of Malta can be equated to a foreign State," and that the relationship between SMOM and Piccoli was an "official governmental relationship."[238]

The question of SMOM's fiscal immunity from Italian taxes arose in 1978 in the Court of Cassation, which held in *Ministero delle Finanze v. The Associa-*

229. *Id.* at 4.

230. *Id.* at 2.

231. *Id.*

232. *Id.* at 1.

233. Association of Italian Knights of The Order of Malta v. Piccoli, 65 I.L.R. 308 (Italy, Ct. Of Cassation, 1974), discussed in 2 ITAL. Y.B. INT'L L 333 (1976).

234. *Id.* at 308.

235. *Id.* at 309.

236. Piccoli v. Association of Italian Knights of the Sovereign Order of Malta, 77 I.L.R. 613 (Italy, Ct. of Appeal of Rome, 1978), discussed in 4 ITAL. Y.B. INT'L L 133 (1978-79).

237. Piccoli, 77 I.L.R. at 614.

238. *Id.* at 615.

tion of Italian Knights of the Order of Malta[239] that the Order, as a subject of international law, was entitled to fiscal immunity. The Association claimed that a registration fee that Italian law required to be paid when loans were arranged was not applicable to the Association, as an organ of SMOM. [240] The court relied on the customary international law principle of *par in parem non habet jurisdictionem* and stated that each state "has the duty, equally fundamental, not to interfere in the sphere of freedom which appertains to the others."[241] The court did differentiate between foreign state activities carried out for purely private ends, and noted that these activities would not be granted fiscal immunity.[242] After noting that the loan arranged by the Association was for the financing of the construction of a Roman hospital, the court stated that the Association's activities in question were in line with the "institutional activities of the Order," which were the "provision of medical and hospital aid to the infirm in times of peace and war."[243] The court also looked at Article 2 of the SMOM constitution,[244] which states this purpose in similar terms.[245] Thus, fiscal immunity was granted to SMOM when it conducts activities in furtherance of helping the sick.

With the granting of fiscal immunity, other religious orders tried to assert that they, too, like SMOM, had international standing and were thus immune from Italian taxes. Their rebuffing by Italian courts highlights SMOM's status as an international entity *sui generis*. In 1978, one Luciano Bacchelli, the grand master of the Order of Santa Maria Gloriosa, claimed that his order had international personalty akin to SMOM.[246] Since his order, of ostensibly religious character, was supposedly sovereign, he refused to pay Italian taxes, relying on the decision in *Ministero delle Finanze*.[247] The Italian Court of Cassation disagreed, holding that the Order of Santa Maria Gloriosa lacked the history and sovereignty of SMOM, and that the "claim of the Order of Santa Maria Gloriosa to be counted among the 'potentates' seems. . . somewhat precarious."[248] The court stated that "the Order of Malta is a unique exception, explicable only by

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239. Ministero delle Finanze v. The Association of Italian Knights of the Order of Malta, (Italy, Ct. of Cassation, 1978) discussed in 4 ITAL. Y.B. INT'L L 127 (1978-79).

240. *Id.* at 127.

241. *Id.* at 128.

242. *Id.* at 128-29.

243. *Id.* at 130.

244. *Id.*

245. SOVEREIGN MIL. ORDER MALTA CONST., art. 2, para. 2, available at http://www.smominfo.org/pdf/constitution.pdf (last visited Mar. 8, 2002).

246. Bacchelli v. Comune di Bologna, 77 I.L.R. 621 (Italy, Ct. of Cassation, 1978), discussed in 4 ITAL. Y.B. INT'L L 137 (1978-79).

247. *Id.* at 621.

248. *Id.* at 624.

reference to its historical background and to the (anomalous) survival in the case of the Order of the requisites of independence or of sovereignty."[249]

One of the most recent cases concerning SMOM is surprising in its fact pattern, but unsurprising in that it confirms the holding of most previous SMOM cases in the 20th century. In 1986, Italian members of SMOM asked artist A.B. Michelangeli to hold a charity recital in the Vatican, with the proceeds to support a hospital in Rome.[250] The recital was held, but the proceeds never made it to the hospital. Michelangeli filed suit in an effort to get the money returned, but the court held that SMOM was immune from suit due to its "peculiar personality in international law."[251] The court stated that even though SMOM did not spend the proceeds of the recital on the "humanitarian purpose for which it was specifically collected. . . [this decision] must be ranged among those institutional functions of [SMOM] in relation to which jurisdictional immunity applies."[252] This is similar to the *Scarfo* case, *supra*, in that the doctor's employment contract, like the charity proceeds, derived from the grand purpose of SMOM and was therefore immune from Italian jurisdiction.

What these cases show is that an ancient religious order, with no territory and no population to speak of, possesses the status of a independent state in the courts of Europe. SMOM relies on what the *Nanni* court called a "customary norm of international law"[253] to achieve its sovereignty and immunity from the laws of other states.

CONCLUSION

There can be little doubt that SMOM is an international entity *sui generis*. It engages in diplomatic relations with 90 states, issues its own passports which are widely accepted, is a permanent observer at the United Nations, and it is member of various international organizations. Its international status predates that of the nation-state, and as such, this status does not hinge on whether SMOM is in possession of any territory. In an age where European states are giving up their sovereignty to the European Union, many of these same states recognize the sovereign status of SMOM in their court systems. The closest international entity to SMOM may very well be the Vatican, but the Vatican at least satisfies the Montevideo Convention's definition of statehood, with territory (around 40 acres) and a population (albeit the Pope and his close advisors).

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249. *Bacchelli v. Comune di Bologna, 77 I.L.R. 621, Id.* at 622. (Italy, Ct. of Cassation, 1978),

250. Ass'ociation of Italian Knights of the Sovereign Military Order of Malta v. Guidetti, discussed in 9 ITAL. Y.B. INT'L L 154 (1999).

251. *Id.* at 155.

252. *Id.*

253. Nanni, *supra* note 212, at 4.

Some have described SMOM as a non-governmental organization,[254] but this clearly misses the mark, as SMOM predates the modern NGO just as it predates the modern nation-state. Indeed, there is no state, NGO, or even religious order quite like SMOM; the Grand Master of the Order of Santa Maria Gloriosa did not have the facts to back up his claim for sovereignty, facts that SMOM has had on its side for the past millennium. Since there is little chance that another entity like SMOM will come around anytime soon, there would no harm to the international community for an even wider acceptance of SMOM's international status.

Indeed, with Switzerland recently voting to become the 190th (and last) member of the United Nations,[255] perhaps Count Marullo's time has come. In this era of global trade, global communication, and global understanding, the United Nations should pay tribute to the tradition, diplomacy, and good works of the Sovereign Military Order of Malta by giving it a voting seat in the U.N. General Assembly. There is no reason why the "greatest movement of sustained international faith that Europe has yet seen" should not take an even greater role in the international community.[256]

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254. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 278 (1997).

255. Elizabeth Olson, *Stepping Back From Isolation, Switzerland Votes to Join U.N.*, N.Y. TIMES, Mar. 4, 2002, at A4.

256. Sir Stephen Tallents, *An Old Order*, SPECTATOR, July 24, 1942, at 80.

Using Title Insurance to Avoid Malpractice And Protect Clients in a Changing Marketplace

ROBIN PAUL MALLOY[1]

I. INTRODUCTION

As lawyers we are members of a noble profession, but we are not free from the pressures of the market. Market changes are influencing the way we practice and changing the professional standard of care with respect to title assurance. Title insurance has become the preferred market norm.

The residential real estate market has changed dramatically in the past few years. The changes in this market are having an impact on many lawyers who are finding it increasingly difficult to remain involved in the residential end of the business. Many are finding it increasingly difficult to provide professional counseling in a residential transaction because of competitive pressure from low cost, non-lawyer, service providers. At the same time, these attorneys are discovering that changing market conditions are revising the standard of professional care for residential transactions, and making fee title insurance the norm for avoiding claims of malpractice.

At the outset, it is important to remember that as lawyers we are not immune from the marketplace. The law, legal institutions, and each of us, as practicing lawyers, need to be aware of the ways in which market forces influence and shape our profession. We must respond to and address these changes or we will quickly find that we are outdated, that we have fewer clients, less revenue, and more liability. More importantly, we will soon discover that we are failing to meet the needs of our clients who are operating in a dynamic and market driven

1. The views expressed in this paper represent the independent and professional opinion of Professor Robin Paul Malloy. While these views may converge with the interests of various title insurance companies, they are the professional views of the author who is solely responsible for the content of this paper. Professor Malloy has consistently expressed his opinion that fee title insurance needs to be used in the residential real estate transaction, and failure to provide for fee title insurance is grounds for a malpractice action against an attorney. *See* Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407 (2000) (hereinafter *Malpractice*). This article includes numerous references to support this conclusion. It also explains market changes in detail, provides sample forms for notifying a client of the need for title insurance, and for dealing with a client that refuses coverage despite legal advice to the contrary. The article also suggests that an attorney may be liable to a third party non-client in certain situations. *See also*, Robin Paul Malloy and James Charles Smith, *Real Estate Transactions 2nd* 421-75 (2002) (hereinafter *Real Estate Transaction*) (leading casebook used at a number of law schools). The opinions, statements, and conclusions of the author are based on years of experience, research, and involvement with real estate and market related issues. The author has published 10 books, over 25 articles, and contributed chapters to 9 other books.

world. To the extent that we fail to adjust to changing market conditions we will find more and more accounting firms, real estate brokers, title companies, and escrow agents, among others, taking over the transactions that have traditionally been within our professional domain. And, we will likely see a decline in the quality of legal advice to the individual client, as lawyers are pushed further and further away from the transaction.

Lawyers must also respond to changing market conditions to avoid malpractice. Just as medical doctors and automobile manufacturers need to adjust their standards and practices overtime, so too lawyers must make similar changes.

In this brief paper, I want to address some of these market changes and explain how title insurance can be used as one important tool for enhancing and protecting our role in the residential real estate transaction, while simultaneously helping our clients. I also want to emphasize my professional view that as a result of market changes, a lawyer commits malpractice in failing to obtain fee owner's title insurance for a residential homebuyer.

In this paper, I proceed in several steps. First, I provide a brief historical background sketch from which to view current market changes. This sketch explains the way in which the market is changing property law and reframing malpractice standards. Second, I address the nature of title risk, the use of title insurance as a tool of risk management, and the potential for malpractice when title insurance is not used in a typical residential transaction. Third, I outline four key market changes that are affecting the lawyer's role in the residential transaction. In this section I also address the way in which these changes are further raising the standard of care with respect to malpractice issues. Fourth, and finally, I explain how lawyers need to adjust their standards to avoid malpractice liability and to respond to these changing market conditions.

II. HISTORICAL BACKGROUND

Market changes are reshaping property law. Property law and the professional standard of care in a residential real estate transaction are no longer local. Regional and national standards of care are displacing long standing local norms. Attorneys that follow local norms that do not include requiring fee owner's title insurance should be held to have committed malpractice.

A basic history of property law indicates that property has traditionally been considered a subject of local law and local control. Property has generally been thought of as concerning a matter of *place*. Consequently, the laws, customs and standards of practice governing in that place were the one's of primary concern to the real property lawyer. Changing market conditions have altered this view. While property law still references notions of place, the law, customs, and standards of practice are no longer considered to be simply local. The integration of financial markets, and real estate related service markets

have transformed the reference point for many issues arising in legal practice. In this part of the paper, therefore, I briefly outline the traditional focus on property as linked to local law, and then indicate the way in which this local conception has been transformed by market forces.

Looking back to earlier time periods in the development of the common law we can understand the common law as focused on the actions and practices of local disputants, lawyers, and judges. Because of the fixed location of place and space with respect to property, there was a very strong local character to the way in which lawyers and legal institutions came to understand and deal with transactions in property. Without the scientific pretensions of its civil law counterpart, as prevailed in most of Europe, the common law gave rise to a 'natural' feeling of law, custom, and standards of practice related to local criteria.

Property, and one's relationship to property, defined social status. A person was a lord or a servant, an owner or a tenant, with certain rights and obligations based on the nature and status of his or her rights in property. And, since real property was a fixed and physical object, it provided a reference point for predictability and stability in social relationships.

For many years this sense of a local legal reference point was shared by both property and contract law. But at a much earlier point in history contract law and the law related to moveable and intangible property began to take on non-local characteristics. Contract law and characteristics of mobility favored a fluid and market based conception of law. As society moved to greater and more frequent market exchanges, commercial law began to shed some of its local character. Market exchange and commerce favored general, uniform, and transparent approaches to legal practice that were translatable and suitable for non-local purposes. Market pressure transformed contract law leading up to the development of numerous uniform laws such as the Uniform Commercial Code (U.C.C.). Peculiar state laws, local customs, and localized standards were replaced by the need to promote trade and exchange across numerous localized places of business.

Similarly, the law of jurisdiction was transformed from having a concern for physical presence within the jurisdiction (within the local place) to one of long-arm statutes and extraterritorial application. This transformation recognized the market's ability to reach across arbitrary geographic boundaries, to disrupt the conventions of local legal practice, and to replace the local with a sense of legal space that extended beyond a local place. In short, the marketplace was no longer local and law was unable to sustain its predominate preoccupation with local concerns.

We can observe a similar transformation in property law. In market terms real property has traditionally been thought of in terms of its *use value*. This was the primary focus up until the early 1900s. In the early 1900s the law began to understand the *exchange value* of property. The use value of property

focuses on the physical object itself. For example, my house has a use value in the way that the object itself provides me with shelter. In addition to this use value, my ownership of the property provides me with exchange value. This exchange value is present in my ability to use the property for collateral for a mortgage loan, or by renting out all or part of the property to a tenant. The exchange value of the property is based on my ability to use the property to produce more capital and to support market transactions.

We can see a clear movement toward the increasing importance of exchange value when we think about current cases involving takings law under the 5th Amendment to the U.S. Constitution. The early takings law cases focused on the infringement of use value. The early cases were concerned with physical taking or invasion of the property. This was important because such an act interfered with the right to use and possession, and with the right to exclude. Developments in the area of *regulatory takings*, however, show a different focus of concern. Regulatory takings address an owner's rights to transfer the property and to enjoy the economic benefits of the property. Regulatory takings are primarily concerned with the exchange value of the property. This is why regulatory takings address issues of investment-backed expectations. These changes in takings law reflect broader changes in property law.

For instance, there has also been a major reconsideration of the nature of property, in terms of exchange value, as a result of the secondary mortgage market, and the securitization of real estate related interests. The secondary mortgage market has expanded the potential opportunity for enhanced exchange value by creating vast new markets for dealing, not with the physical object itself but with legal instruments issued against property related interests.

As a result, real property is now largely considered to be another element of commercial exchange. It is not simply local in nature. Real property is now a localized link to free flowing and substantially integrated financial networks. Property law is transforming in the way that contract law did years earlier. Real estate transactions have been pushed into the global marketplace, and local law, local customs, and localized standards of legal practice, are giving way to broad based market norms and standards.

With respect to title matters, localized forms of title assurance, the abstract and the title opinion, are being rapidly replaced with title insurance. In earlier time periods many parts of the country did not have access to title insurance. Slowly the industry expanded and developed new products and standards. Now, as a result of expanded and integrated markets, title insurance is available in just about every part of the country.

Today, title insurance provides an affordable, more uniform and transparent method for managing title risk than either the title opinion or abstract. Title insurance companies also provide reserve assets, and financial and legal identities that appeal to participants in the newly transforming marketplace.

In making an analogy, one might say that title insurance has become the seat belt and airbag of the real estate transaction. Failure to obtain title insurance for a client in a real estate transaction is just as unreasonable as manufacturing automobiles without such common safety features as the seat belt and airbag.

The bottom line is that changing market conditions are redefining the nature of property and changing the norms for judging competence in legal practice. As national norms replace local ones, it is becoming clear that the prevailing standard of professional care is one that provides for title insurance. Failure to meet this new norm may be grounded in local custom, but when local custom falls below the reasonable standard of care the attorney can and should be held liable for malpractice.

III. TITLE INSURANCE, RISK MANAGEMENT, AND MALPRACTICE

Title problems arise in a substantial number of real estate transactions. The American recording system is a high-risk system in which it is impossible to eliminate the risk of a title problem. Only title insurance provides strict liability coverage for a title defect and this is the reason it has become the market standard in protecting people with an interest in real property.

Many attorneys believe that title problems are infrequent and readily handled by use of a title abstract or a title opinion. This impression is false. Title problems are rather common in residential real estate transactions, and title abstracts and title opinions are inadequate to meet the standards of our current market circumstances. In this section of the paper, I briefly explain the need for title insurance as a means for addressing known risks that cannot be eliminated or reduced by any other method of title assurance. First, I discuss the risk of a title problem in a residential transaction. Second, I address the nature of the title insurance business, and third, I explain the market's preference for title insurance over abstracts and title opinions. All of this leads to the simple conclusion that failure to use fee owner's title insurance amounts to malpractice.

According to the American Land Title Association (ALTA), one in four U.S. real estate transactions involves a title problem.[2] This information was gathered from a nationwide survey of 420 title offices.[3] According to the survey results 25%, or one in four transactions has a title problem. This means that in the year 2001 about 1.6 million residential real estate transactions had title problems.[4] Not all of these problems end up as title claims, however, since a number of them can be managed during the title insurance process. With these statistics in

2. ALTA Press Release, *$350 Million in Title Claims Paid in 2000 Says American Land Title Association*, *available at* http://www.alta.org/indynews/2002/docs/alta0411a.htm (last visted Nov. 10, 2003).

3. *Id.*

4. *Id.*

hand it is difficult to believe some real estate lawyers when they say that they rarely, if ever, encounter a title problem.

As further evidence of title risk and of the value of title insurance, ALTA reports that in the year 2001 title insurers paid out $460 million in claims, as compared to the year 2000 when title insurers paid out $350 million in claims to homeowners that experienced a loss under their policies of fee owner's title insurance.[5]

Title insurance, like other forms of insurance, involves a personal contract in which only the insured is covered by a policy. This means, of course, that a residential homebuyer is covered only by having a fee owner's policy. The homeowner is not covered by a lender policy. This is important because the homebuyer has more at stake in the home purchase, and because that stake rises with the number of years of ownership, as a result of increasing equity in the property. Furthermore, title insurance covers attorney costs that can be crucial for many homebuyers.

When one considers the pay out of $350 million in claims for the year 2000 one might wonder if the price of a title insurance policy provides too much profit to the title industry. Here we need to consider the nature of the industry. Unlike property and casualty underwriters, title insurance companies have high fixed costs with major investments in title plants (title information), and high labor costs as a result of the need to examine titles.[6] These costs are also difficult to adjust in response to swings in the fortunes of the residential real estate market. Consequently, profit margins are much lower than many people might think. According to ALTA, industry wide profit margins average about 3.6% with expenses at about 89.8% and losses at 6.6%.[7]

The title insurance product is one that provides the potential for managing and reducing a number of title risks. The attorney must become educated about the details of the coverage provided, as there are elements of the policy that can be negotiated to attain higher value for a client. Furthermore, with respect to costs, there is no need for a separate title abstract when you have a title insurance policy and title search. Thus, the cost of title insurance includes abstract information, and the savings of costs associated with preparing and issuing a separate abstract of title.

In general, title insurance differs from other forms of insurance in that it insures title with respect to losses based on conditions from the date of the policy backwards. It does not insure for future events. Thus, it insures for certain types of title problems and defects that predate the policy such as a

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5. *Id.* This is an update of 2001 information compared to 2000, from ALTA Press Release, August 26, 2002.

6. The American Land Title Association, *Title Insurance and Industry Statistics 2000, available at* http://www.alta.org/mmbrship/indrsrch/SR1101title.pdf (last modified Nov. 10, 2003).

7. *Id.*

forged document in a chain of title. But it does not cover a defect first created after the date of the policy. This is the traditional rule, but in response to market changes the title industry is beginning to offer new types of coverage that are of value to homebuyers. New title insurance policies approved by ALTA now provide coverage for the risk of some *future* events that may affect title.[8]

Some of the problems covered by the new ALTA Policy include:

> Building permit violations of previous owners. Neighbors building encroaching structures onto your land after you purchase it. Post-policy forgery or impersonation leaving you with no record title. Lack of actual physical access for both vehicles and pedestrians to and from your home (traditionally only legal right of access was covered without regard to the actual physical ability to access the property). Subdivision law violations of the previous owner.[9]

Additionally,

> One of the great benefits of the new Homeowner's Policy relates to estate planning. Previously, if you purchased a policy when you bought your home and subsequently placed the title in your trust for estate planning purposes, you may have lost your title insurance coverage. Not so with ALTA's new Homeowner's Policy.[10]

This new coverage is important to the client. It also means that there is even more for the real estate lawyer to know about title insurance coverage, and even less reason to fail in obtaining title insurance for a client. In addition to understanding all of the exclusions, exceptions, and stipulations of a policy one must also know the way to get the most out of these new provisions.

Title insurance is an excellent product for risk management in the American real estate market. It covers known types of risk that are not covered by alternative forms of title assurance, such as the title abstract and the title opinion. Furthermore, new provisions in title insurance forms, as noted above, provide enhanced coverage against future risk of loss. These protections are not available with other forms of title insurance. This makes it all the more questionable when attorneys fail to use title insurance in representing a homebuyer.

Risk management is important in the American system of property titles because we use a recording system in which documents on the public record are *only evidence* of title and *not proof.* This produces a high-risk title system. In fact, almost every other country in the world rejects our system of title recording. By world standards the U.S. title system is considered inefficient, antiquated, and not a system to be copied. Our recording system has a relatively

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8. ALTA Press Release, *New Title Insurance Policy Consumers Can Relate To, available at* http://www.alta.org/indynews/2001/articles/alta1214a.htm (last visted Nov. 10, 2003) (hereinafter *New Title Insurance Policy*).

9. *Id.*

10. *New Title Insurance Policy, supra* note 8.

high risk of error in it. By global standards title insurance is an essential tool for effectively reducing the risk of the American recording system.

Compared to other forms of title assurance, title insurance provides a superior means of risk management. Both the title abstract and the title opinion are fault-based systems. This means that the covered homebuyer may experience a loss from a title problem and be unable to recover for that loss because the title abstractors, or persons giving an opinion, performed their job in a 'reasonable' manner. In other words, they used the appropriate care in performing their work with respect to the product in question. This is problematic, however, because real estate professionals know that there are a number of title risks that cannot be discovered by careful and diligent title investigation. These known risks are thus uncovered by the title opinion and the abstract of title.

In contrast, title insurance is a form of strict liability coverage. If the defect is covered by the policy, the homeowner recovers on a claim. This means that title insurance covers the very type of defect and risk that is unlikely or impossible to discover. This is the reason that evolving market standards are rendering the decision to use a title abstract or title opinion as unreasonable. Knowing that there are defects and risks that cannot be discovered and that there is a simple, effective, and affordable way to manage this risk, the lawyer commits malpractice by failing to protect the client with fee owner's title insurance. Consequently, in the first instance, malpractice is triggered by the failure to select the appropriate form of title assurance.

The difference between title insurance and other forms of title assurance is important because the American system of titles harbors title defects and errors that cannot be discovered by even the most diligent and super-human efforts at examining title.[11] The only way to cover the known types of risk that will go undiscovered is by title insurance. This is precisely why lenders require title insurance, why secondary mortgage market investors and institutions require title insurance, and why commercial real estate developers require title insurance.

In today's real estate markets virtually everyone has title insurance because they understand the nature of the risk. The only major exception to this rule is the uninformed homebuyer unfortunate enough to have a lawyer that fails to understand the need for title insurance in a rapidly changing marketplace. These lawyers may be well meaning, but they are misinformed. They fail to meet the professional standard of care that has emerged to govern regional and national real estate markets. They should be held accountable for malpractice.

The standard here is no different than we would expect to apply to a medical doctor whose patient suffers a loss or death as a result of outdated practices. I

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11. *See* Malloy, *Malpractice*, *supra* note 1, at 427-34; Malloy, *Real Estate Transactions*, *supra* note 1, at 404-18 (providing common examples of such on and off record risks).

suspect that most lawyers would have little sympathy for the doctor whose defense against a malpractice claim rested upon the fact that he relied on the best information, technology, and medications available in the 1940s, even though the patient was being treated in the year 2002. Likewise, the homeowner that experiences an uninsured loss should have no sympathy for the lawyer that failed to use fee owner's title insurance.

IV. CHANGING MARKET CONDITIONS AND THE IMPLICATIONS FOR TITLE INSURANCE

Four key areas of market change are transforming the practice of real estate law. These changes are readily observable to attorneys in the real estate market. Effective use of title insurance can keep lawyers involved in the residential real estate market and protect them from malpractice claims.

There are four key market developments that have changed the nature of real estate transactions and the way in which we need to deal with the matters of title assurance. Each of these market developments contributes to the need to rethink the way in which many attorneys practice real estate law. Collectively, these market developments underscore the added importance of title insurance for managing transactional risk, enhancing the lawyer's role in the residential market, and minimizing the risk of a malpractice claim. In this part of the paper I discuss these changes. These four areas of change include: increased vertical and horizontal integration; globalization of practice standards and consumer expectations; financial integration of real estate and capital markets; and increased competition and value added bench-marking.

A. INCREASED VERTICAL AND HORIZONTAL INTEGRATION

This involves the 'bundling' of products and services. This results from mergers and acquisitions of firms and businesses across the real estate industry. This trend is producing professional service providers capable of offering one-stop shopping for broker services, mortgages, home inspections, financial counseling, and title services. In bundling these services and products, firms are integrating vertically (with different types of service and product providers), and horizontally (with competitors to cover broader market areas).

All of this is important because it tends to further isolate and distance the real estate attorney from a central role in the residential transaction. The consumer client is most likely to walk into a real estate broker office or a home finance office before coming to a lawyer. In this transforming marketplace the point of 'market entry' is important. It is increasingly likely that the market entrance point for the consumer will offer 'all' of the needed services and products for the residential transaction, and to the extent that a lawyer is brought into a

transaction it is increasingly likely that consumers will have already committed themselves to a variety of legal obligations.

This isolation and distance is increased by lawyer attitudes defining the role of the attorney as a person who does local real property conveyancing. That role is a relic from the past, and one that is quickly being displaced by a variety of non-lawyer competitors. Today the property lawyer must be a full service real estate professional. As a result we have to be proactive, we need to think transactionally, in terms of organizing and managing the transaction. We have to envision our role as the professional capable of identifying the legal and market risk in a transaction, and of being able to eliminate, reduce and manage that risk. To a large extent this means being able to structure the transaction with the proper conditions, engaging other professionals to address problem areas, and drafting documents that clearly define the area of risk covered by others, the standard to be applied to their work product, and the nature and scope of their liability to the client.

An attorney can enhance his or her practice by integrating the use of title insurance products. Title insurance provides another point of market access for the attorney, and offers an opportunity for bundling products and services in a way that benefits both the attorney and the client.

B. GLOBALIZATION OF PRACTICE STANDARDS AND CONSUMER EXPECTATIONS

A key goal of American housing policy and of global real estate policy is to make real estate more affordable. Making real estate more affordable means reducing costs, and increasing efficiency and liquidity. The most important means for accomplishing this is to move toward uniform documents, rules and standards. This is exactly what we have seen in other areas of law such as in those areas covered under the U.C.C.

Consumers are increasingly in tune with this objective. The average homeowner moves every five to seven years and with this kind of movement, and with increasing experience in other types of markets, consumers are expecting a higher degree of uniformity in their transactions. They see mortgage and real estate companies advertising national, not local, services on the television. They also see internet advertising for multi-state law firms, and real estate services. The expectation and the standard of trade are no longer about local variations and peculiarities; they are about national and global standards for practice. And, increasingly the bundled services providers mentioned above tend to look like the place to go rather than dealing with lawyers that still think that market changes have not affected them, and who think that they should be protected by local norms for standards of professional practice when, in fact, local norms may well be substandard.

Title insurance provides a generally uniform approach to title assurance. It meets consumer needs and expectations by providing strict liability coverage

for all covered claims. It also offers a product that is recognizable and valued in national markets because of its regulated nature, and because of the need for title companies to maintain adequate loss reserves.

C. FINANCIAL INTEGRATION OF REAL ESTATE AND CAPITAL MARKETS

Financial integration is primarily the result of the development of the secondary mortgage market. This is a government facilitated market that was non existent in 1970, and now it generates hundreds of billions of dollars in capital for U.S. real estate markets, and trillions of dollars in trades. This is the multi-billion dollar giant that is pushing real estate transactions into the global marketplace of the 21st Century. This market links all 'local' residential real estate transactions to extensive national and international financial markets.

Residential home financing in upstate or western New York, for instance, depends upon money and capital flows from across the country, North America, Europe and Asia. The presence of the secondary mortgage market has dropped the cost of mortgage financing by as much as ¾ to 1%, according to some estimates. This is because the market brings in added funds and enhances liquidity. Most important, the residential mortgage business has changed dramatically because of this activity. Various mortgage lenders sell anywhere from 75% to virtually 100% of their mortgages into the secondary market. Consequently, their primary customer is not the homebuyer but the secondary mortgage market investor. And the secondary mortgage market investor demands, simple, uniform, transparent transactions governed by market standards that are not localized.

States that have tried to promote localized laws that negatively effect mortgages have found that they are punished by secondary market investors. The investors refuse to buy mortgages originated within these jurisdictions. This puts an unbearable squeeze on housing costs in those states until they change their laws and practices.[12]

This integration of financial markets has been the engine behind the move to uniform mortgage and note documents for residential real estate transactions. It is also behind the changing role of title insurance and the changing standards in legal practice. These distant institutional investors know that the American title system has many systemic risk problems and they demand title insurance to manage this risk. This demand is pushing the standard or norm for a residential real estate transaction to include title insurance. And, as more participants in the transaction come to use and expect title insurance as the standard way of covering title risks, persons using a lower quality product are seen as employing substandard professional judgment. Transactional standards are now being set

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12. *See* Robin Paul Malloy, *The Secondary Mortgage Market: A Catalyst For Change in Real Estate Transactions*, 39 Sw. L. J. 991, 1013-20 (1986).

at the national level, and local standards are substandard if they fall below the national standard.

D. INCREASED COMPETITION AND VALUE ADDED BENCH-MARKING

For all of the above reasons the market has become much more competitive. This is particularly true in the residential segment of the real estate transactions market where competition with non-lawyers is increasingly intense. Lawyers find themselves competing with paralegals, title companies, brokers, and others for performance of increasingly routine activities in standardized residential transactions.

The question that gets asked in this situation is, does the lawyer add value to the transaction? And, what kind of value can lawyers add when they get paid $500, $200, or perhaps as little as $25 to do a real estate closing? Consumers want to know the value of paying for a lawyer when it seems that the non-lawyer service providers can do more for less. In many states the non-lawyer can even complete many of the basic forms of the exchange. For many consumers the lawyer just appears to show up at the end of the transactions, protected by some job securing legislation that requires a nominal fee to be paid for the lawyer to 'bless' the paper work that has already been done, or that could easily have been done by the non-lawyers in a quicker, cheaper, and more efficient manner. This is a feeling that many non-lawyer service providers are more than happy to directly or indirectly confirm.

The residential real estate market is about mass production and the lawyer is generally seen as a hindrance rather than a facilitator of the enterprise. The real estate lawyer has to add *real* value to the exchange or there is no compelling reason for one to be involved. One of the most basic areas in which the real estate lawyer should have special expertise and be able to add such value involves matters of title and title risk. The lawyer can add value in this area by simply demonstrating an ability to cover all known title risks through the use of title insurance that provides a strict liability basis for any future claims. Knowing how to negotiate the details of a title policy and how to use it as a risk management tool is something that a lawyer can do to add real value to a transaction.

There are many things that need to be done to keep lawyers involved in the residential transaction. First and foremost, lawyers have to update and transform their thinking. They must move from the image of the real property conveyancer to the image of the well-informed transactional expert. In doing this they must learn to manage risk and to use the appropriate tools.

In the area of real estate transactions a key risk management tool, as stated above, is title insurance. It should be used for lenders and for owners, and, as I have argued elsewhere, the failure to provide fee owner's title insurance is grounds for a malpractice suit against the attorney.

Importantly, it is the choice of title assurance product that initially raises the malpractice claim. As discussed in a previous section of this paper, the title opinion and abstract of title leave the homeowner exposed to known and easily insurable risks. Title issues, defects, and systems of assurance are difficult for many lawyers to fully appreciate. These matters are almost impossible to explain to the typical homebuyer. The homebuyer is not going to be properly informed from a ten or even sixty-minute conversation about title. The homebuyer looks to the attorney to provide the best, up to date, professional judgment about the need for title assurance and about the best way to manage title risks. Despite proclamations to the contrary, it is no surprise that a property may be effected by an Indian Land Claim, by an erroneous survey, a defective legal description, an off-record interest, an on-record filing mistake, a forged document, or a variety of other problems. These are known risks, and they are exactly the type of risk addressed by the title insurance process.

Consequently, in my opinion, there is nothing more unprofessional and dishonest than the lawyer that responds to an uninsured client's loss by saying, "there is nothing we could have done." This is seldom the case. The defect may have been impossible to discover but the loss could have been prevented or managed by using title insurance.

V. CHANGING MARKET CONDITIONS MAKE REAL ESTATE ATTORNEYS LIABLE FOR MALPRACTICE WHEN THEY FAIL TO USE TITLE INSURANCE

A changing marketplace is requiring attorneys to restructure the way that they practice law. In the residential real estate market this means becoming more knowledgeable about title insurance. It means learning to use title insurance to protect the client and to avoid claims of malpractice.

No one can doubt the impact that recent market changes have had on American business. All sectors of the economy have dealt with the need to reorganize and reinvent themselves. The legal business is no different. Even though we are professionals we deal with law in its market context and we can either adjust to that changing context or find that our influence diminishes.

In the residential real estate market we need to move from the passive preparation of closing documents to the active role of transactional manager. We have to position ourselves as the access point to the residential market and be prepared to compete head on with the non-legal service providers.

One of the key tools in this approach, which is underutilized by lawyers in Central and Western New York, is title insurance. There seems to be a sense of antagonism against title insurance and title insurance companies. This is misdirected. The legal profession has to realize that obtaining both a lender and fee title insurance policy is the standard for competent legal practice. There really

is no point is wasting time arguing about whether or not we should be using more fee policies. The marketplace has already set this standard and is imposing it on local markets. The failure to use fee owner's title insurance is a basis for a malpractice action against an attorney.

The real task of lawyering, in today's marketplace, involves mastering the details of title insurance. Attorneys need to work with title companies to produce better products that meet the attorney's needs for risk management on behave of their clients. Attorneys need to be working on ways to bring down the cost of fee policies, simultaneous issues, and reissues. They need to make pricing in New York State comparable to that of many other states with much lower costs. But none of the current difficulty with current title insurance policies or pricing changes the fact that a new norm has emerged in the marketplace. A norm in which all of the major players understand that title insurance is an essential element of the transaction.

Perhaps some lawyers fear that fee title insurance is just another unnecessary expense to impose on a client. This is an ungrounded fear. Clients have to be informed that the recording of their deed is not proof of title in America. They have to be told that no matter how sincere, diligent, and competent we are at title examination there are risks that can not be discovered, and that will not be covered by any other form of title assurance. The only way to protect the client is with the intelligent use of title insurance.

Since we know that abstracts and title opinions can not protect owners from known types of risk, we do them a disservice by failing to have them acquire fee owner's title insurance. Moreover, since we know that every other party to a real estate transaction (the lender, the secondary mortgage participant, and any commercial real estate developer) will require title insurance, an attorney commits malpractice in failing to protect the homeowner to the same extent.

Attorneys who routinely represent lenders or commercial clients and require title insurance in those situations are prime targets for liability in failing to treat their homebuyer client's with the same degree of professional care.

An attorney's liability for failure to have a client obtain title insurance is fairly easy to determine. Liability should cover the amount of any loss experienced by the client that would have been covered had the attorney required title insurance, plus any additional damages or potential punitives.

There is no doubt that an attorney can justify fee owners insurance for a client. At the same time the attorney can use fee title insurance to reduce his own risk exposure in the transaction. And, even more significant, as an attorney agent he can participate in the title insurance process and make the economics of the residential transaction viable. With proper disclosure and consent there is generally no reason to prohibit an attorney from being involved in a real estate transaction and also serving as a participant in the title insurance process.

In many states, such as Florida, this has been a way to keep attorneys in the residential transaction. By participating in the title insurance process the attorneys are kept abreast of title risks, market changes, and the terms and meanings of title policies so that they end up having a high level of competence on a variety of property and title matters. At the same time they protect the client, reduce their own risk exposure, and earn income from the title insurance. They earn this income by adding value to the transaction, and with the added income from this activity they are able to make a living by providing meaningful professional service to their clients.

One thing that is crucial to this market change is that lawyers have got to become competent in their knowledge of title insurance. With few exceptions lawyers are not trained on this subject in law school, and many are intimidated by the various title insurance commitments and policies they confront in practice. This sometimes serves as the wrongheaded but useful excuse for denying the importance of fee title insurance to a client. Title insurance is a risk management tool and if you know the details you will be equipped to work with title companies to tailor protection to the needs of any given transaction.

Finally, what I think we observe in the market is that lawyers who develop a firm knowledge of title insurance and who work with title companies enhance their real estate practice. They tend to position themselves favorably in the market and end up doing more rather than less business.

VI. CONCLUSION

Changing market conditions are forcing lawyers to learn more about title insurance. Using title insurance can enhance a lawyer's legal practice, protect her client, and keep her out of a malpractice claim.

The market for real estate transactions has changed dramatically in recent years, and lawyers are confronting increased competition from a variety of non-legal service providers. To survive in this new marketplace real estate lawyers must adjust their practice and realize that property law is no longer local. As a consequence, the standard for measuring competence in legal practice has also changed. It is no longer justifiable to rely on local custom in the choice of title assurance.

Professionally, real estate lawyers are experiencing the same kind of change as other professionals and business people. Life is not static; it is dynamic. The standards and practices of yesterday are constantly being challenged and revised. This is true of automobile safety standards, medical malpractice standards, and title assurance standards. Lawyers should not be able to perpetuate outdated and low quality legal standards simply because they practice in second and third tier urban or rural marketplaces. While some variation in practices will continue to exist, the basic norms and minimal standards of competence continue to rise. In the area of title assurance, the minimal level of professional

care involves using fee title insurance even though local custom may involve slight variations respecting product choice.

In short, therefore, market standards have made title insurance the only real acceptable way for dealing with title risk, and failure to obtain title insurance for a client is grounds for a malpractice action.

PROFESSOR ROBIN PAUL MALLOY is a noted expert in the area of Real Estate Transactions. He is a licensed member of the Florida Bar and the Bar of the U.S. Supreme Court. He practiced commercial real estate transactions with a major Florida Law firm, and has taught real estate transactions in law schools since 1983. In addition to his current position at Syracuse University (since 1990), he has been a member of the full-time faculty at Tulane University Law School, Indiana University School of Law-Indianapolis, and the Texas Tech University School of Law. He works with members of the Land and Real Estate Initiative Group at The World Bank in Washington, D.C., has consulted on property and market transition matters in China, and has given numerous lectures and presentations on real estate related matters. He is the author of a leading casebook on real estate transactions, a book on real estate, and a workbook on problems and documents for a transactional approach to real estate transactions. He has published 10 books, over 25 articles, and contributed chapters to 9 other books. In 1997 he was honored as the Sun Life Visiting Research Fellow at Mansfield College, Oxford University.

2002 Supreme Court Surveys

EDITORIAL STAFF[1]

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BANKRUPTCY

Young v. United States
535 U.S. 43

A tax debt, due more than three years before a bankruptcy filing, is not discharged under the Bankruptcy Code because the "lookback period" of 11 U.S.C. § 507(a)(8)(A)(i) is tolled during the pendency of a prior bankruptcy filing.

The issue in this case is whether the "three-year lookback period" in bankruptcy is tolled during the pendency of a prior bankruptcy filing.

Petitioners failed to include payment with their 1992 income tax return, which was filed on October 15, 1993. On May 1, 1996, the petitioners filed Chapter 13 bankruptcy. Before confirmation of the reorganization plan, the petitioners moved to dismiss their Chapter 13 bankruptcy petition and filed a new "no asset" petition under Chapter 7. The discharge was granted; however, the

1. Jason Kovacs, the Supreme Court Survey editor, selected these surveys because they were viewed as the most interesting Supreme Court cases decided last year.

Internal Revenue Service (hereinafter IRS) requested payment of the 1992 tax debt, claiming that the "three-year lookback period" began with the filing of the Chapter 13 bankruptcy.

The Supreme Court affirmed the bankruptcy court and found that "all limitation periods are 'substantive.'" As such, the lookback period is equivalent to a statute of limitations, which is routinely subject to equitable tolling. Furthermore, the Court reasons that by virtue of the automatic stay that was enacted at the time of the petitioner's filing under Chapter 13 bankruptcy, the IRS's efforts to collect their debt were frozen from the day of the Chapter 13 filing forward. Therefore, the IRS's "period of disability tolled the three-year lookback period when the Youngs [petitioners] filed their Chapter 7 petition."

Elisa Weselis

CIVIL PROCEDURE

J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd. 536 U.S. 88

A corporation organized under the laws of the British Virgin Islands is a citizen or subject of a foreign state for purposes of alien diversity jurisdiction.

The issues in this case are whether Traffic Stream (BVI) Infrastructure Ltd. (hereinafter Traffic Stream) has been incorporated under the laws of a foreign state and whether the corporate citizens are citizens or subjects under the Alienage Diversity Act.

Traffic Stream is a corporation organized under the laws of the British Virgin Islands, an overseas territory of the United Kingdom. In 1998, J.P. Morgan Chase Bank (hereinafter J.P. Morgan) agreed to finance some ventures that Traffic Stream had organized to construct and operate toll roads in China with the parties' contract to be governed by New York State law. Traffic Stream agreed to submit to the jurisdiction of federal courts in Manhattan and to waive any immunity from their jurisdiction. J.P. Morgan subsequently charged Traffic Stream with defaulting on its obligations and sued in the U.S. District Court for the Southern District of New York. The court found that subject-matter jurisdiction existed under the Alienage Diversity Act and granted summary judgment to J.P. Morgan. Traffic Stream appealed and the Second Circuit held that because Traffic Stream was a citizen of an overseas territory and not an independent foreign state, jurisdiction did not exist.

The Supreme Court reasoned that a corporation of a foreign state is deemed that state's subject for jurisdiction purposes. Although Traffic Stream was organized under the law of the British Virgin Islands, which are not recognized as an independent foreign state, the Court has never held that the requisite status as citizen must be held directly from a formally recognized state. Furthermore,

because the United Kingdom still controls the islands, the statute permitting incorporation in the British Virgin Islands is enacted under the exercise of the United Kingdom's political authority. As a result, Traffic Stream is a citizen of the United Kingdom.

Melissa Kowalewsk

CONSTITUTIONAL LAW

Christopher v. Harbury
536 U.S. 403

In *Harbury*, the Supreme Court reversed a decision of the United States' Court of Appeals for the District of Columbia Circuit when it held that the petitioner failed to state a claim for denial of the right of access to the United States federal court system.

The issue presented, before the Court, was whether the petitioner provided an adequate claim in order to gain access to the federal courts.

Harbury, the plaintiff-respondent, alleged that federal officials intentionally deceived her by concealing information about her husband. Harbury's husband was a Guatemalan dissident, who had been "detained, tortured, and executed by Guatemalan army officers," who were paid by the Central Intelligence Agency (CIA). Harbury alleged that this deception denied her access to the courts, and her deceased husband's Fifth Amendment due process rights. Furthermore, she argued that the denial of access to the courts prevented her from receiving information that would have enabled her to commence a lawsuit that may have precluded her husband's death. Harbury argued that under the *Bivens* case, both she and her deceased husband had rights to access the federal courts.[2]

The Supreme Court held that the plaintiff did not have a right of access to the federal courts because she lacked a cause of action. Additionally, the Supreme Court stated that an underlying cause of action must be present in the plaintiff's claim in order to describe the official acts that perpetuated the litigation. This conclusion is analogous to the holding presented in *Lewis v. Casey*.[3]

In *Lewis*, the Supreme Court held that named plaintiffs in an action must provide "no frivolous," "arguable" underlying claims that are redressable in order for an action to exist.[4] In the case at bar, both of Harbury's claims were absent of any underlying cause of action that confirmed that the government's deception occurred and that a remedy was available. Consequently, Harbury's claims were also struck down because of a inadequate claim as well as each

2. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
3. Lewis v. Casey, 518 U.S. 343 (1996).
4. *Id.* at 346-348

defendant of the suit was entitled to qualified immunity and thus, could not have a civil claim brought against them.

Christopher J. Grace

Republican Party of Minnesota v. White
536 U.S. 765

The Supreme Court struck down a canon of the Minnesota Code of Judicial Conduct as violative of the First Amendment. The canon at issue limited the free speech rights of Minnesota judicial candidates.

The issue in this case was whether the Minnesota announce clause, which prevented judicial candidates from expressing their views on pending legal disputes, was permitted under the First Amendment.

Petitioner was a candidate for the associate justice of Minnesota in 1996. In the course of campaigning, petitioner distributed literature that criticized decisions of the Minnesota Supreme Court. A complaint was filed with the Office of Lawyer's Professional Responsibility, a board that investigates and prosecutes ethical violations of lawyer candidates for judicial office. The complaint against the petitioner was dropped, but fearing his legal career was in jeopardy, petitioner withdrew from the race. In 1998, petitioner became a candidate again and sought a declaratory judgment regarding the constitutionality of the announce clause. The Minnesota Republican Party joined the suit claiming the announce clause hindered them from endorsing petitioner's candidacy because of the party's inability to determine petitioner's political and judicial views.

The Supreme Court reversed the Eighth Circuit and held that the announce clause was under-inclusive and not narrowly tailored to serve a compelling state interest. The announce clause was created to prevent judicial candidates from announcing their views on pending legal or disputed legal matters in order to maintain the impartiality of the candidate after gaining judicial office. The Judicial Board's pre-approved topics which censors an individual's speech is not content-neutral and therefore violates the First Amendment, since it is not the role of the government to select issues worthy of debate in a political campaign. A compelling interest was not found because the purpose of the announce clause did not serve the goal of impartiality or open-mindedness. The announce clause was under-inclusive because individuals can publicize their opinions on any past or pending litigation before they become candidates and can continue to advocate their opinions after their election. By restricting a candidate's free speech based on content during the election, the clause does not serve the purpose of impartiality for which the regulation was adopted. By silencing candi-

dates during the election, the public is unable to ascertain legal views and gather information to cast an informed vote.

Davida Ofori-Sarpong

Thomas v. Chicago Park District
534 U.S. 316

The Supreme Court rejected a § 1983 assault on a municipal park ordinance by a pro-marijuana legalization group that claimed the ordinance violated the First Amendment.

The issue in this case was whether an ordinance is prima facie unconstitutional when it requires permits be obtained before group activities or rallies could be held in a public park.

Petitioners applied to the Chicago Park District for permits to hold a rally that would advocate the legalization of marijuana. The application was denied, and claimed a violation of their First Amendment rights where the denial of their application stems from the content of their rally, especially their stance on the legalization of marijuana. They further contend that because the permits are needed before their First Amendment rights of participating in rally to support a political viewpoint could be exercised, the Park District had to put in place heightened procedure by initiating litigation every time a permit is denied.

The Supreme Court, in an opinion by Justice Scalia, upheld the District Court and granted summary judgment to the Park District. Heightened procedural requirements are not necessary where an ordinance does not prohibit free speech but regulates activity based on content neutral time, place and manner. The Court found the method by which the Park District grants permits was constitutional because it is based on the number of applicants and their need to use the space for specific days and times. As a result of limited space with large numbers of applicants, earlier applicants are granted permits and others are granted permission as space becomes available. The Park District uses a list of ten criteria in all cases including, but not limited to: payment of application fee, the availability of space and time for the proposed activity, considerations of the danger that the activity posses to the public, and the Park District's prior experience with the group. Therefore the standards for granting and denying permits are based on judicially reviewable criteria and not capricious or arbitrary whims of a board. It is only when a licensing body has a broad grant of discretion in granting or denying permits should there be heightened scrutiny because of the likelihood of permit denials based on political views or content. A scheme that conditions approval upon content presents a danger to the First Amendment, but

in this case, the ordinance is not directed at communication but rather all activity conducted in the public park.

Davida Ofori-Sarpong

Zelman v. Simmons-Harris
536 U.S. 639

School vouchers were held constitutional in this controversial case that will have repercussions in education policy throughout the several states for years to come.

The issue in this case was whether the state of Ohio's Pilot Project Scholarship Program offends the Establishment Clause of the United States' Constitution.

Ohio enacted the Pilot Project Scholarship Program in 1996 in order to provide assistance to parents and children of a school district under the supervision and management of the district by the state superintendent. Cleveland is the only city to meet the requirement. Tuition aide is distributed up to $2,250.00 to parents based on their financial need, beginning with families who live below 200% of the poverty line. Therefore, it allows low-income families to send their children to private institutions and provides guidelines that the private schools must follow with regards to payment of tuition. Additionally, any student in Cleveland is eligible for grants that provide the financial means to achieve tutorial assistance. Respondents challenged the program on grounds that it was government support of religion.

The Supreme Court held that the program did not violate the Establishment Clause. The Court reasoned that Ohio Pilot Project Scholarship Program is neutral with regards to religion and benefits a "wide spectrum of individuals, defined only by financial need and residence in a particular school district." The Court found that there are "no 'financial incentives' that 'skew' the program toward religious schools;" rather, the program provided the parents of the children with the choice of sending their children to public or private schools with the tuition aide. Therefore, in accordance with case precedent, the Pilot Program does not offend the Establishment Clause.

Elisa Weselis

CRIMINAL PROCEDURE

Mickens v. Taylor
535 U.S. 162

A criminal defendant alleging a violation of the Sixth Amendment must show that a conflict of interest adversely affected the defendant's lawyer's effectiveness.

The issue in this case is what must a defendant show in order to prove ineffective assistance of counsel when a trial court fails to investigate a possible conflict of interest that was either known or should have been reasonably known.

Attorney Bryan Saunders was assigned to defend Timothy Hall, a juvenile, on March 20, 1992. Ten days later Hall was found dead and soon afterwards the same judge who assigned Saunders to Hall assigned Saunders to represent Mickens. Saunder's past representation of Hall was not disclosed to Mickens. A Virginia jury sentenced Mickens to death in 1993. Mickens filed for a writ of habeas corpus claiming he was denied effective assistance of counsel because one of his appointed attorneys had a conflict of interest. The Fourth Circuit held that although cause had been established to merit an inquiry into the conflict of interest, because Mickens did not demonstrate an adverse effect on his attorney's representation, the appeal was denied.

The Supreme Court affirmed the Fourth Circuit by a 5-4 vote. In an opinion written by Justice Scalia, the Court held that a defendant must show the conflict of interest adversely affected counsel's performance to prove a Sixth Amendment violation when a trial court fails to investigate a possible conflict of interest that was either known or should have been reasonably known. Mickens argued that the trial judge in his case failed to make the *Sullivan* inquiry.[5] However, the Court held such an inquiry was not necessary where the defendant failed to show that his counsel actively represented conflicting interests. Without such a showing, the defendant "has not established the constitutional predicate for his claim of ineffective assistance."[6] A conflict of interest that has no probable effect on the outcome of a criminal proceeding does not rise to the level of a Sixth Amendment violation.

Rigoberto Martinez

5. Cuyler v. Sullivan, 446 U.S. 335 (1980).
6. *Id.* at 350.

FIRST AMENDMENT

Ashcroft v. American Civil Liberties Union
535 U.S. 564

The Supreme Court upheld Congress's latest attempt to protect children from exposure to pornographic material on the Internet.

The issue in this case was whether the Child Online Protection Act's (hereinafter COPA) use of "community standards" to identify "material that is harmful to minors" violates the First Amendment.

COPA prohibits a person from placing on the World Wide Web material for commercial purposes that is harmful to minors. The Act defined material that was harmful to minors by applying the three-part test for obscenity set forth in *Miller v. California.*[7] The American Civil Liberties Union (ACLU) argued that COPA was in violation of the First Amendment. The ACLU alleged that COPA prohibits constitutionally protected speech, fails to promote a government interest, and is too broad in scope.

The *Miller* Court set forth a three-part test to assess whether material is obscene and thus, not protected by the First Amendment. The test is (1) whether an average person applying community standards would find that the work appeals to the "prurient" interest; (2) whether the work offensively describes sexually explicit conduct prohibited by state law; and (3) whether that work lacks educational value. The Supreme Court applying this test went on to establish that it is sufficient to note that "community standards" do not have to be defined by reference to a specific geographical area. Further, to fall within the scope of COPA, works must not only represent material that is harmful to minors, but they must also appeal to the interest of minors and lack material value. The Supreme Court concluded that for the requirements for COPA to be applicable, they must substantially limit the amount of material covered by the statue. Therefore, the scope of COPA and its reliance on community standards does not render the statue overbroad for purposes of the First Amendment. However, the Supreme Court made clear that its holding in this case was limited in scope.

Thomas D'Angelo

LABOR LAW

Great-West Life & Annuity Ins. Co. v. Knudson
534 U.S. 204

This case held that the provision of the Employment Retirement Income Security Act of 1974 (hereinafter ERISA) which authorized plan participants to

7. Miller v. California, 413 U.S. 15 (1973).

bring actions to obtain appropriate equitable relief did not authorize specific performance of the reimbursement provision.

At issue in this case is whether a tort victim, who collects damages from a third party, must reimburse an employee welfare benefit plan under § 502(a)(3) of ERISA, which permits an ERISA fiduciary to enjoin any act that violates the terms of a plan, and further to obtain "appropriate equitable relief" to redress violations or enforce provisions of an ERISA plan.

Respondent Eric Knudson's wife Janette was seriously injured in a car accident, at which time she was covered by his plan as an eligible dependent. The plan provided that if a third party were liable for expenses incurred by the covered person for illness or sickness, the plan would pay the covered expenses but would have the right to recover payment that was received. The plan provided that they would have the first lien on any judgment or settlement that the covered person received. Petitioner, Great-West Life & Annuity Ins. Co. (hereinafter Great-Western) notified Knudson that they were entitled to recovery and reimbursement for any expenses that were paid on his wife's behalf. The Knudsons were awarded $650,000, and Great-Western filed suit seeking injunctive and declaratory relief to enforce the reimbursement provision of the plan.

The Supreme Court held that the provision of ERISA which authorized plan participants to bring actions to obtain appropriate equitable relief did not authorize for specific performance of the reimbursement provision. Equitable relief is the only kind of relief to be granted under the statute. Since Great-Western was seeking legal, rather than equitable, relief (the imposition of personal liability on respondents for a contractual obligation to pay money) the Court held that the statute did not apply to this action. The analytical reasoning of the Court is based on the fact that the provision of ERISA in question does not authorize an employee benefit plan to bring action for specific performance to compel a plan beneficiary to turn over funds received as a result of third party restitution in a tort case.

Robyn Juskiewicz

TAX LAW

United States v Fior D'Italia, Inc.
536 U.S. 238

The Internal Revenue Service (IRS) is authorized to assess a restaurant's income from tips by using an aggregate estimate of all the tips that a restaurant's customers gave to its employees.

At issue in this case was the proper interpretation of a tax statute. The IRS contended that it could use an aggregation method to determine income from tips, while the restaurant contended that the IRS was required to determine total

tip income by estimating each individual employee's tip income separately, and then add the individual estimates together to create a total.

In 1991 and 1992, the reports provided to the Fior D'Italia restaurant by the restaurant's employees showed that the total tip income amounted to less than what was reported by the employees. The restaurant paid its FICA tax based on the lower amount. This discrepancy led the IRS to conduct a compliance check. The check led the I.R.S. to issue an assessment against the restaurant for additional FICA tax. The government's efforts to calculate the added tax it found owed to the IRS used an aggregation method rather than totaling the income of employees separately.

The Court found that the aggregate estimating method does not fall outside the bounds of what is reasonable. The potential for errors from calculating an aggregate estimate did not render the estimate unreasonable since the restaurant remained free to challenge the accuracy of the estimate. The mere possibility for abuse by the I.R.S. was insufficient to preclude the use of an aggregate estimate. Justices Souter, Scalia, and Thomas dissented due to the Court's broad interpretation of the tax statute.

Michael Suchoparek

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10. List undergraduate awards, honors, and/or prizes _____
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11. List any scholarships, awards, prizes or other financial assistance you have received or plan to receive; the amount(s) and the dates and purpose:
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12. List scholastic honor societies that you belong to: _____
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14. List employment activity during the past two years and state whether full-time or part-time:_____
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    _____
15. List hobbies or special interests:_____
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16. I represent that the information contained in this application and material sent in support thereof is true, accurate and authentic.

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