The DIGEST
National Italian American Bar Association Law Journal

ARTICLES

THE DIGEST

The Law Journal of the National Italian-American Bar Association

1995-1996 EDITORIAL STAFF

THE DIGEST

The Law Journal of the National Italian-American Bar Association

THE DIGEST

Nineteen Ninety-Six

ARTICLES

Published annually by the members of the ***National Italian-American Bar Association,*** */ashington, D.C. Editorial Office: NIABA, 2020 Pennsylvania Avenue N.W., Suite 932, Wash-ıgton, D.C. 20006. Publication Office: Joe Christensen, Inc., P.O. Box 81269, 1540 Adams St., incoln, NE 68501.*

Single issue volumes are available through the Editorial Office at a price of $15.00. Rates for ulk copies quoted on request.

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The Italian Legal Profession

OTTAVIO CAMPANELLA†

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I. INTRODUCTION

A nation's legal system is both a basic element of its cultural heritage, and a depiction of its political and social philosophy.[1] At the heart of a legal system is the legal profession. A nation's legal profession acts as the quintessential life-giving source to this ordinarily inanimate infrastructure. Therefore, in order to acquire a rudimentary understanding of another nation's legal system, one must examine the characteristics of its legal profession. Within this Article, I shall discuss a general view of the Italian legal profession in an attempt to cultivate a better understanding of the Italian legal system.

This Article will focus specifically on each of the following areas: some basic distinctions between common-law and civil-law systems, the historical origin of Italian law, and a general depiction of the Italian legal profession, including educational requirements and a description of the variety of legal practitioners and academics. The latter portion of this Article shall revolve around the judiciary, particularly the Italian court system and magistracy.

II. HISTORICAL BACKGROUND

Within this section, the following topics will be discussed: the difference between civil-law and common-law systems and the historical origin of Italian law. There are several distinctions between civil-law and common-law systems:

> [T]he similarities between the civil-law systems and their differences with common-law systems are especially marked in the general structure of the systems, in the classifications and rules of what is traditionally private law, having to do with persons, property, succession, and obligations, and in the law of procedure and rules of evidence.[2]

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† B.A., State University of New York at Stony Brook, 1990; J.D., Syracuse University, 1993; admitted to practice law in New York and New Jersey. The author wishes to thank the following individuals for their invaluable assistance: Mr. Michael C. Rainone, Esq., Chairman of Board of the National Italian-American Bar Association, 1993; Professor Robin P. Malloy, Professor of Law and Economics, Syracuse University; Mr. Thomas M. Federman and Mr. Quirino Mancini of Dobson & Sinisi, Rome, Italy; and Mr. Anthony M. Calabrese, Technical Editor of the Syracuse Law Review, 1993.

1. Mauro Cappelletti, *In Honor of John Henry Merryman*, 39 STAN. L. REV. 1079, 1080 (1987) (A tribute to John Henry Merryman, the comparativist).

2. ALAN WATSON, THE MAKING OF CIVIL LAW 1 (1981).

For example, while the use of juries in civil proceedings[3] is prevalent in common-law systems, their use in civil-law systems is rare, if not totally nonexistent.[4] Furthermore, while the law which exists in civil-law systems stems from a codified and therefore written tradition, the law found in common-law systems is descended from age old unwritten English custom.[5]

The traditional source of law in a civil-law system is a "detailed enumeration of rules [and] regulations [found in the form of] code[s] that provide[ ] the basis for settling all disputes."[6] These codes are created and compiled by legal scholars, particularly law professors, whose intent is to draft them with the greatest clarity feasible.[7] As a result, the role of a civil-law judge, in theory, is to be nondiscretionary. His[8] function is limited to discovering and applying the appropriate law to the issue before him.[9] In contrast, the traditional source of law in a common-law system, such as in the United States, originates from the judiciary.[10] In short, judges create, interpret, and change a salient portion of American[11] law.[12] Furthermore, while the doctrine of "stare decisis"[13] is of great importance in a common-law nation, it is given relatively little weight or official recognition in a civil-law nation.[14] As a result of these differences, the priority importance given to each particular legal profession is different. For example, while it is the judges that occupy the highest and most prominent legal

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3. A civil proceeding should not be confused with civil law, in that, while the former is an action brought to enforce, redress, or protect private rights, the latter is a system of jurisprudence. *See* BLACK'S LAW DICTIONARY 245, 246 (6th ed. 1990). Civil proceedings exist in both common and civil-law legal systems.

4. Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 982 (1982).

5. HOWARD ABADINSKY, LAW AND JUSTICE 9 (1988).

6. *Id.*

7. *Id.*

8. The pronouns "his," "he" and "him," used throughout this Article, are meant to connote both the male and the female gender.

9. ABADINSKY, *supra* note 5, at 9.

10. Robert A. Chaim & Claude Rohwer, *Legal Education, in* THE U.S. LEGAL SYSTEM: A PRACTICE HANDBOOK 26 (Dennis Campbell & Winifred Hepperle eds., 1983).

11. The word "American," when used throughout this Article, refers to the United States of America.

12. Chaim & Rohwer, *supra* note 10, at 26. There is, however, among conservative legal scholars, a growing belief that a judge's role should be nondiscretionary and limited to a strict interpretation and application of the law without personal modification. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). *See also* WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (The Federalist Society ed., 1992).

13. "Stare decisis" is a legal doctrine that states that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, regardless of whether the parties and property are the same. *See* BLACK'S LAW DICTIONARY, 1406 (6th ed. 1990).

14. ABADINSKY, *supra* note 5, at 10.

position in a common-law system,[15] in a civil-law system, it is the position of law professor[16] that is the most prestigious and most sought after.[17]

The legal system that exists in Italy is one that utilizes civil law. The origin of civil law in Italy is derived from Roman Jurisprudence,[18] which in itself has evolved from ancient Roman law codified in the XII Tables, also known as the *jus quiritium*.[19] Subsequent to the permanent separation of the Roman Empire, the Emperor Justinian I[20] of Constantinople in the Sixth Century A.D. assigned to an assembly of legal scholars the task of systemizing Roman law.[21] This systemization of Roman law resulted in the *corpus juris civilis*, or what is familiarly known as the Code of Justinian.[22] The *corpus juris civilis*, as it was translated, analyzed, developed and refined by Italian legal scholars in the 12th Century and thereafter, became the direct origin of the modern Italian legal system.[23]

III. ITALIAN LEGAL PROFESSION[24]

A. EDUCATIONAL REQUIREMENTS

Currently, the legal profession in Italy is composed of three distinct categories: the practitioners, the academics, and the magistracy.[25] The fundamental educational requirement for entry into any of the above branches of the legal profession is the *Laurea in Giurisprudenza*,[26] awarded by an Italian university.[27] Unlike in the United States, no preliminary university studies are required for admission into an Italian university for the study of law.[28] Furthermore, the system of selective admission found in the United States is

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15. Chaim & Rohwer, *supra* note 10, at 26.

16. Law professors hold a prestigious position in civil law systems because they are the source and the origin of the codes, which make up the primary law of a civil law nation.

17. *See* MAURO CAPPELLETTI ET AL., THE ITALIAN LEGAL SYSTEM 87, 108 (1967).

18. ABADINSKY, *supra* note 5, at 26.

19. MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 2 (Hans Smit ed., 1965). The XII Tables, which were drawn up by a special commission in 451-450 B.C., are the oldest of the Roman Codes. For a more in depth discussion of the XII Tables and Roman Law in general, *see* Franca Elia Harris, *Roman Civil Liability: The Precursor to Anglo-American Tort Law*, 2 DIG. 109 (1992).

20. Byzantine Emperor who reigned between 527-565 A.D. WEBSTER NEW UNIVERSAL UNABRIDGED DICTIONARY 993 (Deluxe 2d ed., 1979).

21. ABADINSKY, *supra* note 5, at 9. *See* CAPPELLETTI ET AL., *supra* note 17, at 1, 5-6.

22. ABADINSKY, *supra* note 5, at 9. For a more in depth discussion of the Code of Justinian, *see* Frank C. Razzano, *The Institutes of Justinian*, 2 DIG. 23 (1992).

23. CAPPELLETTI ET AL., *supra* note 17, at 1.

24. For a greater visualization of the Italian legal profession, a schematic diagram has been provided in Appendix I.

25. *See* G. LEROY CERTOMA, THE ITALIAN LEGAL SYSTEM 43 (W.E. Butler ed., 1985).

26. The *Laurea in Giurisprudenza* is the standard law degree offered in Italy. It is equivalent to the American *Juris Doctor*.

27. CERTOMA, *supra* note 25, at 43.

28. CAPPELLETTI ET AL., *supra* note 17, at 88.

absent in Italy.[29] Entrance into an Italian university is granted to all individuals who have completed thirteen years of primary and secondary education.[30] A screening process does, however, occur in Italy, but instead of it occurring during admissions, it takes place subsequently through the examination process.[31] Furthermore, unlike in the United States, the cost of a legal education in Italy does not factor into the screening process.[32]

While primary and secondary education in Italy is in many respects similar to that in the United States, the law school education is considerably different. In the United States, the case method and the Socratic method are the predominant forms of law school instruction.[33] "[These] method[s] . . . [are] designed to focus the students' attention on the identification of legal problems or issues, the gradual evolution of rules of law during repeated applications by the courts, and the rationale and policy consideration upon which those rules are founded."[34] In contrast, the case method and Socratic method of teaching are rarely employed in Italy because the basic law is codified.[35] The predominate method of instruction in an Italian law school is by lecture.[36] Though the attendance of these lectures is mandatory, it has become customary for only a small portion of students actually to attend.[37] These lectures tend to be highly theoretical, and practical applications of the material taught are infrequently presented.[38] It is the explanation and classification of definitions and concepts that constitute a major portion of the information conferred in these lectures.[39]

In addition, the professor assigns several appropriate textbooks, and on many occasions makes available his own printed notes.[40] The typical Italian law curriculum which is the same in every Italian university,[41] covers the following subjects:

> private law, Roman law, the history of Roman law, political economy, constitutional law, the philosophy of law, Italian legal history, administrative law,

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29. Louis F. Del Duca, *The Expanding Role of International and Comparative Law Studies—An Overview of the Italian Legal System,* 88 DICK. L. REV. 221, 234 (1984).

30. *Id. See* Aldisert, *supra* note 4, at 943.

31. Del Duca, *supra* note 29, at 234.

32. Tuition at an Italian law school is minimal and barely covers administrative costs. *See* CAPPELLETTI ET AL., *supra* note 17, at 90 n.17.

33. Chaim & Rohwer, *supra* note 10, at 22-23.

34. Chaim & Rohwer, *supra* note 10, at 23.

35. CAPPELLETTI ET AL., *supra* note 17, at 89.

36. CAPPELLETTI ET AL., *supra* note 17, at 89.

37. CAPPELLETTI ET AL., *supra* note 17, at 89. *See* Del Duca, *supra* note 29, at 234.

38. CAPPELLETTI & PERILLO, *supra* note 19, at 55.

39. CAPPELLETTI ET AL., *supra* note 17, at 89.

40. CAPPELLETTI ET AL., *supra* note 17, at 89.

41. The law curriculum is the same in every Italian university because all, except Sacred Heart Catholic University of Milan, are State-owned. *See* Del Duca, *supra* note 29, at 234. Another reason for this may be that, unlike in the United States where there is no federal bar and each state's bar is distinct, the State examinations in each particular category of the legal profession in Italy are uniform.

> public finance and taxation, criminal law, civil law, commercial law, labour law, international law, ecclesiastical law, criminal procedure, civil procedure, and optional courses selected amongst subjects such as agrarian law, comparative law, regional law, taxation, legal medicine, and Canon law.[42]

In comparison, with the exception of a similar first year curriculum[43] given at many accredited American law schools,[44] there are generally no additional course requirements common among American law schools.[45] A fundamental explanation of the legal education in Italy is that Italian law schools, unlike those in the United States, "are not concerned with techniques of problem-solving, but with the inculcation of fundamental concepts and principles."[46] In short, "law school [in Italy] is not considered a professional training school, but a cultural institution where law is taught as a science."[47]

The examinations in an Italian law school are oral[48] and are based on the assigned texts.[49] Examinations are held three times a year[50] and are frequently conducted in the presence of other classmates.[51] "The lack of interest in problem-solving as a pedagogical tool is carried over into the examinations"[52] and, as a result, the students are tested on their ability to explain and expound upon fundamental legal doctrines.[53] In theory, the law program in Italy is designed to be culminated within four years, but in reality, only a small fraction of the students complete the program in the proposed time.[54] The reason why only a small fraction of the students complete the program within the proposed time is because Italian law students have the prerogative of postponing their examinations until they consider themselves prepared.[55] Although students may retake failed examinations indefinitely, only their final grades are reported on their record.[56] Therefore, dismissal for poor academic performance is rare.[57] In spite

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42. CERTOMA, *supra* note 25, at 43.

43. A typical first-year curriculum in an American law school includes the following subjects: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, Torts, and Legal Research and Writing.

44. An accredited law school is one which has been approved by the state and the Association of American Law Schools and/or the American Bar Association. BLACK'S LAW DICTIONARY 20 (6th ed. 1990).

45. ABADINSKY, *supra* note 5, at 62.

46. CAPPELLETTI ET AL., *supra* note 17, at 89.

47. CAPPELLETTI ET AL., *supra* note 17, at 89.

48. CAPPELLETTI ET AL., *supra* note 17, at 89-90.

49. CAPPELLETTI ET AL., *supra* note 17, at 89.

50. CAPPELLETTI ET AL., *supra* note 17, at 90.

51. CAPPELLETTI ET AL., *supra* note 17, at 89-90.

52. CAPPELLETTI ET AL., *supra* note 17, at 90.

53. *See* CAPPELLETTI ET AL., *supra* note 17, at 89.

54. *See* CAPPELLETTI ET AL., *supra* note 17, at 90. *See also* Del Duca, *supra* note 29, at 234.

55. CAPPELLETTI ET AL., *supra* note 17, at 90.

56. Del Duca, *supra* note 29, at 234.

57. CAPPELLETTI ET AL., *supra* note 17, at 90.

of these options available to the Italian law student, only a small percentage of students enrolled actually graduate.[58]

Once a law student has completed all of the required course work, he must write a thesis under the close supervision and guidance of a law professor.[59] After the thesis is written, the last obstacle to the acquisition of the *Laurea in Giurisprudenza* is a successful completion of a thesis examination.[60] The thesis examination is an oral examination conducted by a panel of law professors on the thesis topic.[61] In short, following a successful performance on the thesis examination, the student is awarded the degree of *Dottore*[62] *in Giurisprudenza*.[63]

There are several positive as well as negative aspects of the Italian system of legal education.[64] One positive aspect is that because of the minimal student-professor contact, the Italian law student develops a keen ability of self-reliance.[65] Furthermore, as a result of the many "oral examinations, the student acquires considerable verbal fluency in discussing difficult concepts and principles."[66] A disadvantage of this system, however, is that it promotes a passive learning process by encouraging memorization and minimizing individual thinking.[67] Furthermore, with the exception of the thesis, the law program in Italy offers very little opportunity to enhance one's research and writing skills.[68] In contrast, American law students must undergo at least one year of legal research and writing,[69] at which time they are taught basic lawyering skills.[70] In addition, American law students, unlike their Italian counterparts,[71] have the opportunity to further enhance their research and writing skills by participating in the publication of student-edited law journals.[72] In short, as a result of the

58. Del Duca, *supra* note 29, at 234.

59. CAPPELLETTI ET AL., *supra* note 17, at 90.

60. CAPPELLETTI ET AL., *supra* note 17, at 90.

61. CAPPELLETTI ET AL., *supra* note 17, at 90.

62. Irrespective of the field of study, Italian Universities neither grant a Bachelor's nor Master's degree, only the degree of *Dottore*. CAPPELLETTI ET AL., *supra* note 17, at 90.

63. CAPPELLETTI ET AL., *supra* note 17, at 90.

64. *See* CAPPELLETTI ET AL., *supra* note 17, at 90. *See also* CAPPELLETTI & PERILLO, *supra* note 19, at 55.

65. *See* CAPPELLETTI ET AL., *supra* note 17, at 90. *See also* CAPPELLETTI & PERILLO, *supra* note 19, at 55.

66. CAPPELLETTI ET AL., *supra* note 17, at 90.

67. CAPPELLETTI ET AL., *supra* note 17, at 90.

68. CAPPELLETTI ET AL., *supra* note 17, at 90-91.

69. ABADINSKY, *supra* note 5, at 60-61.

70. These lawyering skills may include the following: learning about legal analysis, writing, and research; client interviewing and counseling; negotiation; and effective trial and appellate advocacy. SYRACUSE UNIVERSITY COLLEGE OF LAW, DESCRIPTION OF COURSES (1992-93) (on file with the author).

71. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 55.

72. *See* ABADINSKY, *supra* note 5, at 64.

lack of substantial writing and research training, an Italian law student is not trained to handle a real case upon graduation.[73]

Upon graduating from an Italian law school, more than fifty percent of the students conclude their legal careers.[74] "They have acquired the title of *[D]ottore* and will be addressed by that title in social intercourse, [much like how] an American [physician] is addressed as 'Doctor.' "[75] The bestowal of a title of *Dottore* is not unique to the legal field, but is the title conferred upon all university graduates, regardless of the field of study.[76] This seems to indicate that Italian society is more class and status conscious when compared to the United States, where titles are conferred only to a limited number of professions. Consequently, for those who do not pursue any future legal endeavors, the acquisition of an Italian law degree grants greater access to the more prominent positions in private industry and in government.[77] For those individuals who intend to continue their legal careers, however, there exists the option of entering the legal profession as either practitioners, part of academia, or part of the magistracy.[78]

B. THE PRACTITIONERS

The practitioner category is composed of the *Procuratori*, the *Avvocati*, the *Avvocati dello Stato* and the *Notaii*. The most common practitioners, however, are either *Procuratori* or *Avvocati*.

The *Procuratore*, which is basically a title bestowed upon the novice level practitioner, can give only limited representation.[79] The *Procuratore* acts as "the [client's] agent and procedural technician who, pursuant to a written power of attorney, prepares and signs procedural documents for the [client]."[80] His duties may include signing the appropriate documents that initiate a civil action.[81] "The requisites for registration as a *[P]rocurator[e]* are Italian citizenship, the enjoyment of all civil rights, unblemished conduct, [and] the possession of a law degree conferred or recogni[z]ed by an Italian University."[82] Furthermore, in order for a law graduate to become a *Procuratore*, he must partake in a two-year apprenticeship in the office of an already established *Procuratore*.[83] Subsequent to this two-year apprenticeship, the law graduate is

73. CAPPELLETTI ET AL., *supra* note 17, at 91.
74. CAPPELLETTI ET AL., *supra* note 17, at 91.
75. CAPPELLETTI ET AL., *supra* note 17, at 91.
76. *See* CAPPELLETTI ET AL., *supra* note 17, at 90.
77. CAPPELLETTI ET AL., *supra* note 17, at 91.
78. CAPPELLETTI ET AL., *supra* note 17, at 91.
79. Del Duca, *supra* note 29, at 235.
80. CAPPELLETTI ET AL., *supra* note 17, at 91.
81. CAPPELLETTI & PERILLO, *supra* note 19, at 56-57.
82. CERTOMA, *supra* note 25, at 44.
83. *See* Del Duca, *supra* note 29, at 235. The law graduate has the option of not participating in an apprenticeship program. Instead, the law graduate would enter his name on the rolls of probationary

qualified to take the *Procuratore* state examination.[84] This state examination,[85] which tests a pragmatic aspect of the legal practice, is composed of two written and two oral portions.[86] The written portions generally cover civil and administrative law as well as civil and criminal procedure.[87] The oral portion of the examination covers not only the subjects tested in the written portion but includes the testing of commercial and tax law.[88] Upon successful completion of this examination, the law graduate is then after known as a *Procuratore* and may practice before the various courts found within the appellate district in which he resides.[89] These courts include the *Pretori*,[90] the *Tribunali*[91] and the *Corte di Appello*.[92] In short, if the *Procuratore* does not adhere to this jurisdictional limitation, the legal acts he performs will be held invalid and unenforceable.[93]

To achieve the status of *Avvocato*, which is a senior level practitioner, an individual must either practice as a *Procuratore* for at least six years or successfully complete an additional state examination.[94] This additional state examination, "which may be taken after two years of practice as a *[Procuratore]*, consists of four written and four oral [portions] covering civil, criminal, administrative and commercial law as well as civil and criminal procedure."[95] The *Avvocato* is entitled to practice before any and all the *Pretori*, the *Tribunali*, and the *Corti di Appello* throughout Italy.[96] The only limitation that has been imposed is that the newly admitted *Avvocato* may not practice before the superior

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Procuratori and practice on a limited scope. Moreover, the law graduate would be limited to practicing only before the *Pretore*, a lower level trial court, in the district of his residence. If the law graduate chooses this particular option, he must practice for a four-year duration in this restricted manner before he is qualified to take the *Procuratore* state examination. CERTOMA, *supra* note 25, at 45. It must be noted, however, that this alternative option is not commonly taken. Comparatively, in the United States, the option exists in certain states, such as Vermont and Virginia, to apprentice with an attorney in lieu of attending law school. *See* RULES FOR ADMISSION TO THE BAR 84, 88 (West Publishing Co. ed., 1982). Here, too, this alternative option is seldomly used.

84. Del Duca, *supra* note 29, at 235.

85. Unlike in the United States, in Italy there are no bar review courses. The law graduate relies upon the apprenticeship program to prepare himself for the various state examinations.

86. CERTOMA, *supra* note 25, at 44.

87. CERTOMA, *supra* note 25, at 44.

88. CERTOMA, *supra* note 25, at 44.

89. CERTOMA, *supra* note 25, at 45.

90. The *Pretori* are single-judge, trial-level courts that oversee minor criminal and civil matters.

91. The *Tribunali* are the highest trial-level courts on civil matters and hear criminal matters that involve a maximum penalty of incarceration that does not exceed eight years.

92. The *Corti di Apello* are appellate-level courts that hear appeals from the *Tribunali*.

93. CERTOMA, *supra* note 25, at 45.

94. CERTOMA, *supra* note 25, at 44.

95. CERTOMA, *supra* note 25, at 44.

96. CERTOMA, *supra* note 25, at 45.

courts[97] of Italy.[98] The *Avvocato* may, however, be admitted to practice before Italy's superior courts after eight years of practice as an *Avvocato* or by the successful completion of another written examination taken after one year of practice as an *Avvocato*.[99] These subsequent examinations "cover [such topics as] civil, criminal, and administrative recourses to [the *Corte di Cassazione]* and administrative recourses to the *[Consiglio di Stato]*, and the *[Corte dei Conti]*."[100]

The *Procuratore* and the *Avvocato* play distinct roles in the Italian legal system.[101] "The function of a *[Procuratore]* is to represent the party in the development of the proceedings and to perform all of those acts necessary [for] its progress."[102] The *Avvocato*, however, "has the more elevated function of the defense of the party, that is, of making oral or written legal arguments in favor of his client."[103] "In short, the functions of the *[Procuratore]* are of a nondiscretionary and procedural nature while those of the *[Avvocato]* are primarily connected with the exercise of his expert discretion."[104] Even though the services that the *Procuratore* and the *Avvocato* provide are generally independent and distinct, on several occasions they may be exercised concurrently because almost every *Avvocato* is also registered as a *Procuratore* and is capable of performing both functions.[105]

Although the Italian legal profession is similar in many respects to its United States counterpart, there are several salient dissimilarities. For example, while partnerships for the practice of law are prevalent in the United States, they are prohibited in Italy.[106] Furthermore, "[practitioners] may not accept full or part-time employment[107] [in nonlegal fields], and may not engage in business,

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97. The superior courts of Italy include the *Corte di Cassazione*, the *Corte Suprema Costitutionale*, the *Consiglio di Stato*, and the *Corte dei Conti*.

98. CERTOMA, *supra* note 25, at 44.

99. CERTOMA, *supra* note 25, at 44. *See* Del Duca, *supra* note 29, at 235.

100. CERTOMA, *supra* note 25, at 44. The *Corte di Cassazione* is the highest level court in the ordinary court hierarchy. CERTOMA, *supra* note 25, at 187. The *Consiglio di Stato* is the highest administrative court in Italy. CAPPELLETTI ET AL., *supra* note 17, at 82-83. The *Corte dei Conti* is the highest judicial body which exercises control and jurisdiction over matters of public finances and accounting. CAPPELLETTI ET AL., *supra* note 17, at 83.

101. CERTOMA, *supra* note 25, at 45.

102. CERTOMA, *supra* note 25, at 45.

103. CERTOMA, *supra* note 25, at 45.

104. CERTOMA, *supra* note 25, at 45.

105. CERTOMA, *supra* note 25, at 45.

106. CAPPELLETTI ET AL., *supra* note 17, at 93. *See also* CAPPELLETTI & PERILLO, *supra* note 19, at 60.

107. University professors, as well as their assistants, are exempt from this general prohibition and may practice before the courts while retaining their university employment. CAPPELLETTI & PERILLO, *supra* note 19, at 60. In addition, an elected public office is not considered employment, so a practitioner may hold public office and maintain an active practice of law. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 60-61.

[while practicing law]."[108] Moreover, practitioners are dissuaded from accepting employment with corporations as "in-house" counsel.[109] The policy behind the existence of these prohibitions stems from a desire to make the practitioners individually responsible for their actions.[110] If a practitioner violates any of the designated prohibitions, he may be banned from practicing law before any Italian court.[111] Another distinction between Italian and United States legal professions is that in Italy contingent fee agreements are forbidden, and legal fees are generally fixed.[112] These fees are generally set by the National Council of the Attorneys' Guild.[113] The *Avvocato*, however, has the option of deviating from the fixed fee, but only if the client agrees.[114] Furthermore, unlike the United States, the losing litigant in a case reimburses the victor for his counsel's fee.[115] These fee regulations seem to exist in order to minimize the strain on the already overburdened Italian court system.[116] In short, the reimbursement regulation may cause an individual to hesitate before bringing a claim because the individual must have the finances to pay not only his own attorney's fees but, if he loses, he may be subjected to paying the opposing attorney's fees.[117]

Another group of legal practitioners are those that fall within a state agency familiarly known as the *Avvocatura dello Stato*.[118] The members of the *Avvocatura dello Stato* are civil servants,[119] who are assigned the task of representing the State and most of its organs, including governmental corporations,[120] whenever it is a party to a civil, criminal, or administrative proceeding.[121] Moreover, these individuals have the duty of representing the provinces, munic-

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108. CAPPELLETTI ET AL., *supra* note 17, at 93.

109. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 60. *See also* CAPPELLETTI ET AL., *supra* note 17, at 93.

110. CAPPELLETTI ET AL., *supra* note 17, at 93.

111. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 60. *See also* CAPPELLETTI ET AL., *supra* note 17, at 93.

112. CAPPELLETTI ET AL., *supra* note 17, at 95. It must be noted that fixed fees for legal services have been considered a violation of § 1 of the Sherman Act and therefore unlawful in United States. Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975).

113. The National Council of Attorney's Guild, familiarly known as the *Ordine Forense*, "is a semi-autonomous quasi-governmental agency that is responsible for maintaining the rolls of attorneys and for disciplining violators of professional ethics." *See* CAPPELLETTI ET AL., *supra* note 17, at 93. The members of National Council of Attorneys' Guild are elected by local guilds, which can be found within the district of each *Tribunale*. CAPPELLETTI & PERILLO, *supra* note 19, at 59. Membership into the local guild is mandatory for the *Procuratori* and *Avvocati*. *See* CAPPELLETTI ET AL., *supra* note 17, at 93.

114. Del Duca, *supra* note 29, at 235.

115. Del Duca, *supra* note 29, at 235.

116. *See Brave Arm of the Law*, ECONOMIST, Aug. 18, 1984, at 35.

117. *See* Del Duca, *supra* note 29, at 235.

118. CAPPELLETTI & PERILLO, *supra* note 19, at 64-65.

119. CAPPELLETTI & PERILLO, *supra* note 19, at 65.

120. Del Duca, *supra* note 29, at 236.

121. *See* CERTOMA, *supra* note 25, at 51.

ipalities, towns, and other smaller regions found in Italy.[122] Finally, the members of the *Avvocatura dello Stato* have the responsibility of representing and defending an employee of the State, or of any of the aforementioned governmental entities, on matters that involve his official capacity.[123]

The *Avvocatura dello Stato* is headed by the *Avvocato Generale dello Stato*, "who exercises supervisory functions over the entire agency and determines its overall policy."[124] The *Avvocatura dello Stato*, which is composed of the *Procuratori dello Stato*, the *Avvocati dello Stato*, and the *Avvocato Generale dello Stato*,[125] is responsible only to the Prime Minister.[126] The members of the *Avvocatura dello Stato* are selected by a competitive entrance examination consisting of oral and written portions.[127] The entrance examination is open to several members of the legal profession, including probationary magistrates, the *Procuratori*, and law school graduates who are eligible for the *Procuratori* examination.[128] After successful completion of this examination, the individual is bestowed the title of *Procuratore dello Stato.*[129] Following two years of service as a *Procuratore dello Stato*, the practitioner will be promoted to the status of *Avvocato dello Stato.*[130] In short, the current system of "career advancement . . . [among the members of *Avvocatura dello Stato*] . . . is basically one of economic progression on the mere basis of seniority which, per se, is taken to imply the acquisition of experience and professional ability."[131]

The last substantial group in the practitioner category is the *Notaii.* The Italian *Notaio* has "important responsibilities far exceeding those of the pedestrian oath-giving American notary public."[132] While the American notary's function revolves around the administration of oaths and certification and authentication of certain documents and signatures,[133] the Italian *Notaio* is responsible for drafting and authenticating a variety of important legal instruments, such as wills, corporate charters, conveyances, contracts, deeds, bills of sale, and affidavits.[134]

> Generally, speaking, an instrument purporting to have been drafted by and executed under the supervision of a *[Notaio]* is conclusive evidence in any subsequent court proceeding that it was so drafted and executed, that the recit-

122. CERTOMA, *supra* note 25, at 52.
123. CERTOMA, *supra* note 25, at 52.
124. CAPPELLETTI ET AL., *supra* note 17, at 98.
125. CERTOMA, *supra* note 25, at 53.
126. CAPPELLETTI ET AL., *supra* note 17, at 98.
127. CAPPELLETTI ET AL., *supra* note 17, at 98.
128. CAPPELLETTI ET AL., *supra* note 17, at 98.
129. CAPPELLETTI ET AL., *supra* note 17, at 98.
130. CERTOMA, *supra* note 25, at 53.
131. CERTOMA, *supra* note 25, at 53.
132. Aldisert, *supra* note 4, at 945.
133. BLACK'S LAW DICTIONARY 1060 (6th ed. 1990).
134. Del Duca, *supra* note 29, at 235. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 65.

> als and agreements expressed in the instruments were accurate reports of the parties' statements and agreements, and that any fact purported to have been performed in the presence of the *[Notaio]* was in fact performed.[135]

For a law graduate to become a *Notaio*, he must attend a Notary school and serve as an apprentice to a *Notaio* for two years.[136] After the two year apprenticeship to a *Notaio*, the individual must successfully complete a difficult national examination,[137] which is held annually by the *Ministero di Grazia e Giustizia*.[138] "The examination, which has both a theoretical and practical orientation, includes three written papers which concern an inter vivos transaction, a will and a non-contentious process respectively, and three oral [sections] which cover civil and commercial law, notarial records and organization, and taxation on notarial transaction."[139] Consequently, the law graduates who are successful in the examination are ranked in order of merit and accordingly allocated to fill the available vacancies.[140] The new *Notaio* is then assigned to a specific notarial district,[141] which coincides with the geographic jurisdiction of the *Tribunali*.[142] Each notarial district is composed of a limited number of *Notaii*,[143] which is determined by the size of the population and quantum of business done in that particular district.[144]

"Unlike, the *[Procuratore* or the *Avvocato]*, the *[Notaio]* must serve any person who requests his services, and, like [other legal practitioners], he may not advertise his services or compete for clients."[145] In addition, in order to prevent competition, the *Notaio* is prohibited from practicing outside his assigned district.[146] Although, a *Notaio* is considered a public official, he receives no salary from the State.[147] His income is derived from the clients he serves.[148] The fees which the *Notaio* receives, though fixed by the law, are quite generous.[149] "The average *Notaio* earns considerably more than the average *Avvocato*,

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135. Aldisert, *supra* note 4, at 945.
136. Del Duca, *supra* note 29, at 235.
137. Del Duca, *supra* note 29, at 235.
138. CERTOMA, *supra* note 25, at 57.
139. CERTOMA, *supra* note 25, at 57.
140. CERTOMA, *supra* note 25, at 57. Candidates who are successful but who are not allocated a position due to the limited availability must retake the *Notaio* examination in the future if they desire to be reconsidered for a position. CERTOMA, *supra* note 25, at 57. As a consolation, however, points are added to the grade received in any subsequent *Notaio* examination taken by the candidate. CERTOMA, *supra* note 25, at 57.
141. Del Duca, *supra* note 29, at 235.
142. CERTOMA, *supra* note 25, at 57.
143. CERTOMA, *supra* note 25, at 57.
144. CERTOMA, *supra* note 25, at 57-58.
145. CAPPELLETTI ET AL., *supra* note 17, at 101.
146. CAPPELLETTI ET AL., *supra* note 17, at 101.
147. CAPPELLETTI ET AL., *supra* note 17, at 101.
148. CAPPELLETTI ET AL., *supra* note 17, at 101.
149. CAPPELLETTI ET AL., *supra* note 17, at 101.

Procuratore, or [Magistrate]."[150] In short, the *Notaio* is one of the more financially gratifying positions in the Italian legal profession.[151] The position of the *Notaio*, however, has some unfavorable aspects to it. The most commonly cited criticisms include, at times, that the work may be quite dull[152] and that the individual *Notaio* has very little choice over where he will practice his art.[153]

C. ACADEMIA

Of all the categories in the legal profession the most prestigious and most difficult to attain is a career in academia.[154] "The title 'professor' is a coveted and prestigious one."[155] A law graduate who desires entrance into the world of academia must initially begin his path as an assistant to a sponsoring professor.[156] As an assistant, the law graduate's duties include researching and teaching, when necessary.[157] The assistant's progress on the path to professorship depends upon his performance in a series of national competitions, familiarly known as *concorsi*.[158] Success in these *concorsi* is usually determined by the quality and quantity of the assistant's publications.[159]

The threshold step in an assistant's path to professorship is the acquisition, through a competition, of the *Libera Docenza*.[160] After acquisition of this crucial step, the assistant is bestowed the title of *Libero Docente* and is permitted to conduct classes without supervision.[161] Most assistants, however, never attain this status.[162] Nonetheless, the few that do acquire it have spent at least five years and often a decade or more in their pursuit.[163] The procurement of the *Novi Libera Docenza* does not automatically result in an academic position, which is dependent on the professional vacancies available.[164] It is quite common that individuals who hold the status of *Libero Docente* continue as assistants for several years until they secure an academic post.[165]

When an academic post becomes available, the *Ministero dell' Educazione* announces the vacancy.[166] It is, however, the faculty of the particular law

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150. CAPPELLETTI & PERILLO, *supra* note 19, at 67.
151. CAPPELLETTI & PERILLO, *supra* note 19, at 67.
152. CAPPELLETTI ET AL., *supra* note 17, at 102.
153. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 67.
154. CAPPELLETTI ET AL., *supra* note 17, at 87.
155. CAPPELLETTI ET AL., *supra* note 17, at 87.
156. CAPPELLETTI ET AL., *supra* note 17, at 87.
157. CAPPELLETTI ET AL., *supra* note 17, at 87.
158. CAPPELLETTI ET AL., *supra* note 17, at 87.
159. CAPPELLETTI ET AL., *supra* note 17, at 87.
160. CAPPELLETTI ET AL., *supra* note 17, at 87.
161. CAPPELLETTI ET AL., *supra* note 17, at 87.
162. CAPPELLETTI ET AL., *supra* note 17, at 87.
163. CAPPELLETTI ET AL., *supra* note 17, at 87.
164. CAPPELLETTI ET AL., *supra* note 17, at 87.
165. CAPPELLETTI ET AL., *supra* note 17, at 87.
166. CAPPELLETTI ET AL., *supra* note 17, at 88.

school with the vacancy that evaluates and determines who will be chosen to fill the opening.[167] The vacancy is open not only to the holder of a *Libera Docenza*, but to professors of other universities.[168] Once the assistant obtains an academic post, he acquires the title of *Professore Straordinario*[169] in a particular legal specialty.[170] Th individual will serve as a *Professore Straordinario* for approximately three years, after which he will be evaluated by a national committee of professors in the individual's field of expertise.[171] Subsequent to a satisfactory finding by this committee, the individual is promoted to *Professore Ordinario*.[172] The position of *Professore Ordinario* is a full professorship from which the individual "may not be removed, except for cause, until the mandatory retirement age of seventy-five."[173]

In comparison to academia in the United States, it appears that American law professors, in general, "are not products of unique training programs, rather, they are generally members of the [legal profession, who have demonstrated] academic excellence and who have a penchant for teaching and legal scholarship."[174] Moreover, in relation to their Italian counterparts, American law professors, in general, do more teaching and somewhat less scholarly research and writing.[175]

D. JUDICIARY

The Italian judiciary is composed of two elements, the Italian court system and the magistracy. The magistracy is the final category in which Italian law graduates may enter. Within this section, I shall initially present a general view of the Italian court system and then proceed to discuss the magistracy. In short, the magistracy section will revolve around the entrance requirements, promotions, and the friction its members have with *Mafia*-type organizations.

1. *Italian Court System*[176]—Although judicial districts are organized by region and province,[177] Italy has a unified national court system.[178] Its court sys-

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167. CAPPELLETTI ET AL., *supra* note 17, at 88.
168. CAPPELLETTI ET AL., *supra* note 17, at 88.
169. CAPPELLETTI ET AL., *supra* note 17, at 88.
170. CAPPELLETTI ET AL., *supra* note 17, at 88. An Italian professor is not appointed merely as a professor of law, but as a professor of law in a particular legal specialty. CAPPELLETTI ET AL., *supra* note 17, at 88. For example, an individual may be appointed as a professor of criminal law or as a professor of taxation. CAPPELLETTI ET AL., *supra* note 17, at 88.
171. CAPPELLETTI ET AL., *supra* note 17, at 88.
172. CAPPELLETTI ET AL., *supra* note 17, at 88.
173. CAPPELLETTI ET AL., *supra* note 17, at 88.
174. Chaim & Rohwer, *supra* note 10, at 17.
175. Chaim & Rohwer, *supra* note 10, at 26.
176. For a greater visualization of the Italian court system, a schematic diagram has been provided in Appendix II.
177. Del Duca, *supra* note 29, at 227.
178. CAPPELLETTI ET AL., *supra* note 17, at 79.

tem is divided into two basic categories, "ordinary courts" and "special courts."[179] "Ordinary courts" hear most criminal prosecutions and almost all civil actions between private parties.[180] "Special courts," on the other hand, hear only certain types of cases, such as constitutional cases or those involving the State or one of its subdivisions.[181]

The "ordinary courts" in Italy are composed of the *Conciliatori*, *Pretori*, *Tribunali*, *Corte di Appello*, *Corti d' Assise*, *Corti d' Assise di Appello*, and the *Corte di Cassazione*.[182] At the lowest level of the Italian court system are the *Conciliatori*.[183] The *Conciliatori* are only competent to hear petty civil cases; however, they are capable of presiding over larger matters if the parties involved agree.[184] On many occasions the *Conciliatori* act more as mediators than as judges.[185] "The *[C]onciliatori*, who serve for prestige and in fulfillment of a civic duty, are not paid a salary and are not necessarily law school graduates."[186] They do, however, receive fees from the cases over which they preside.[187] The *Conciliatori* are appointed by the *Consiglio Superiore della Magistratura*[188] for a three-year renewable term.[189]

The next level of courts in the Italian court system are those presided over by the *Pretori*.[190] The *Pretore* is the lowest level career judge and "it is here that the young law graduate who has elected to pursue a judicial career begins his duties."[191] The *Pretori*, like the *Conciliatori*, sit as single-judge courts.[192] These courts have jurisdiction over civil matters involving amounts up to 1,000,000 *lire*[193] and in criminal matters punishable only by fine[194] or by imprisonment of four years or less.[195] In addition, the *Pretori* preside over cases involving "cer-

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179. CAPPELLETTI & PERILLO, *supra* note 19, at 69.
180. CAPPELLETTI & PERILLO, *supra* note 19, at 69.
181. Cappelletti & Perillo, *supra* note 19, at 69.
182. Aldisert, *supra* note 4, at 983-84.
183. CAPPELLETTI ET AL., *supra* note 17, at 79.
184. Del Duca, *supra* note 29, at 228.
185. CAPPELLETTI & PERILLO, *supra* note 19, at 69.
186. CAPPELLETTI ET AL., *supra* note 17, at 79.
187. Aldisert, *supra* note 4, at 983.
188. The *Consiglio Superiore della Magistratura* is the governing body of the Italian magistracy.
189. Elisabeth Silvestri, *Alternatives to or Within Formal Procedures in Italy*, 8 CIV. JUST. Q. 45, 47 (1989). The requirements that an individual must fulfill to be appointed as a *Conciliatore* are Italian citizenship, residence in the town, a minimum age of 25 years, and the capability of holding office with independence and authority. *Id.* at 47 n.7. *See* Del Duca, *supra* note 29, at 228.
190. Del Duca, *supra* note 29, at 228.
191. Aldisert, *supra* note 4, at 983.
192. CAPPELLETTI & PERILLO, *supra* note 19, at 69-70.
193. One million *lire* is approximately $833 when estimating the current exchange rate as being 1,200 *lire* per dollar.
194. Del Duca, *supra* note 29, at 228.
195. Jeffrey J. Miller, *Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 22 N.Y.U. J. INT'L L. & POL. 215, 221 n.29 (1990) (explaining that the *Pretori* are analogous to small claims courts, with both civil and criminal jurisdiction).

tain specified crimes, such as theft, burglary, and manslaughter, which are punishable by more serious sentences."[196] Furthermore, it has original jurisdiction over issues of labor law.[197]

In order to relieve the workload of the backlogged Italian courts, practicing *Avvocati* and *Notaii* are frequently appointed as temporary *Pretori*, familarly known as *Vice-Pretori*.[198] These practitioners are "appointed on a part-time basis to serve unpaid three-year terms."[199] Alternatively, some practitioners may be appointed as *Vice-Pretori* with pay for a six-month period.[200] Unlike the three-year appointees, the six-month appointees are prohibited from practicing law while serving as *Vice-Pretori*.[201]

"The provincial capitals and about fifty other towns, mainly in southern Italy and the Piedmont, [hold] the next highest court[s], the multi-judge *[T]ribunal[i]*, comparable to [the American] trial courts of general jurisdiction."[202] These three-judge courts have the authority to entertain all civil matters not handled by the *Conciliatori* or the *Pretori*.[203] In addition, "they have exclusive jurisdiction on matters of tax, personal status and capacity, the authenticity of documents, cases involving redress for other than monetary damages, and execution of judgments on real property."[204] The *Tribunali* also have jurisdiction over criminal matters that are not handled by the *Pretori*[205] and involve a possible sentence of incarceration of eight years or less.[206] Finally, "the *[T]ribunali* hear civil and criminal appeals on questions of fact and law from the *[P]retori*."[207]

Appeals from the *Tribunali* go to the twenty-three *Corti di Appello* sitting in regional capitals and major cities throughout Italy.[208] Each *Corte di Appello*, is composed of a panel of five judges, who review questions of both law and fact.[209] The *Corti di Appello*, however, are courts that have exclusive jurisdiction over adoption approvals and matters involving enforcement of foreign judgments.[210]

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196. *Id. See* Codice di Procedura Penale [C.P.P.] art. 7 (1989) (Italy).
197. Del Duca, *supra* note 29, at 229.
198. Del Duca, *supra* note 29, at 229.
199. Del Duca, *supra* note 29, at 229 (The *Vice-Pretore* position is one of prestige and may be socially and financially beneficial to the appointee in the future).
200. CAPPELLETTI & PERILLO, *supra* note 19, at 70.
201. CAPPELLETTI & PERILLO, *supra* note 19, at 70.
202. Aldisert, *supra* note 4, at 984.
203. Del Duca, *supra* note 29, at 229.
204. Del Duca, *supra* note 29, at 229.
205. CAPPELLETTI ET AL., *supra* note 17, at 80.
206. Del Duca, *supra* note 29, at 229.
207. CAPPELLETTI ET AL., *supra* note 17, at 79.
208. MICHAEL HARRISON, GOVERNMENT AND POLITICS, IN ITALY: A COUNTRY STUDY 229, 258 (Rinn S. Shinn ed., 1985).
209. CAPPELLETTI ET AL., *supra* note 17, at 80.
210. CAPPELLETTI ET AL., *supra* note 17, at 80.

For criminal matters, including those against the State[211] which involve a possible penalty of incarceration of greater than eight years,[212] the *Corti d' Assise* have exclusive jurisdiction.[213] The *Corti d' Assise* are basically specialized, yet distinct, sections of the *Tribunali*, which handle the more serious criminal matters.[214] The cases that are heard in the *Corti d' Assise* are presided over by two professional judges and six *giudice popolari*.[215] The *giudice popolari* are lay-jurors, who, with the professional judges, decide the law and the facts of a case brought in the *Corti d' Assise*.[216] A majority vote controls the verdict,[217] but if there is a tie, the defendant is acquitted.[218]

Appeals on questions of fact and law from the *Corti d' Assise* are heard by *Corti d' Assise di Appello*.[219] The *Corti d' Assise di Appello* are organized as special sections of the *Corti di Appello* and, like the *Corti d' Assise*, are also composed of two professional judges and six *giudice popolari*.[220] The *giudice popolari*, unlike American jurors whose tasks are limited to determining questions of fact, have the duty of determining not only questions of fact, but of law.[221] In addition, "the six *[giudice popolari]* have the voting power to override the views of the two . . . [professional] judges, [but] this rarely [occurs]."[222]

Finally, the preeminent court in the category of "ordinary courts" is the *Corte di Cassazione*,[223] located in Rome.[224] The *Corte di Cassazione*, as the highest appellate court in Italy, is limited to reviewing only questions of law.[225] "The right of appeal to the *[Corte di Cassazione]* is constitutionally guaranteed with regard to final judgments and certain intermediate orders affecting personal liberties."[226] "The purpose of the *[Corte di Cassazione]* is to ensure the unity and uniformity of national law and to regulate conflicts of jurisdiction."[227] "Although one of the functions of the *Corte di Cassazione* is to provide for the

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211. Miller, supra note 195, at 221 n.29.

212. The *Corti d'Assise*, however, do not have exclusive jurisdiction over certain specified criminal matters which are now assigned to the *Pretori*, as delegated by the *Codice di Procedura Penale. Codice di Procedura Penale*, art. VII. These specified criminal matters include such crimes as burglary, theft, and manslaughter.

213. Del Duca, *supra* note 29, at 229.

214. CAPPELLETTI ET AL., *supra* note 17, at 80.

215. Aldisert, *supra* note 4, at 984.

216. Aldisert, *supra* note 4, at 984.

217. Aldisert, *supra* note 4, at 984.

218. CAPPELLETTI ET AL., *supra* note 17, at 80.

219. CAPPELLETTI ET AL., *supra* note 17, at 80.

220. CAPPELLETTI ET AL., *supra* note 17, at 80.

221. Del Duca, *supra* note 29, at 230.

222. Del Duca, *supra* note 29, at 230.

223. Aldisert, *supra* note 4, at 984.

224. CAPPELLETTI & PERILLO, *supra* note 19, at 72.

225. CERTOMA, *supra* note 25, at 189.

226. Del Duca, *supra* note 29, at 230; *See* La Costituzione della Repubblica Italiana [Constitution] art. 111 (Italy).

227. Del Duca, *supra* note 29, at 230.

uniform interpretation of the law, its decision is not binding outside the case in which it was rendered."[228] Moreover, even though the doctrine of stare decisis is not officially recognized, the decisions rendered by the *Corte di Cassazione* are seen as persuasive authority.[229]

The *Corte di Cassazione* is composed of eight sections that entertain civil matters and six sections that entertain criminal matters.[230] Each section is composed of a panel of five judges that presides over the appealed matter.[231] Finally, the *Corte di Cassazione* has the power to go into a type of en banc session when important cases arise.[232] During this en banc session, known as the *sezioni unite*, eleven of the highest ranking judges in Italy preside over the case.[233]

The second category of courts is composed of those known as "special courts." Three of the more important "special courts"[234] are the *Corte Suprema Costituzionale*,[235] the *Consiglio di Stato*, and the *Corte dei Conti*.[236]

The *Corte Suprema Costituzionale* is a special court that was created in 1956 as mandated by the Italian Constitution.[237] "[It] is the only [Italian] court competent to review the constitutionality of laws."[238] Since the *Corte Suprema Costituzionale* usually adjudicates constitutional challenges that arise in the course of a proceeding in other courts, it is quite rare for it to preside over an entire case.[239] For example, when a court is faced with a statute that it considers unconstitutional, it will suspend the proceeding before it[240] and refer the issue to the *Corte Suprema Costituzionale*.[241] The original proceeding is suspended indefinitely until the *Corte Suprema Costituzionale* adjudicates the referred issue.[242] "A decision of constitutionality does not preclude future challenges by other parties."[243] The *Corte Suprema Costituzionale* also has the power to resolve controversies "between two regions, between a region and the [S]tate and

228. CAPPELLETTI & PERILLO, *supra* note 19, at 72.
229. Del Duca, *supra* note 29, at 230.
230. Del Duca, *supra* note 29, at 230.
231. Del Duca, *supra* note 29, at 230.
232. Aldisert, *supra* note 4, at 984.
233. Aldisert, *supra* note 4, at 984.
234. Aldisert, *supra* note 4, at 987. *See* Del Duca, *supra* note 29, at 232-33. *See* La Costituzione della Repubblica Italiana [Constitution] arts. 103, 134 (Italy).
235. *See* La Costituzione della Repubblica Italiana [Constitution] arts. 134-37 (Italy).
236. *See* La Costituzione della Repubblica Italiana [Constitution] art. 103 (Italy).
237. CAPPELLETTI & PERILLO, *supra* note 19, at 73.
238. Del Duca, *supra* note 29, at 233. *See* La Costituzione della Repubblica Italiana [Constitution] art. 134 (Italy).
239. CAPPELLETTI & PERILLO, *supra* note 19, at 73.
240. Alessandro Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 AM. J. COMP. L. 373, 375 (1990).
241. Del Duca, *supra* note 29, at 233.
242. Del Duca, *supra* note 29, at 233.
243. Del Duca, *supra* note 29, at 233.

between higher [governmental] organs of the [S]tate."[244] Furthermore, this court has the competency to entertain impeachment proceedings against the President of the Republic of Italy and the cabinet ministers.[245]

The *Corte Suprema Costituzionale* is composed of fifteen judges: a third of whom are chosen by the President of the Republic, another third of whom are chosen by a joint session of Parliament, and the final third of whom are chosen by the *Corte di Cassazione*, the *Consiglio di Stato*, and the *Corte dei Conti*.[246] The judges on this court serve for a non-renewable nine-year term and are chosen from among judges of other high level courts, law professors, and law practitioners with a minimum of twenty years of legal experience.[247]

Another important "special court" found in Italy is the *Consiglio di Stato*. "The *Consiglio di Stato* is an advisory organ on judicial and administrative matters and ensures the legality of public administration."[248] Moreover, it is the supreme administrative court in Italy.[249] The *Consiglio di Stato*, as well as all other administrative courts in Italy, "[is] composed of [magistrates] who are part of the executive rather than the judicial branch of government."[250] This court is divided into six sections, three of which provide advisory opinions[251] to government officials, and three of which hear appeals[252] from the lower administrative courts, familiarly known as *Tribunali Amministrativi Regionali*.[253] The *Tribunali Amministrativi Regionali* are lower level administrative courts that are found in all of Italy's twenty regions.[254] These lower level administrative courts have jurisdiction over administrative actions and controversies that arise within their regions.[255] Some examples of cases over which the *Tribunali Am-*

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244. CAPPELLETTI ET AL., *supra* note 17, at 73. *See* La Costituzione della Repubblica Italiana [Constitution] art. 134 (Italy).

245. CAPELLETTI ET AL., *supra* note 17, at 73. *See* La Costituzione della Repubblica Italiana [Constitution] art. 134 (Italy).

246. La Costituzione della Repubblica Italiana [Constitution] art. 135 (Italy). *See* Del Duca, *supra* note 29, at 233.

247. La Costituzione della Repubblica Italiana [Constitution] art. 135 (Italy).

248. La Costituzione della Repubblica Italiana [Constitution] art. 100 (Italy).

249. Del Duca, *supra* note 29, at 232.

250. Del Duca, *supra* note 29, at 231.

251. CERTOMA, *supra* note 25, at 159. "[The] consultative functions are exercised by [sections I, II, and III] . . . and by the General Assembly, [which is] composed of the President [of *Consiglio di Stato*] and all [one hundred eleven magistrates] . . . of the *[Consiglio di Stato]*." CERTOMA, *supra* note 25, at 159. "The President of the *Consiglio di Stato*, is a civil servant appointed by the President of the Republic of Italy, after resolution of the Counsel of Ministers." INFORMATION AND COPYRIGHT SERVICE, PRESIDENCY OF THE COUNCIL OF MINISTERS, ITALIAN REPUBLIC CONSTITUTIONAL ADMINISTRATION 67 (1976).

252. CERTOMA, *supra* note 25, at 159. "[The] judicial functions are exercised by the IV, V and VI sections and by the Plenary Assembly, [which is] composed of the President [of *Consiglio di Stato*] and four [magistrates] . . . from each judicial section." CERTOMA, *supra* note 25, at 159.

253. Del Duca, *supra* note 29, at 232.

254. Del Duca, *supra* note 29, at 231.

255. Del Duca, *supra* note 29, at 231.

ministrativi Regionali may preside include "the revocation of an administrative act usually on the grounds of its illegitimacy because of the administrative body's lack of competence, violation of a statue, exceeding authority (illegittimita), or [an] abuse of discretion [by an administrative official]."[256]

Apart from its appellate jurisdiction, the *Consiglio di Stato* has original jurisdiction over matters involving enforcement proceedings taken to compel the public administration to conform to judgments rendered by other courts.[257] Finally, it also has exclusive jurisdiction over matters in which the national government is involved.[258]

In addition to the *Consiglio di Stato*, another important administrative court is the *Corte dei Conti*. "The *Corte dei Conti* was instituted in 1862 and is the highest judicial body which exercises control and jurisdiction over matters of public accounting and pensions."[259] Its primary role is to assess the public finances and to audit and prosecute public officials for misappropriation and mismanagement of public assets.[260] "The [C]ourt's judicial functions fall into three broad categories: disputes regarding the administration of State funds and property; pensions; and the employment disputes of its own personnel."[261] In addition, the *Corte dei Conti* also provides consultation to the Government and Parliament regarding any legislation which may modify the existing law on public finances.[262]

The *Corte dei Conti* is divided into nine sections; eight of which sit in Rome[263] and one of which sits in Palermo.[264] A minimum of five magistrates is required to preside over a case in any of the sections.[265] An appeal from a decision rendered by a section of the *Corte dei Conti* may be taken to a special joint section of the *Corte dei Conti*, where eleven judges selected from the regular sections will hear the appeal.[266] In short, this Court's fundamental purpose is to "exercise[ ] a form of preventive control on the legitimacy of [g]overnment measures and of subsequent control on the management of the budget" and public finances.[267]

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256. Aldisert, *supra* note 4, at 989.

257. CERTOMA, *supra* note 25, at 159.

258. Aldisert, *supra* note 4, at 989.

259. WHO'S WHO IN ITALY 2449 (1992).

260. Del Duca, *supra* note 29, at 233.

261. CERTOMA, *supra* note 25, at 158.

262. CERTOMA, *supra* note 25, at 158-59.

263. CAPPELLETTI ET AL., *supra* note 17, at 83 (Six out of eight sections located in Rome are concerned with pension claims.).

264. CAPPELLETTI ET AL., *supra* note 17, at 83.

265. CAPPELLETTI ET AL., *supra* note 17, at 83.

266. CAPPELLETTI ET AL., *supra* note 17, at 83.

267. La Costituzione della Repubblica Italiana [Constitution] art. 100 (Italy).

2. *Magistracy*—As stated earlier, the final category of legal professionals in which Italian law graduates enter is the magistracy, familiarly known as the *Magistratura*. "The . . . magistracy . . . may be broadly divided between judicial and invocatory organs depending upon whether their fundamental function is respectively adjudication or the formulation of requests and opinions which are to be considered by a separate decision-making organ."[268] While the judicial functions are carried out by judges, familiarly known as the *Giudici*, "the invocatory function is generally exercised by a distinct organ known as the *[P]ubblico [M]inistero*."[269] "The *[P]ubblico [M]inistero* is, in essence, a public office which has the duty of giving effect to the collective interest either by initiating [criminal] judicial proceedings or by intervening in proceedings commenced by private parties."[270] Members of the *Pubblico Ministero*[271] are also known as public prosecutors.[272] Under the Italian Constitution,[273] both the public prosecutors[274] and judges are members of the *Magistratura*.[275] In addition, both branches follow a common career path,[276] have the same entrance requirements and salary,[277] and allow members to move throughout their careers from the role of a public prosecutor to that of a judge and vice versa.[278]

Both branches of the *Magistratura* are governed by the *Consiglio Superiore della Magistratura*,[279] which is composed of thirty-three members: twenty of which are elected by magistrates from their own ranks, ten of which are elected by a qualified majority of Parliament in joint sitting, and three of which are filled by the President of the Italian Republic, the *Primo Presidente*,[280] and

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268. CERTOMA, *supra* note 25, at 61.

269. CERTOMA, *supra* note 25, at 61.

270. CERTOMA, *supra* note 25, at 68-69; *see* La Costituzione della Repubblica Italiana [Constitution] art. 112 (Italy). It must be noted that the role of the *Pubblico Ministero* is not exclusively limited to criminal proceedings. It has "various functions in civil proceedings . . . [such as the appointment of conservators or guardians] when a person is presumed dead, and the application for orders relating to parental authority, interdiction, and capacity . . . ." CERTOMA, *supra* note 25, at 69.

271. Though both the *Pubblico Ministero* and *Avvocatura dello Stato* are organs of the State, the functions of the *Pubblico Ministero* are to be distinguished from those of the *Avvocatura dello Stato* because, while the *Pubblico Ministero* is concerned with the collective public interest of the State, the *Avvocatura dello Stato* is concerned with the State's private interests. CERTOMA, *supra* note 25, at 70.

272. 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, 29 (1992).

273. La Costituzione della Repubblica Italiana [Constitution] arts. 100-08 (Italy).

274. Public prosecutors, like the entry level practitioners, are known as *Procuratori*, but there is no affiliation between the two professions. Del Duca, *supra* note 29, at 231 n.73.

275. Pizzi & Marafioti, *supra* note 272, at 40.

276. Pizzi & Marafioti, *supra* note 272, at 30.

277. Pizzi & Marafioti, *supra* note 272, at 29-30.

278. Pizzi & Marafioti, *supra* note 272, at 40.

279. CAPPELLETTI ET AL., *supra* note 17, at 103. *See* Del Duca, *supra* note 29, at 231.

280. The *Primo Presidente* is the Chief Justice of the *Corte di Cassazione*.

Procuratore Generale[281] of the *Corte di Cassazione*.[282] Entrance into the *Magistratura* is determined by a national examination[283] "held annually by the *[Ministero di Grazia e Giustizia]* pursuant to a resolution of the *[Consiglio Superiore della Magistratura]* to fill a given number of vacancies."[284] Out of all the professional entrance examinations, the one that allows admission into the *Magistratura* has been cited as the most challenging.[285] This examination is composed of both written and oral portions.[286] The written portion tests subjects such as civil, Roman, criminal, and administrative law.[287] The oral portion, in addition to the subjects tested in the written portion, may probe such topics as constitutional, ecclesiastical, international, labor, and social welfare law, as well as, civil and criminal procedure, and statistics.[288] "Only persons who hold a law degree, are aged between twenty-one and thirty, and satisfy certain physical and moral requirements are eligible to take the entrance examinations."[289] Once the candidates are successful in fulfilling all the appropriate entrance requirements,[290] they are ranked in order of merit and accordingly allocated to the available vacancies.[291] Consequently, the successful candidate is appointed as a probationary magistrate, familiarly known as an *Uditore Giudiziario*.[292] The *Uditore Giudiziario* is then assigned to a *Corte di Appello*, where he will partake in a six-month apprenticeship program.[293] After the individual's appren-

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281. The *Procuratore Generale* of the *Corte di Cassazione* is also known as the Attorney General of the *Pubblico Ministero*.

282. Pizzorusso, *supra* note 240, at 377 n.16.

283. An exception to this form of recruitment is the direct appointment of full law professors and distinguished *Avvocati* with fifteen years of experience to the *Corti di Cassazione* as judges. CAPPELLETTI & PERILLO, *supra* note 19, at 75.

284. CERTOMA, *supra* note 25, at 71.

285. CERTOMA, *supra* note 25, at 72.

286. CERTOMA, *supra* note 25, at 72.

287. CERTOMA, *supra* note 25, at 72.

288. CERTOMA, *supra* note 25, at 72.

289. CERTOMA, *supra* note 25, at 72.

290. The selection of administrative judges, like ordinary judges, is on the basis of educational qualifications and a competitive examination. Moreover, all administrative law judges, such as those found in the *Consiglio di Stato* and the *Corte dei Conti*, must be graduates of an Italian law school. Del Duca, *supra* note 29, at 232.

291. CERTOMA, *supra* note 25, at 72. It must be taken into account that, since there is a shortage of judges, most successful candidates get placed. *See* CAPPELLETTI ET. AL., *supra* note 17, at 104.

292. CERTOMA, *supra* note 25, at 71-72. *See* CAPPELLETTI & PERILLO, *supra* note 19, at 74. *See also* CAPPELLETTI ET AL., *supra* note 17, at 104.

293. CERTOMA, *supra* note 25, at 72. The *Uditore Giudiziario* may also be assigned to serve his apprenticeship in a public prosecutor's office attached to the *Corte di Appello*, depending on the availability. CAPPELLETTI ET AL., *supra* note 17, at 104. The program entails assisting other magistrates and attending cerain courses that will prepare the *Uditore Giudiziario* for his future role as either a *Procuratore* or *Giudice*. CERTOMA, *supra* note 25, at 72.

ticeship, he is granted the status of *Uditore*[294] and is assigned to the lowest level of the professional judicial ladder, the *Pretore*.[295]

Traditionally, promotion was based upon examination and merit.[296] Today, however, all promotions are granted on the basis of seniority.[297]

> The [current] requisite periods of seniority for promotion are two years from appointment as an *[U]ditore* for promotion to a *[Magistrato di] Tribunale*, [eleven] years from appointment [as a *Magistrato di Tribunale*] for promotion to a *[Magistrato d'] Appello*, a further seven years for appointment as a *[Magistrato di Cassazione]*, and another eight years for the declaration of eligibility for superior management functions.[298]

This process of advancement is dependent on what positions are available in the judicial system. One disadvantage of the change to a seniority-based promotion system is that the current system may discourage further professional preparation.[299] In short, all magistrates may hold office until the age of seventy and can be dismissed only for cause.[300]

In comparing the Italian magistrate with the American judge, there are several key distinctions. For example, while the Italian magistrate is educated and trained specifically for his position, judges in the United States have no formal education beyond law school.[301] Moreover, while the Italian magistrate obtains his position through merit and scholarly achievement, generally, the American judge acquires his position through the political process.[302] Moreover, in select-

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294. CERTOMA, *supra* note 25, at 72. The titles of *Uditore Giudiziario*, *Uditore* and *Magistrato* (magistrate) are those granted to both judges and public prosecutors.

295. Mary L. Volcansek, *The Judicial Role in Italy: Independence, Impartiality and Legitimacy*, 90 JUDICATURE 322, 323 (1990).

296. CERTOMA, *supra* note 25, at 72. Until the 1960s promotions were by the highest judicial officials and were based on rigorous examinations, scrutiny of decisions, and public morality; promotions could be denied for using incorrect interpretations of law or written opinions that indicated a political persuasion or that were simply dull. This merit system was dismantled to speed the decisional process and to remove control over judicial careers from holdover Fascist judges. *See* Volcansek, *supra* note 295, at 323.

297. CERTOMA, *supra* note 25, at 72.

298. CERTOMA, *supra* note 25, at 72-73. "The title of [*Magistrato di Tribunale*] is somewhat misleading. A person bearing that title may be appointed to serve as a [*P]retore*, as a [*Giudice*] in a [*Tribunale*], or as a [*Procuratore*] attached to a [*Tribunale*]." CAPPELLETTI ET AL., *supra* note 17, at 105.

299. CERTOMA, *supra* note 25, at 73.

300. CAPPELLETTI ET AL., *supra* note 17, at 106.

301. ABADINSKY, *supra* note 5, at 10.

302. ABADINSKY, *supra* note 5, at 10. "Judges in the United States are typically attorneys who have been active in the political arena." ABADINSKY, *supra* note 5, at 10. A merit selection system, however, does exist in a minority of states. PAUL WICE, JUDGES & LAWYERS THE HUMAN SIDE OF JUSTICE, 190 (1991). This form of judicial selection was originated in 1937 by the Missouri Court Plan and has currently been adopted in thirteen states. *Id.* "[T]he merit system of judicial selection attempts to incorporate the positive attributes of both elective and appointive systems. Merit selection is in reality a 'mixed system' designed to select judicial candidates of high quality and eliminate the influence of partisan politics while still providing for accountability through the use of retention elections." *Id.*

ing judges, "the [American] judicial system provides a rich source of political patronage and, accordingly, there are important political implications in any method used to select judges."[303] In short, the two basic methods used in selecting judges in the United States are appointment by a chief executive, such as a mayor, governor, or president, or by an election.[304] Another significant difference is that, unlike in Italy where both public prosecutors and judges fall within the penumbra of the magistracy, in the United States public prosecutors and judges fall into two separate and distinct governmental divisions. While judges are part of the judiciary branch of government, the public prosecutors are part of the executive branch.[305]

In addition, the Italian judiciary is arranged along lines quite different than that of the United States.[306] Though the principle of separation of powers also exists in Italy,[307] the judiciary is not only a separate, but also an autonomous branch of government.[308] Magistrates are selected, promoted, and overseen by magistrates,[309] who make up a significant portion of *Consiglio Superiore della Magistratura*.[310] Furthermore, each individual magistrate is somewhat autonomous by nature in that he possesses a large measure of independence.[311] The Italian Constitution maintains that "judges are subject only to the law."[312] "This is an elliptical way of stating the judges need not heed unlawful orders from judicial superiors or other governmental authorities."[313] Moreover, magistrates may be neither transferred[314] nor removed from office without cause.[315] "This is to prevent the influence of judicial conduct by threats of expulsion or threats of exile to a desolate community."[316]

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303. ABADINSKY, *supra* note 5, at 110.

304. ABADINSKY, *supra* note 5, at 110.

305. *See* ABADINSKY, *supra* note 5, at 121. *See also* BLACK'S LAW DICTIONARY 1221, 1222 (6th ed. 1990).

306. CAPPELLETTI ET AL., *supra* note 17, at 102.

307. One commentator noted that:[I]n the Italian case, that separation works only in one direction—protecting the judiciary from other powers of government, but allowing [magistrates] to participate actively in other branches. [Magistrates] may participate in a full-time capacity in the executive branch and in Parliament, as well as in other posts, by taking temporary leave from their judicial tasks and relinquishing neither place nor seniority . . . The sole restrictions are that no exigencies exist to make their services within the [*Magistratura*] indispensable and that the outside activities do not affect adversely the status and prestige of the [*Magistratura*].Volcansek, *supra* note 295, at 324.

308. CAPPELLETTI ET AL., *supra* note 17, at 102.

309. CAPPELLETTI ET AL., *supra* note 17, at 102.

310. Pizzorusso, *supra* note 240, at 377 n.16. *See* Del Duca, *supra* note 29, at 231.

311. CAPPELLETTI ET AL., *supra* note 17, at 106.

312. La Costituzione della Repubblica Italiana [Constitution] art. 101 (Italy). *See* CAPPELLETTI ET AL., *supra* note 17, at 106.

313. CAPPELLETTI ET AL., *supra* note 17, at 106.

314. CAPPELLETTI ET AL., *supra* note 17, at 107.

315. CAPPELLETTI ET AL., *supra* note 17, at 106.

316. CAPPELLETTI ET AL., *supra* note 17, at 107.

As stated earlier, public prosecutors are also considered part of the magistracy. "The rationale behind the granting of judicial status to prosecutors is that they, like judges, must be impartial and free from political and governmental pressures."[317] One of the major reasons for such a significant insulation from political pressure seems to be that certain portions of the government are tainted by corruption, particularly in the southern region.[318] *Mafia*-type organizations are perhaps the major source of corruption in the political and social structure of Italy.[319]

Mafia-type organizations are so deeply interwoven into the fabric of Italian society that they have become part of the darker side of Italian culture.[320] For example, "[w]hen the former Christian Democratic mayor of Palermo, Vito Ciancimino, was [convicted] of steering public contracts to known *Mafiosi*, he defended himself by insisting that what he had done has been standard operating procedure in Palermo for decades."[321] Furthermore, " '[a]fter drugs, government contracts have become the *Mafia's* largest source of income,' says Francesco Misiani of Italy's *[Ministero di Grazia e Giustizia]*."[322] He further stated that, "if the *Mafia* were to disappear today, between 100,000 and 200,000 families in Sicily would lose their principal source of income."[323] In addition, magistrates have argued that the *Mafia's* extraordinary resilience can be accounted for only through the clandestine affiliation that it has with Italy's politicians.[324] In Italy, there is continuous friction and tension not only between the *Mafia* and the magistrates, but between the politicians and the magistrates. This tension may stem from the fact that almost all the significant political scandals within the last decade have been exposed by magistrates.[325]

As a result of the magistrates' extensive powers, including the ability to subpoena, arrest, interrogate, and incarcerate, they have risen to the forefront of the battle against political corruption and the influence of organized crime.[326] Magistrates, in their fight against the *Mafia*, have often confronted dangers that

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317. CAPPELLETTI ET AL., *supra* note 17, at 107.

318. *See* Stephen Addison, *Italian Judges Strike to Protest Conditions*, Reuters, Dec. 14 1990, *available in* LEXIS, Nexis Library, Reuters File; John Follain, *Italian Minister Declares War on Mafia after Night of Killings*, Reuter Library Report, Nov. 28, 1990, *available in* LEXIS, Nexis Library, Lbyrpt File.

319. *See* Follain, *supra* note 318. *See also Brave Arm of the Law*, *supra* note 116, at 35.

320. VITTORFRANCO S. PISANO, THE DYNAMICS OF SUBVERSION AND VIOLENCE IN CONTEMPORARY ITALY 148 (1987).

321. Alexander Stille, *A Family Affair Crime Rules in the South*, U.S. NEWS & WORLD REPORT, Nov. 12, 1990, at 50.

322. *Id.*

323. *Id.*

324. *Brave Arm of the Law*, *supra* note 116, at 35.

325. *Brave Arm of the Law*, *supra* note 116, at 35.

326. E.J. Dionne, Jr., *Italy Loves its Activist Magistrates Even as it Worries*, N.Y. TIMES, Oct. 16, 1984, at A15.

have, on occasion, led to tragedy.[327] For example, in the months preceding a maxi-trial,[328] where four hundred sixty-seven reputed *Mafia* members were being tried, almost a dozen prominent judges and policemen were assassinated.[329] The magistrates went to extraordinary lengths to guard against a similar *Mafia* reprisal during the aforementioned maxi-trial, which included holding the trial in a bombproof courthouse.[330] In addition, the authorities equipped the courtrooms with high-tech monitoring cameras and thirty bulletproof cages, which were used to detain defendants and informants.[331] Furthermore, the defendants were led into the courtroom through subterranean tunnels from holding pens located in an adjacent building. They were escorted into a courthouse that was guarded by more than two thousand *Carabinieri*[332] in appropriate protective gear.[333] In short, since the life of a magistrate is a dangerous one, the pavement in front of their homes is left free of pedestrians and cars.[334]

Despite the magistrate's extensive power, his resources are limited, and therefore, he may have some difficulty in adequately performing his duties, whether it be to combat the *Mafia* or to settle a dispute among village farmers.[335] An example of this is that many judiciary offices are understaffed, including those in the Rome district, where there are not enough typists to complete the work.[336] In addition, court clerks throughout Italy have a tendency to end their days at two o'clock in the afternoon.[337] Many magistrates lack not only computerized offices, but direct telephone lines.[338] "Lacking computerized archives, magistrates build up their own expertise, thus exposing themselves to additional risks; an expert on the *Mafia* . . . may become, in the words of an Italian judge, 'a walking archive' who can be erased by a single bullet."[339] In short, the duties of an Italian magistrate are not only dangerous, but difficult and demanding.

IV. CONCLUSION

As noted within this Article, the Italian legal profession has several distinguishing features which permeate throughout each particular subdivision. For

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327. *Id.*
328. Under the new *Codice di Procedura Penale*, which went into effect on October 24, 1989, maxi-trials have been abolished. *See* Miller, *supra* note 195, at 215.
329. Angus Deming & Theodore Stanger, *Sicily's Mafia on Trial*, NEWSWEEK, Feb. 4, 1986, at 38.
330. *Id.*
331. *Id.*
332. The *Carabinieri* are familiarly known as the military police.
333. Deming & Stanger, *supra* note 329, at 38.
334. *Brave Arm of the Law*, *supra* note 116, at 35.
335. *Brave Arm of the Law*, *supra* note 116, at 35.
336. *Brave Arm of the Law*, *supra* note 116, at 35.
337. *Brave Arm of the Law*, *supra* note 116, at 35.
338. *Brave Arm of the Law*, *supra* note 116, at 35.
339. *Brave Arm of the Law*, *supra* note 116, at 35.

example, whether he is to become a *Notaio* or a *Magistrato*, the individual aspiring to a career in law must undergo a series of extensive hurdles that test competency and qualifications. As a result of the distinct stratification among each of the legal subdivisions, there is an almost complete lack of lateral movement among personnel.[340] In addition, the emphasis placed upon specialization and apprenticeship results in an in-depth preparation for a successful legal career.[341]

It is the goal of this Article not only to present a general view of the Italian legal profession, but to promote a better understanding of the Italian legal system. It is the author's hope that the information provided within this Article will prove useful to individuals who currently have or anticipate having future relations with the Republic of Italy.[342] Finally, for the readers' perusal and further comprehension of the Italian legal profession and the court system, two schematic diagrams have been provided in Appendix I and II.

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340. CAPPELLETTI ET AL., *supra* note 17, at 109.

341. CAPPELLETTI ET AL., *supra* note 17, at 109.

342. Since completion of the above article, there have been several modifications made to the Italian Court System. Interested readers should review Louis F. Del Duca & Patrick Del Duca, *The Italian Legal System; Adapting to the Needs of a Dynamic Society*, THE DIGEST 12, (1994 & 95). The following are some of the more prominent changes:

Prior to 1993, the *Conciliatori* was at the lowest level of the Italian Court System. However, the creation of the *Giudice di Pace* (Justice of the Peace) has basically assumed the role that the *Conciliatori* formerly held. One significant difference is the *Giudice di Pace* must be law school graduate between the ages of 50 and 71 and is usually a former law professor, judge or lawyer. The jurisdiction of the *Giudice di Pace* includes presiding over cases involving contracts for goods valued up to 5 million lire ($3,125. using an exchange rate of 1,600 lire per dollar). Tort cases involving automobiles and boats seeking damages up to 30 million lire ($18,750.), contested administrative law cases seeking damages up to 30 million lire, as well as, other minor level cases, including misdemeanor crimes.

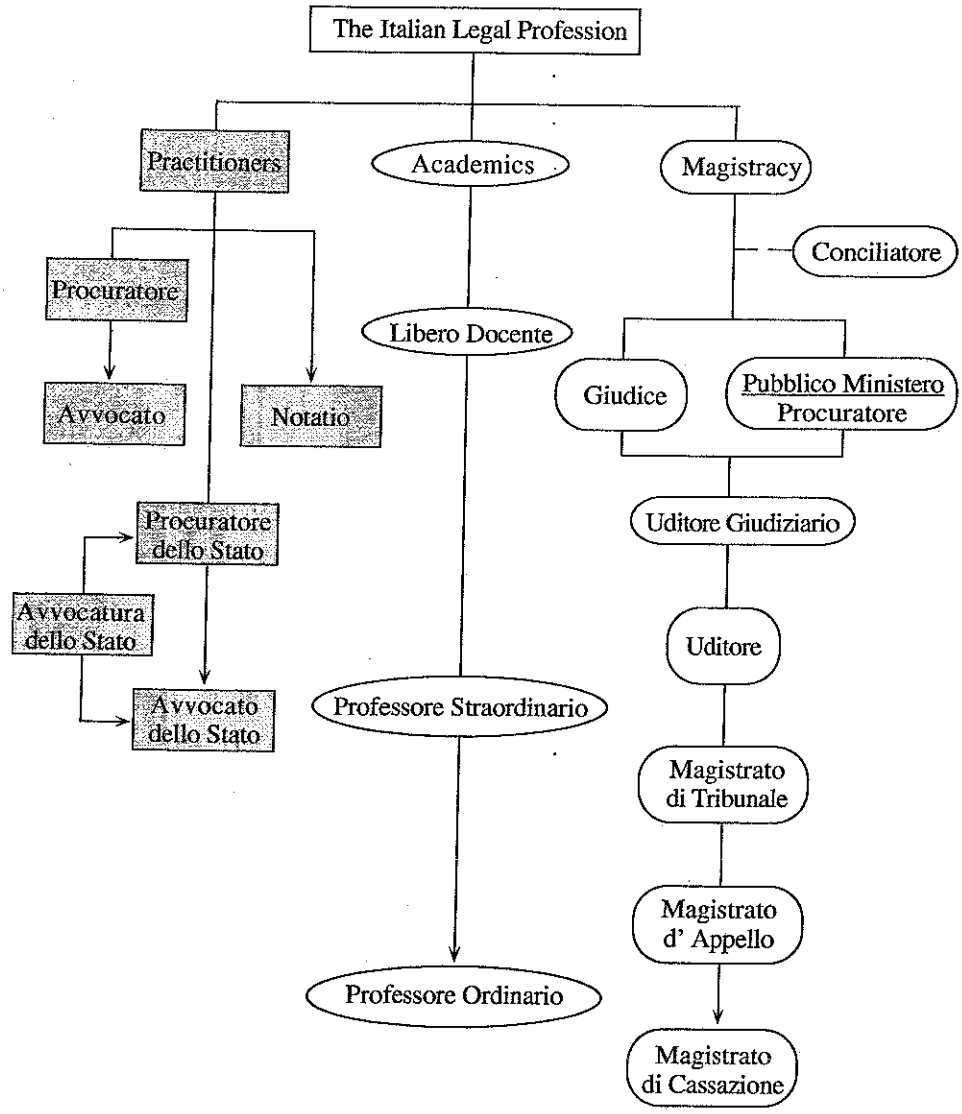
The next level of courts, the *Pretori*, have jurisdiction over civil matters not covered by the *Giudici di Pace*. The single judge *Pretori*, generally hears civil cases involving amounts up to 20 million lire, as well as, criminal matter punishable by fine or by less than 4 years imprisonment.

The next highest courts are the *Tribunali*, which have jurisdiction over cases not covered by the *Giudici di Pace* and *Pretori*. They also exercise jurisdiction over criminal matters involving a possible incarceration of up to 24 years. The *Tribunali* are currently divided into 2 divisions; one division involves cases that are presided over by one judge panels, while the other division utilizes three judge panels to hear cases. The three judge panel division has jurisdiction over criminal matters and appeals from the *Pretori* and the *Giudici di Pace*. They also hear specific types of civil cases involving juveniles, Bankruptcy and actions against administrators, directors, and liquidators of corporations. In short, a significant portion of civil cases are handle by the one judge panel division.

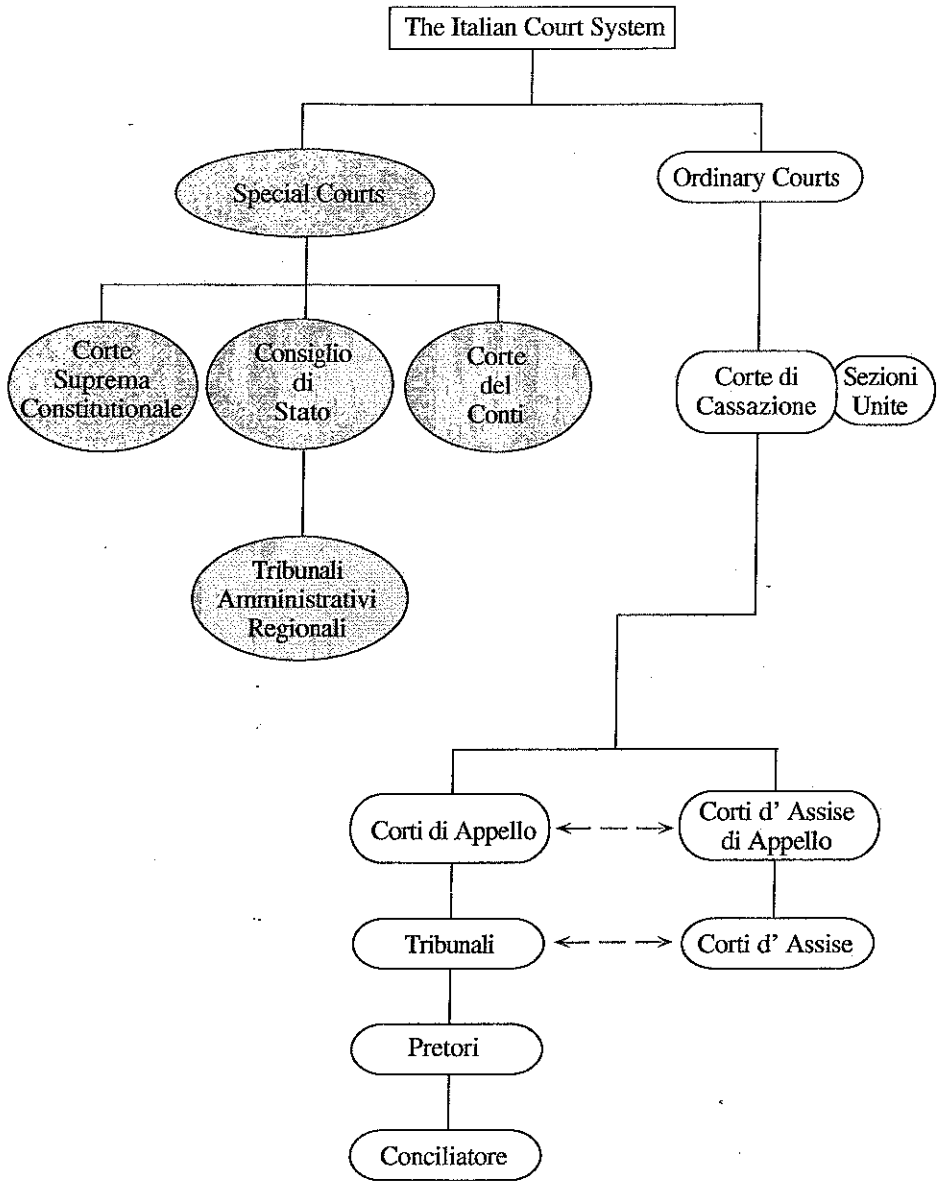
For criminal cases involving a possible sentence greater than 24 years of life imprisonment, the *Corti d' Assise* have jurisdiction.

The final prominent change in the Italian Court System involves the *Corti di Appello*, which now hear appeals from the *Tribunali* in three judge panels.

APPENDIX I


The Italian Legal Profession
Practitioners
Academics
Magistracy
Conciliatore
Procuratore
Libero Docente
Avvocato
Notatio
Giudice
Pubblico Ministero
Procuratore
Uditore Giudiziario
Procuratore dello Stato
Avvocatura dello Stato
Uditore
Avvocato dello Stato
Professore Straordinario
Magistrato di Tribunale
Magistrato d' Appello
Professore Ordinario
Magistrato di Cassazione

APPENDIX II


The Italian Court System
Special Courts
Ordinary Courts
Corte Suprema Constitutionale
Consiglio di Stato
Corte del Conti
Corte di Cassazione
Sezioni Unite
Tribunali Amministrativi Regionali
Corti di Appello
Corti d' Assise di Appello
Tribunali
Corti d' Assise
Pretori
Conciliatore

Italy Enacts New Rules on Conflict of Laws and Jurisdiction

VINCENZO SINISI†

I. INTRODUCTION

The Italian rules on conflict of laws, traditionally set forth in the "Preliminary Provisions to the Civil Code" (Disposizioni Preliminari al Codice Civile), remained substantially unchanged for approximately half a century. The first attack on this antiquated set of rules was the enactment of Law No. 613 of 14 October 1985,[1] which implemented the Rome Convention of 19 June 1980 on the Applicable Law for Contractual Obligations.[2] The Convention entered into force in 1991.

The Rome Convention applies, regardless of whether the contracting parties are citizens of or reside in one of the member states of the European Union,[3] or the applicable law is that of a country which belongs or does not belong to the European Union.[4] The new rules substantially modified the previous legislation according to which, *unless otherwise agreed*, a contract was governed by the laws of the country where the contract was entered into.[5] Under the provisions of Rome Convention, a contract is governed by the laws of the country where the obligation which characterizes the contract is to be performed, unless otherwise agreed by the parties.[6] Therefore, a construction contract is governed by the laws of the country where the construction is to be erected, and an agency agreement by the laws of the territory where the agent exercises his activity.

Some years after the Rome Convention entered into force, it was clear that the entire system of conflict of laws was to be revisited and this was accomplished through the enactment of Law No. 218 of 31 May 1995[7] (Law 218/95), concerning conflict of laws and the enforcement and recognition of foreign ju-

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† Avv. Vincenzo Sinisi. Sinisi, Ceschini, Mancini & Partners. Via Francesco Carrara, 24, 00196 Rome, Italy.

1. Law No. 613, Oct. 14, 1985, Gazz. Uff. No. 262, Nov. 7, 1985.

2. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) [hereinafter Rome Convention].

3. The purpose of the convention is that of providing a common set of rules on conflict of laws throughout the European Union. *See* Sacerdoti, in La Convenzione di Roma sul diritto applicabile ai contratti internazionali, a cura di Sacerdoti-Frigo, p. 4.

4. Rome Convention, *supra* note 2, art. 2.

5. *See* PRELIMINARY PROVISIONS TO THE CIVIL CODE [PRE. PROV. C.C.] art. 25(1) (Italy) (according to which: "Obligations arising out of contracts are governed by the national law of the contracting parties, if common to them, otherwise by that of the place in which the contract was concluded. However, a different intention of the parties will prevail in any event.").

6. Rome Convention, *supra* note 2, art. 4(2) (place of performance) & art. 3 (freedom of choice).

7. Law No. 218, May 31, 1995, Gazz. Uff. No. 128, June 3, 1995 [hereinafter Law 218/95].

dicial decisions, which is briefly examined below. The provisions of Law 218/95 entered into force on 1 September 1995, except for the rules regarding the enforcement of foreign judicial awards, which shall enter into force on 1 June 1996.

The reform covers the entire spectrum of legal relationships, from family relationships to corporate issues, from adoption rules to inheritance rights, not to forget issues relating to the jurisdiction of Italian courts over foreign residents and that of enforcement of foreign decisions in Italy. This article will focus on some of the most common conflicts of law situations, and will then briefly analyze the jurisdictional issues.

II. CRITERIA FOR THE SELECTION OF THE APPLICABLE LAW

A. GENERAL CONSIDERATIONS

Law 218/95 conclusively clarifies certain issues which often created problems in legal practice due to the lack of specific regulation and the presence of diverging interpretations.

First of all, Article 13 specifically indicates that reference to the foreign law, which is identified pursuant to the rules on conflict of laws, includes the conflict of law rules of said foreign law and; therefore, it is possible that the case be ultimately decided under the laws of another country.[8]

Furthermore, in contrast with the prevailing judicial practice, which cast on the parties the obligation to prove and illustrate the foreign law,[9] Article 14 indicates that the judge is obliged to ascertain the content of the foreign law. In order to fulfil this duty, he may avail himself of the assistance of court appointed experts or he may request information from the Ministry of Justice.

Finally, the issue of the selection of the appropriate law when the foreign country is a federation, such as the United States, which was the cause of many practical problems in the past, is now specifically addressed by providing that reference be made to the state or regional laws which would be applicable in accordance to the rules of the foreign country. In the event these rules are impossible to determine, the laws of the state or region which is most closely connected to the matter would be applicable.[10]

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8. The previous rule, set forth in Article 30 of the Preliminary Provisions to the Civil Code, was the opposite and excluded reference to the rules on conflict of laws of the foreign jurisdiction.

9. Cass. 29 Feb. 1993, No. 1127, Riv. dir. internaz. privato e proc., 1994, 104; Cass. 19 Feb. 1986, No. 995, in Foro It., Rep. 1986, voce Procedimento civile, n. 13; Trib. Genova, 24 Jan. 1989, Foro It., Rep. 1991, voce Trasporto marittimo, No. 30.

10. *See* Law 218/95, *supra* note 7, art. 18.

B. LEGAL ENTITIES

Article 25 of Law 218/95 provides that corporations, associations, partnerships, foundations and all other legal entities are governed by the laws of the country of incorporation. Such laws will govern, among other things, the juridical nature of the entity; its incorporation, transformation or dissolution; its ability to contract obligations and the powers of its representatives; the participation rights of the holders in the entity; the consequences of an infringement of the applicable statutory rules as well as of the provisions of the by-laws.

In order to avoid forum shopping by Italian companies, it is specified that Italian law shall apply instead of the law of the country of incorporation in the event the company, although incorporated abroad, has its administration head-office in Italy, or in the event the main purpose of the company is located in Italy. Therefore, the creation outside of Italy of a company whose main purpose is, in fact, that of transacting business in Italy, shall always be regulated by Italian law.

C. FAMILY MATTERS

The rules of Law 218/95 relating to family matters contain a drastic innovation to the previous legislation. The traditional criterion of nationality[11] is now sometimes derogated by that of residence.[12] It is also possible to derogate from the applicable law by virtue of agreement.[13] This issue was not covered by the previous legislation.

Following the tradition, Law 218/95 deals separately with the issues of marriage, economic relationship between spouses, relationship between parents and children, and the status of children.

As to the marriage itself, the substantive requirements for the celebration of a valid marriage, such as age, legal capacity, lack of precedent marriages, and the like, are those indicated by the laws of the country of citizenship of each spouse. As to formal requirements, however, the marriage will be deemed valid if in compliance with the rules of the place of celebration or with the rules of

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11. *See* PRE. PROV. C.C. art. 18, 19 & 20 (applying, respectively, to the personal relationship between spouses, economic relationships between spouses and parent/child relations). In all cases, preference was given to the national law of the husband/father, in the event the wife/mother was of a different nationality. This preference was ruled unconstitutional by the Italian Constitutional Court with Decision No. 71, 5 Mar. 1987, with reference to Article 18 and Decision No. 477, 10 Dec. 1987, with reference to Article 20. No decision was rendered on Article 19, due to procedural reasons.

12. In the event of family relationships between spouses of different nationality, the ruling of the constitutional court against the preference in favour of the national law of the husband created more than one problem. It was not clear what law should apply in the event the two countries regulated the same matter in substantially different ways. The new law now solves the problem by stating that "the relationship between spouses having different nationalities . . . is governed by the laws of the country where the life of the family is predominantly located." Law 218/95, *supra* note 7, art. 29(2).

13. The possibility of selecting the applicable law is given only with respect to economic relationship matters between spouses. *See* Law 218/95, *supra* note 7, art. 30(1).

the county of citizenship of at least one spouse. The personal relationship between the spouses, including separation and divorce, is regulated by the laws of the country of which both spouses are citizens. As mentioned above, in the event the spouses are of different nationality, reference is made to the laws of the country where the life of the family is predominantly situated.

As to the economic relationship, it is now provided that the same law which governs personal matters shall apply (ie. nationality of the spouses if common to them, otherwise residence of the family), provided however, that the spouses may select another law if such law is that of a country of which at least one of the spouses is a citizen or a resident. In order for such an agreement to be binding vis-à-vis third parties, it is required that the agreement be known to such third parties and; in the event of real estate transactions, it is required that the agreement be recorded as required by the laws of the country where the real estate is located.

The legal status of children is governed by a variety of laws, depending on the actual issue in dispute. The most important notation is that relating to the relationship between children and parents which is governed by the law of citizenship of the child.

D. INHERITANCE

In the past inheritance rights were always governed by the law of citizenship of the person whose inheritance was considered.[14] Article 46 of Law 218/95 now continues to make reference to the same criterion, but also provides that the testator may derogate from the above law and select the law of the state where he resides at the time of drafting the will. The selection, which is voided if the testator no longer resides in that country at the time of his death, will not prejudice forced heirship rights in favor of heirs residing in Italy.[15]

As to formal (and not substantive) requirements, a will is valid if in compliance with the rules of the country where it was executed, or with the rules of the country of citizenship or residence of the testator.

The above rules also apply to donations.[16]

E. CONTRACTUAL OBLIGATIONS

As mentioned above, prior to the entering into force of the Rome Convention on the Law Applicable to Contractual Obligations, the general rule was that contracts were governed by the laws of the country where the contract was

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14. *See* PRE. PROV. C.C. art. 23.

15. According to Article 536 of the Italian Civil Code, the following relatives are reserved a share in the estate of the deceased: spouse, children, legitimate ascendants. The reserved share varies depending on the number and quality of the heirs and cannot be diminished by the deceased, by will or donation.

16. Law 218/95, *supra* note 7, art. 56.

executed.[17] In compliance with the Rome Convention, Article 57 of Law 218/95 now states that contractual obligations are, as a general rule, disciplined by the Rome Convention, unless otherwise provided by other international conventions. The key criterion is, therefore, that of the laws of the country where the obligation which characterizes the contract is to be performed, unless otherwise agreed by the parties.[18]

The scope of such an agreement between the parties is not without limits. First of all, the selection of a law which does not have sufficient connection to the matter will not preclude the application of the mandatory rules of law of the country whose regulation would be applicable in the absence of such a choice of law.[19] Furthermore, in the event the choice of law clause is included in a consumer contract or in an employment agreement the selected law will never be able to deprive the consumer or the employee of rights and protection offered by the laws of the country where the consumer is located or the employee performs his job.[20]

F. NON-CONTRACTUAL OBLIGATIONS

This section of Law 218/95 deals with a variety of legal situations, ranging from unilateral promises and undertakings, to torts issues, to include also checks and promissory notes which, undoubtedly, might be also considered as having a contractual nature.

In the past all non-contractual obligations were governed by the laws of the place where the facts from which they arise took place.[21] The new regulation, contained in Articles 58 through 63 of Law 218/95, is along the same lines. It is, however, much more detailed and distinguishes among various types of obligations. More specifically, unilateral promises are governed by the laws of the State where the promise was made[22] while credit instruments, such as bills of exchange and checks, are governed in accordance with the Geneva Convention on Bills of Exchange.[23] Should the credit instrument be outside of the scope of the Geneva Convention, the governing law shall be that of the country of issu-

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17. *See* PRE. PROV. C.C. art. 25(1) (according to which: "Obligations arising from contract are governed by the national law of the contracting parties, if common to them; otherwise by that of the place in which the contract was made. In any case the different intention of the parties shall control.").

18. Rome Convention, *supra* note 2, art. 4.

19. Rome Convention, *supra* note 2, art. 3(3).

20. Rome Convention, *supra* note 2, art. 5 & 6.

21. *See* PRE. PROV. C.C. art. 25(2).

22. Law 218/95, *supra* note 7, art. 58. This article clarifies a doubtful issue as unilateral promises are sometimes treated as contractual obligations and it is in line with the interpretation previously given to the pre-existing regulation. *See* Mengozzi, in Trattato di Diritto Privato, UTET, I, 462ff.

23. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, 143 U.N.T.S. 257 [hereinafter Geneva Convention]. The Geneva Convention applies regardless of whether the country where the instrument was issued has ratified the Convention, or not. Similarly, no importance is borne by the circumstance that the law identified pursuant to the convention is that of

ance of the instrument. Tort liability is governed by the laws of the State where the event occurred; however, Article 62(1) of Law 218/96 now allows the injured party to request the application of the law of the State where the fact causing the damage occurred.[24] A special provision exists for product liability cases, for which it is provided that the injured party has the option to select that the applicable law be that of the country where the producer has its domicile or central administration, or to apply the laws of the country where the product was purchased.[25]

Legal obligations, such as remuneration for unjust enrichment, restitution of payments unduly received, and the like, are subject to the laws of the country where the event triggering the obligation occurred.[26]

III. JURISDICTION

A. PERSONAL JURISDICTION OF ITALIAN COURTS AND CHOICE OF FORUM

This matter has been substantially modified by the enactment of Law 218/95. Under the new regulation,[27] Italian courts have jurisdiction over a foreign defendant when said defendant is domiciled or residing in Italy, has a representative authorized to appear in court in Italy, or when jurisdiction is based on the exclusive, non waivable, forum provisions contained in the Brussels Convention on Jurisdiction and the Enforcement of Judgements.[28]

With respect to choice of forum, the Brussels Convention already provided the parties with the freedom to determine the competent forum, provided that:

- the selected forum is that of a country belonging to the European Union;
- at least one of the parties is domiciled in a signatory country[29]

This rule was very innovative, as the Italian Code of Civil Procedure previously prohibited the waiver of Italian jurisdiction, which prohibition remained

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a country which has not ratified the Convention. In fact, Italy has not made these reservations at the time of filing its ratification. *See* Cass. 10 Mar. 1993, No. 2894, Foro It. I 1994, 149.

24. This rule has clarified an important and disputed issue between giving preference to the place where the event occurred (*See* Trib. Napoli 5 Aug. 1990, In Rivista Giuridica Trasporti 1991, 228 [applies Italian law to an accident occurred abroad if the consequences of the accident materialized in Italy]) and the place where the fact causing the damage occurred (*See* Trib. Milano 14 Oct. 1991, Rivista dir. int. priv. proc. 1991, 403).

25. In practice, this provision introduces some sort of international uniformity, at the most expensive level for the producer, in international product liability claims.

26. Law 218/95, *supra* note 7, art. 61.

27. Law 218/95, *supra* note 7, art. 3.

28. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 16, 1978 O.J. (L 304) 77 [hereinafter Brussels Convention] (provisions of article 16 state that the exclusive forum for disputes regarding real property, status of a corporate entity, public records, trademark, copyright and patent and enforcement of judgements is the place where the matter in controversy is located).

29. *See* Brussels Convention, *supra* note 28, art. 17.

in force for relationships outside the scope of the Brussels Convention.[30] Law 218/95 has now repealed any difference between EU and non-EU countries, and provides that unless the dispute falls within the scope of the exclusive jurisdiction matters mentioned above or relates to public policy matters, the parties are always free to waive Italian jurisdiction, also in favour of non-EU countries, provided that the agreement be in writing.[31]

Finally, extending again a concept already existing within the framework of the Brussels Convention, Law 218/95 now provides that when an action is pending before a foreign court, and this action may be enforceable in Italy, under the rules which will be examined below, the Italian court which is petitioned on the same matter shall issue a stay order, and wait for the foreign procedure to conclude. Should the foreign judge decline jurisdiction, or should the foreign judgment be declared unenforceable in Italy, then the Italian procedure may be resumed.[32]

B. ENFORCEMENT OF FOREIGN JUDGMENTS

This section contains one of the most remarkable changes to the previous legislation. Its entering into force has been postponed until 1 June 1996 in order to solve some administrative problems arising out of the new legislation.

Except for the decisions issued by courts of member states of the European Union, which are automatically enforceable throughout the EU pursuant to the Brussels Convention, the recognition of a foreign judgment was almost impossible to obtain in Italy. First of all the previous legislation, still in force until 1 June 1996, requires that recognition could be granted only after a judicial procedure before the court of appeals, the duration of which was seldom less than two years.[33] Furthermore, the Italian defendant could ask for a review of the merits of the case had he failed to appear before the foreign court regardless of the fact that he had been duly served.[34] Finally, the commencement of an action in Italy, although groundless, would prevent the enforcement of a foreign judgment on the same issues.[35] It was therefore common to either not appear before the foreign court at all or, to appear and in the event that the case was not going well, commence an action in Italy, therefore depriving the foreign decision of any practical meaning. These problems have now been solved by the new regulation according to which foreign judicial decisions are immediately enforceable in Italy provided that the following requirements are met:[36]

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30. CODICE DI PROCEDURA CIVILE [C.P.C.] art. 2 (Italy).
31. Law 218/95, *supra* note 7, art. 4.
32. Law 218/95, *supra* note 7, art. 7.
33. *See* C.P.C. art. 796ff.
34. *See* C.P.C. art. 798.
35. *See* C.P.C. art. 797(6).
36. Law 218/95, *supra* note 7, art. 64.

1. The judgement was issued by a court which, according to Italian rules of civil procedure, was in fact competent to hear the case.
2. The defendant was properly notified of the lawsuit in compliance with the laws of the country where the lawsuit was initiated and was provided with a reasonable amount of time to appear in court.
3. The party against whom the judgement was enforced duly appeared before the foreign court, or the foreign court declared that such party failed to appear, with the consequence that a default procedure was then used. As mentioned above, this is a very important innovation as, prior to the enactment of Law 218/95, if the Italian defendant failed to appear before the foreign court, the Italian court could review the case on the merits, if so requested by the defendant.
4. The decision to be enforced in Italy is final and not subject to appeal.
5. The decision rendered by the foreign court does not conflict with decisions rendered by an Italian court on the same matter.
6. No parallel suit between the parties, instituted prior to the commencement of the suit before the foreign court, is pending before Italian courts. This is the most crucial modification introduced by Law 218/95 as it prevents the commencement of frivolous parallel suits in Italy that would deprive the foreign decision of any effect.
7. The decision does not conflict with Italian public policy.

Even more liberal rules exist for decisions issued by courts of countries belonging to the EU, or which are a signatory to the Lugano Convention.[37] In this case, the foreign decision is directly enforceable in Italy, as if it were rendered by an Italian court[38] and the exequatur procedure is only a formality.[39]

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37. Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Nov. 25, 1988, 1988 O.J. (L 319) 9 (essentially extending the Brussels Convention to the then EFTA countries of Austria, Finland, Iceland, Norway, Sweden, and Switzerland).

38. *See* Brussels Convention, *supra* note 28, art. 26.

39. The exequatur is granted ex parte and the defendant has one month from the notification of the exequatur to propose an opposition against such decision. *See* Brussels Convention, *supra* note 28, art. 36.

Review of Jury Verdicts in Diversity Cases: An *Erie* Update*

STEVEN ALAN CHILDRESS†

INTRODUCTION: THE IMPORTANCE OF A JURY STANDARD

A federal court can affect the outcome of a case by its choice of the standard to review a jury verdict. Justice Byron White once wrote that the particular jury test chosen "will often be influential, if not dispositive," so circuit disagreement as to the applicable standard of review "is of far more than academic interest."[1] Legal scholars generally examining the review issue in recent years have written that "[t]he likelihood of affirmance is partly a function of the degree of deference that the appeals court gives [to a judicial actor's findings of fact]."[2]

One professor wryly noted that the standard of review, "[f]or a hollow concept[,] receives a surprising amount of attention [by courts.]"[3] The view that the jury review test is a hollow choice is much belied, not only by the courts' general attention but also by case after case where the stated standard seems to have bite in application.

A striking example is offered by the Sixth Circuit. In civil cases brought under diversity jurisdiction, that court has consistently applied the relevant state's standard to review a jury's verdict for sufficiency of the evidence to support it.[4] Because this rule forces the federal appeals court to apply a different review rule than it would in an ordinary civil action (at least where the state's standard differs), such cases present a deviation from the usual "control"

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† Associate Professor of Law, Tulane Law School. Ph.D., M.A., University of California at Berkeley (Jurisprudence and Social Policy); J.D., Harvard Law School; B.A., University of Alabama. Much of the analysis in this article is developed and substantially updated from Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271, 290-326 (1994). Some of the issues are before the Supreme Court, *infra* note 134.

1. Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (dissenting from denial of certiorari).

2. Charles R. Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of Pullman-Standard v. Swint*, 58 Tul. L. Rev. 403, 404 (1983); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 600 (2d ed. 1993); ROBERT MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY § 7.21 (1985).

3. Martin B. Louis, *Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C.L. REV. 733, 759 (1990) (attributing "hollow" view to others); *see also* Daniel Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 37-38 (1994) (agreeing that differences in appellate review formulas are elusive in application, but the Court can treat them seriously by studying the rule's basis).

4. *See infra* text accompanying notes 78-88.

of a generic *reasonableness* review test used in federal civil appeals.[5] The court may apply Tennessee law which provides the stricter *complete absence* jury review standard,[6] and therefore the use of a state standard may vary results in that court. Some such applications appear so inconsistent with the predictable federal result that they serve to illustrate, or at least suggest, that review standards do matter.[7]

Consider the Sixth Circuit's 1987 decision in *Finch v. Monumental Life Insurance Co.*[8] The court specifically applied Tennessee's *any material evidence* standard to review a jury verdict in favor of a life insurance beneficiary.[9] The insured husband had failed to pay his premium, but his widow testified that he regularly did so when he received a notice. The insurer sent four such notices to several people in its files. The insured was in its files, and the notices were mailed. No direct proof, however, was offered that notice was specifically sent to or received by the insured. The court found that this raised a sufficient inference that he did not receive notice, so the judgment entered on the verdict was affirmed.[10]

With the evidence presented in that way, it may be unsurprising that the panel majority affirmed. As the dissent countered, other record facts made unlikely the jury's inference that the husband had failed to pay due to lack of notice rather than deliberate choice. In fact, within only a few months before the nonpayment, the husband had written to the defendant insurer an angry letter in which he threatened to "discontinue coverage" because it had just raised his rates by thirty percent. Yet the jury's finding assumed that he did not follow through and deliberately discontinued payment as he threatened, but instead failed to receive four separate notices sent by computer in four batches to a file of names which included the insured's, the others in the file having received

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5. *See infra* text accompanying notes 31-43 (discussion of the application of the general test under FED. R. CIV. P. 50).

6. *See, e.g.*, Gold v. National Savings Bank, 641 F.2d 430, 434 & n.3 (6th Cir.) (applying Tennessee law), *cert. denied*, 454 U.S. 826 (1981). Under a *complete absence* test, of course, any evidence supporting a verdict requires affirmance, even if contrary evidence appears to overwhelm that result. Tennessee's *any material evidence* standard, which affirms a jury verdict even short of "substantial" evidence (the usual threshold in federal courts), echoes the *complete absence* standard used in older Supreme Court opinions and modern Jones Act and F.E.L.A. appeals. *See generally* 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.03, 3.07 (2d ed. 1992) (discussing older cases using *any evidence* test, and restrictive Jones Act and F.E.L.A. review). Several states still apply some form of the restrictive test. *See infra* note 44.

7. For example, on the *complete absence* test the court has reversed a directed verdict granted to plaintiffs on rather slender evidence of arson. *See* Arms v. State Farm Fire & Casualty. Co., 731 F.2d 1245, 1252 (6th Cir. 1984) (Kennedy, J., dissenting) ("the circumstantial evidence here was simply insufficient"); the choice of a state jury test may have affected this controversial result. *See also* Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 878 (5th Cir.) (emphasizing clear differences in state standards in deciding particular cases), *cert. denied*, 389 U.S. 930 (1967).

8. 820 F.2d 1426 (6th Cir. 1987).

9. *Finch*, 820 F.2d at 1430 (citing Tennessee law).

10. *Id.* at 1430-31 (affirming denial of j.n.o.v.).

their notices.[11] The inference that all four letters were misdirected was "a truly extraordinary coincidence,"[12] said the dissent, and not sufficient to support a plaintiff's verdict.

Nevertheless, this might be the inevitable result of an *any material evidence* review whereas the usual federal review would demand reversal. The dissenting judge did not say so, but affirmance would seem unthinkable under a less strictly stated test such as *reasonableness* or *substantial evidence*, or especially if the reviewer were allowed to look to both sides of the evidence and truly consider the reasonable inferences to be drawn.[13] To the extent affirmance can be justified at all, it appears to follow from an application of Tennessee's unusually generous standard. At the least the *Finch* case, in its juxtaposed factual presentations, illustrates the decisionmaking potential of a standard of review as applied.

I. THE CHOICE OF LAW FOR FEDERAL JURY REVIEW

If the jury test chosen matters, it must also matter whether a federal court will follow a rule, like the Sixth Circuit's, of applying state standards in some review situations. Does state or federal law provide the standard for trial and appellate courts to review a jury verdict in a federal civil action based on diversity jurisdiction? It is a classic problem of choice of law under *Erie R.R. Co. v. Tompkins*.[14] The federal circuits have long split on the issue, some applying their federal standard of review, others looking to a state jury review test in those cases in which state law has provided the rule of decision.[15]

Even the U.S. Supreme Court has a tradition of appearing baffled by the problem. During the 1958-1964 period, it repeatedly faced the question but would never quite answer it.[16] Instead, the Court always found other grounds by which to resolve each case, while leaving open the jury review issue[17] or

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11. *See id.* at 1433-34 (Nelson, J., dissenting).

12. *Id.* at 1433 (adding that jury inference was speculation).

13. The general federal jury test does allow both sides of the evidence to be considered in most circuits. *See infra* note 37 and accompanying text.

14. 304 U.S. 64 (1938) (denying general federal rule requiring application of state law in diversity cases, but apparently allowing federal courts to determine and apply their own procedures).

15. *See infra* text accompanying notes 45-121 (detailing the current circuit conflict); *see also* Dick v. New York Life Ins. Co., 359 U.S. 437 (1959); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971); Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944).

16. *See* Mercer v. Theriot, 377 U.S. 152, 155-56 (1964) (per curiam) (Court granting certiorari on issue and allowing full briefing and argument); Dick v. New York Life Ins. Co., 359 U.S. 437, 444-45 (1959) (recognizing that an "important question" is "lurking" of " whether it is proper to apply a state or federal test of sufficiency of evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship").

17. *Mercer*, 377 U.S. at 156 ("The evidence was sufficient under any standard which might be appropriate—state or federal."); *Dick*, 359 U.S. at 445 ("But the question is not properly here for

otherwise passing up the chance to resolve it.[18] This left lower courts in disarray.[19] Ironically, the Court played this game of chicken all while it reached decision after decision in the more blatantly controversial areas of political, civil, and personal rights.[20]

To be sure, in 1965, the Court did provide general *Erie* guidance in *Hanna v. Plumer*.[21] Language in that decision could be seen as an inspiration for lower courts to address anew the circuit conflict on the particular standard of review issue which the Court had avoided.[22] Three decades later, *Hanna* remains an important contribution to the development of the *Erie* doctrine.[23] Yet the Court did not purport to resolve the baffling jury review issue, and since then has not expressly returned to this particular *Erie* question of review over jury verdicts in diversity cases. And even lower courts which saw *Hanna* as an invitation to revisit the issue tended to remain in conflict with other courts[24] or would fail to resolve the still-open question.[25]

The disarray continues, with few opinions providing any more analysis than a citation to an older case which in turn has not fully considered the problem. The state-standard rule is like the weather. Everyone talks about it but no one does anything about it. The impact, like the weather, is fickle. The courts' choice of review rules, though making incremental or no difference where state law is similar,[26] can significantly affect the review process in particular cases, as illustrated by *Finch* above.

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decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied.").

18. *See* Simler v. Conner, 372 U.S. 221, 221-22 (1963) (per curiam) (discussing application of federal law on issue of availability of jury trial, but not resolving review of juries); *see also* Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 537-40 (1958).

19. Cooper, *supra* note 15, at 972 (observing that as of 1971, the "Supreme Court has explicitly avoided making a choice," leading to inconsistent cases below).

20. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (recognizing constitutional privilege in state-law libel claim); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that exclusionary rule to enforce Fourth Amendment applies to states).

21. 380 U.S. 460 (1965) (applying federal rule permitting substituted service of process despite conflicting state rule).

22. Gold v. National Sav. Bank of Albany, 641 F.2d 430, 434 n.3 (6th Cir.) (noting shift in lower courts after *Hanna*), *cert. denied*, 454 U.S. 826 (1981); Lones v. Detroit, Toledo & Ironton R.R., 398 F.2d 914, 919 (6th Cir. 1968) (noting open issue after *Hanna*), *cert. denied*, 393 U.S. 1063 (1969); Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 870-71 (5th Cir. 1967) (examining circuit split after then-recent Court cases), *cert. denied*, 389 U.S. 930 (1967).

23. *See* CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 55, at 380-81 (5th ed. 1994); Mary K. Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 673-79 (1988).

24. *E.g., Gold*, 641 F.2d at 434 n.3 (Sixth Circuit maintaining its use of state standard despite noting the "continued vitality" of its rule "is open to question"); *see also Lones*, 398 F.2d at 919.

25. *See infra* text accompanying notes 99-121 (discussing position of Second, Third, and Eighth Circuits).

26. *See, e.g., infra* text accompanying notes 69, 92, 97, 106, and 119.

Federal courts today are faced with even more reasons to adopt a uniform federal standard in all challenges to a civil jury verdict. This article analyzes this long-questioned but still-surviving diversity dilemma. Unlike the weather, something can be done. The issue should be properly predicted and finally resolved.

The dilemma is resolved when interpreted from the clouds of recent Supreme Court decisions on other issues, as well as the 1991 amendment to Rule 50 of the Federal Rules of Civil Procedure.[27] Both developments subtly support federal law. The use of a federal review rule also finds ample support in the historic policies and modern theories behind *Erie*'s allocation of decisionmaking power between state and federal bodies. This is true especially when considered in light of the allocation of decisionmaking power between the judge and the jury in the federal system.[28] Furthermore, very recent case law from the Seventh Circuit confirms a trend toward establishing a uniform federal standard applicable in diversity cases.[29]

Despite this trend, the standard for sufficiency of the evidence for a jury to reach a verdict or make a finding of fact remains the most problematic *Erie* issue in appellate review.[30]

II. JURY REVIEW FOR SUFFICIENCY OF THE EVIDENCE GENERALLY

Evidentiary sufficiency must be contrasted with an allegation that a verdict or finding is against the weight of the evidence and thus justifies a new trial.[31] Instead, sufficiency is raised at trial through a motion for judgment as a matter of law under Rule 50,[32] a two-step procedure formerly named directed verdict and judgment n.o.v. It is challenged on appeal by way of review over the district judge's decision on the motion made below for judgment as a matter of law.

The trial judge may only direct a verdict, grant judgment n.o.v., or grant judgment as a matter of law if there is no sufficient evidentiary basis for the jury to decide otherwise. The appellate court may affirm the trial judge's decision

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27. *See infra* text accompanying notes 130-160.

28. *See infra* text accompanying notes 173-216.

29. *See infra* text accompanying notes 70-74.

30. A recent source downplays the circuit split by noting that most courts apply a federal test and suggesting that this should be the rule. MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 5.04, at 13-14 (Supp. 1994). Nonetheless, in many circuits the minority rule is followed consistently and cannot be ignored as a descriptive matter of what courts *do*, even if the very recent switch in the Seventh Circuit supports the normative position taken. Among the federal courts generally, "the question is still open." 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, at 270 (1995).

31. *See* Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 970-71 (7th Cir. 1983); United States *ex rel.* Wayerhaeuser Co. v. Bucon Constr. Co., 430 F.2d 420, 423 (5th Cir. 1970); 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.01, 5.11 (2d ed. 1992).

32. FED. R. CIV. P. 50 (1991).

only if the evidence likewise fails to support a contrary jury verdict.[33] Whether the evidence is "sufficient" must be made by some threshold measure of acceptability, as applied to the particular part of the record to be reviewed for its sufficiency.

In the typical civil jury trial, the first aspect of the standard used to test the jury's decision is some form of a "reasonable jury" measure,[34] stated in a variety of ways.[35] In assessing the evidence, all reasonable inferences must be taken as resolved in favor of the nonmoving party or the jury's verdict.[36] Somewhat less settled is the proper set of materials reviewed. The test is applied to a part or all of the record, depending on the circuit in which the case arises.[37]

The appellate court's review, in turn, is *de novo*.[38] Thus, no deference is given to the trial court's ruling whether it granted or denied the sufficiency motion.[39] The same substantive measure is applied to test the jury itself[40] which is a reasonableness standard acting on the relevant evidence with the trial court's intermediate decision virtually taken out of the appellate review process. The appellate court's usual review over the federal jury is deferential in exactly the same way that the trial judge's was.

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33. *See, e.g., id.*; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc).

34. *See, e.g.,* FED. R. CIV. P. 50 (1991) (adopting test long articulated in cases: "no legally sufficient basis for a reasonable jury to have found for that party").

35. *See* Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982) (noting variations); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (discussing phrasings); 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.01 (2d ed. 1992) (collecting various phrasings).

36. *E.g.,* Turner v. Purina Mills, Inc., 989 F.2d 1419, 1421 (5th Cir. 1993); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193 (7th Cir. 1992); Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); Santiago-Negron v. Castro-Davila, 865 F.2d 431, 445 (1st Cir. 1989); DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982).

37. *See* Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari) (collecting cases on circuit conflict on the jury review standard generally); 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.03 (2d ed. 1992) (analyzing conflicting circuit standards, especially as to what body of evidence is reviewed under the test). Most circuits use "whole record" review and consider evidence on both sides. *Id.*

38. *E.g.*, Sokol Crystal Prods. v. DSC Comms., 15 F.3d 1427, 1432 (7th Cir. 1994); Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 540 (6th Cir. 1993); Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); Trzcinski v. American Cas. Co., 953 F.2d 307, 313, 315 (7th Cir. 1992); Chrysler Capital Corp. v. Lavender, 934 F.2d 290, 293 (11th Cir. 1991); Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502, 508 (2d Cir. 1989).

39. *E.g.*, The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988); Diebold v. Moore McCormack Bulk Transp. Lines, 805 F.2d 55, 57 (2d Cir. 1986); Ellis v. Chevron U.S.A., 650 F.2d 94 (5th Cir. 1981); Dulin v. Circle F Indus., 558 F.2d 456, 465 (8th Cir. 1977).

40. *E.g.*, Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124-25 (1st Cir. 1992); Rotondo v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992); Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525, 1528 (11th Cir. 1989); Joyce v. Atlanta Richfield Co., 651 F.2d 676, 680 (10th Cir. 1981).

The reasonableness test itself, again in the usual jury case, is often restated in terms of requiring "substantial evidence" to support a verdict,[41] as contrasted with an *any evidence* or *complete absence* measure which is no longer seen as providing the proper test in typical federal cases.[42] The latter, more stringent test remains in Jones Act and Federal Employers' Liability Act cases.[43] It is also used in several states (at least in certain contexts), notably Wisconsin, North Carolina, Texas, Georgia, and Tennessee.[44] Whatever the "usual" federal standard to review civil juries, the issue remains whether that general test will also apply, or be applied in the same manner, in cases arising under state law.

III. THE MAJORITY RULE: FEDERAL LAW APPLIES

A majority of courts today, after early inconsistency in some circuits,[45] expressly apply their federal sufficiency test of reasonableness discussed above even in diversity and other state law cases, both at trial and on appeal. This

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41. *E.g.*, DeMaine v. Bank One, Akron, N.A., 904 F.2d 219, 220 (4th Cir. 1990); Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987); Koch v. Sec. of Dept. of Health, Educ. & Welfare, 590 F.2d 260, 261 (8th Cir. 1978); Boeing Co. v. Shipman, 411 F.2d 365, 370 (5th Cir. 1969) (en banc) (discussing consistency of *substantial evidence* with *reasonableness* test).

42. *See* Cooper, *supra* note 15, at 918-19; 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 266 and § 2529, at 298-300 (1995); 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.03 (2d ed. 1992).

43. *See* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 523 (1957) (Jones Act); Lavender v. Kurn, 327 U.S. 645, 653 (1946) (F.E.L.A.); Boeing Co. v. Shipman, 411 F.2d 365, 370-73 (5th Cir. 1969) (en banc) (distinguishing usual federal standard of review from Jones Act review); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2526 (1995); *see also supra* note 6. The Jones Act is found at 46 U.S.C. app. § 688, and the F.E.L.A. at 45 U.S.C. § 51.

44. *Wisconsin*: Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193-96 (7th Cir. 1992) (citing Kolpin v. Pioneer Power & Light Co., 162 Wis.2d 1, 469 N.W.2d 595 (1991) [reciting Wisconsin *directed verdict* test of "no credible evidence" or "any evidence," and noting distinction for j.n.o.v. test, which does not permit sufficiency review]). *North Carolina*: DeMaine v. Bank One, Akron, N.A., 904 F.2d 219, 220 (4th Cir. 1990) (contrasting North Carolina *scintilla* decisions). *Texas*: Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); Navarette v. Temple Indep. School Dist., 706 S.W.2d 308, 309 (Tex. 1986); William Powers & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515 (1991) (examining complex rules and contexts). *Georgia*: La-Roche Indus., Inc. v. AIG Risk Mgmt., Inc., 959 F.2d 189, 193 (11th Cir. 1992) (describing Georgia law on jury award of attorneys' fees). *Tennessee*: Truan v. Smith, 578 S.W.2d 73, 74 (Tenn. 1979); Kaley *ex rel.* Lanham v. Union Planters Nat'l Bank, 775 S.W.2d 607, 611 (Tenn. App. 1988); TENN. R. APP. P. 13(d).

45. *See supra* note 15.

application has become firmly settled in the Fourth,[46] Fifth,[47] Ninth,[48] Tenth,[49] Eleventh,[50] and District of Columbia[51] Circuits.

In the Fifth Circuit, for example, any effort to interweave state sufficiency rules into jury review "must be rejected as attempts to apply state procedural rules to the judge-jury relationship in federal court."[52] The court thus clarifies: "What they needed to prove to make a jury case is, of course, to be measured by [state] substantive law. Whether they proved such a case is a matter of federal procedural law."[53] Likewise, the Fourth Circuit is clear that a federal court sitting in diversity "must also apply the Federal Rules of Civil Procedure and, therefore, must review the jury verdict under standards established by [Rule 50(b) and its *substantial evidence* test]."[54]

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46. DeMaine v. Bank One, Akron, N.A., 904 F.2d 219, 220 (4th Cir. 1990); Fitzgerald v. Manning, 679 F.2d 341, 346 (4th Cir. 1982); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1064-67 (4th Cir. 1969) (discussing sufficiency of evidence in detail).

47. Esposito v. Davis, 47 F.3d 164, 167 (5th Cir. 1995); Hiltgen v. Sumrall, 47 F.3d 695, 699-700 (5th Cir. 1995) (applying the general federal test and Rule 50(a)(1)); Thrash v. State Farm Fire & Casualty. Co., 992 F.2d 1354, 1356 (5th Cir. 1993); Ayres v. Sears, Roebuck & Co., 789 F.2d 1173, 1175 (5th Cir. 1986); Foster v. Ford Motor Co., 616 F.2d 1304 (5th Cir. 1980); Coastal Plains Feeders v. Hartford Fire Ins. Co., 545 F.2d 448, 453 (5th Cir. 1977). The court met *en banc* to resolve the *Erie* issue in a landmark case famous for establishing the *substantial evidence* test and whole-record review generally in civil cases, replacing a *complete absence* standard sometimes used previously in that circuit. Boeing Co. v. Shipman, 411 F.2d 365, 368-70 & nn.2-4 (5th Cir. 1969).

48. Miller v. Republic Nat'l Life Ins. Co., 789 F.2d 1336, 1340 (9th Cir. 1986); Bank of California, N.A. v. Opie, 663 F.2d 977, 979 (9th Cir. 1981); *see* Sankovich v. Life Ins. Co. of N. Am., 638 F.2d 136, 138 (9th Cir. 1981) (discussing sufficiency of evidence in summary judgment context); Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 & nn.2-3 (9th Cir. 1978).

49. Pegasus Helicopters, Inc. v. United Technologies Corp., 35 F.3d 507, 510 (10th Cir. 1994); Orth v. Emerson Elec. Co., 980 F.2d 632, 635 (10th Cir. 1992); Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); McKinney v. Gannett Co., 817 F.2d 659, 663 (10th Cir. 1987); Yazzie v. Sullivent, 561 F.2d 183, 188 (10th Cir. 1977); *see* Mid-America Pipeline Co. v. Lario Enterprises, Inc., 942 F.2d 1519, 1524 (10th Cir. 1991) ("as a matter of independent federal procedure we utilize the normal federal standards of appellate review to examine the district court's decision process").

50. Jones v. Miles Laboratories, Inc., 887 F.2d 1576, 1578 (11th Cir. 1989); Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525, 1527-28 (11th Cir. 1989); Federal Kemper Life Assurance. Co. v. First Nat'l Bank, 712 F.2d 459, 464 (11th Cir. 1983); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982); *see* Christopher v. Cutter Laboratories, 53 F.3d 1184, 1190 (11th Cir. 1995) (applying general federal test in diversity case); *but cf.* LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc., 959 F.2d 189, 193 (11th Cir. 1992) (using Georgia review test over award of attorneys' fees even though issue is framed as review of j.n.o.v. motion).

51. *See* Wilson v. Good Humor Corp., 757 F.2d 1293, 1298 (D.C. Cir. 1985) (applying federal test). Of course, the D.C. Circuit may not face diversity issues in the usual way of the state-based courts, but it interprets district law and at times is even asked to interpret and apply state law. *See id.* at 1301 n.6.

52. Owens v. International Paper Co., 528 F.2d 606, 611 (5th Cir. 1976).

53. *Id.* at 609 (emphasis in original) (affirming directed verdict); *accord* Fitzgerald v. Manning, 679 F.2d 341, 346 n.1 (4th Cir. 1982).

54. Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 (4th Cir. 1991) (discussing sufficiency and new trial review on punitive damages, and contrasting jury charge as state substance). This is so even though its judges recently met *en banc* to consider the proper instructions to be given a federal jury in deciding state-law punitive damages, and disagreed strongly about that issue. Johnson v. Hugo's

In all these courts, state law is said to provide the underlying cause of action and the substance of the parties' arguments,[55] including such tricky issues, arguably similar to review standards, as the standard of proof at trial and the tort doctrine of *res ipsa loquitur*.[56] As the Fifth Circuit has distinguished, federal standards are used to test the insufficiency of the evidence in relation to the verdict, but the court refers to state law in diversity cases for the *kind* of evidence that must be produced to support the verdict.[57] However, other special rules dealing with inferences are regarded as a sub-application of the jury sufficiency test and should be governed by federal rules.[58]

IV. THE SEVENTH CIRCUIT'S HISTORY AND RECENT ABOUT-FACE

In an established tradition over three decades,[59] the Seventh Circuit expressly used a state standard of review for sufficiency of the evidence in scores of jury cases.[60] By contrast, it was also settled that motions for new trial would be

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Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc); *see* Charles J. Knight, Note, *State-Law Punitive Damage Schemes and the Seventh Amendment Right to Jury Trial in the Federal Courts*, 14 REV. LITIG. 657 (1995). Apparently there is no question that post-trial review of the verdict, on damages and more broadly, is controlled by federal tests and the Seventh Amendment.

55. *E.g.*, Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992) (Colorado provides substantive law but not standard to review jury); Coursey v. Broadhurst, 888 F.2d 338, 344 (5th Cir. 1989) (Mississippi law on methods of setting damages to personal property); Peterson v. Hager, 724 F.2d 851, 854 (10th Cir. 1984) (on rehearing) (how to set crop damages in negligence); Montgomery Indus., Int'l v. Thomas Constr. Co., 620 F.2d 91 (5th Cir. 1980) (whether facts were contract estoppel); Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 (9th Cir. 1978) (elements of cause of action); *see* Salve Regina College v. Russell, 499 U.S. 225, 227 (1991) (appellate review of legal issues is *de novo* in diversity cases, while state substance is provided by state law).

56. *See, e.g.*, Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) (*res ipsa* and burden of proof); De Marines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) (burden of proof).

57. Ayres v. Sears, Roebuck & Co., 789 F.2d 1173, 1175 (5th Cir. 1986); McCandless v. Beech Aircraft Corp., 779 F.2d 220, 223 (5th Cir. 1985), *vacated on other grounds*, 798 F.2d 163 (1986); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs" materiality).

58. Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) (contrasting); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1067-68 (4th Cir. 1969); Equitable Life Assur. Soc. v. Fry, 386 F.2d 239, 245 (5th Cir. 1967).

59. Such cases were generally recognized as providing a settled state rule in the circuit. *E.g.*, CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 92, at 609 n.21 (4th ed. 1983). Two early cases, however, had applied federal review. Gudgel v. Southern Shippers, Inc., 387 F.2d 723, 725 (7th Cir. 1967); Reitan v. Travelers Indem. Co., 267 F.2d 66, 69 (7th Cir. 1959).

60. *E.g.*, Hystro Prods., Inc. v. MNP Corp., 18 F.3d 1384, 1387 & n.2 (7th Cir. 1994); Dolder v. Martinton Township, 998 F.2d 499, 501 (7th Cir. 1993); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193-95 (7th Cir. 1992); Ross v. Black & Decker, Inc., 977 F.2d 1178, 1182 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993); Trzcinski v. American Cas. Co., 953 F.2d 307, 313 (7th Cir. 1992); A. Kush & Assocs. v. American States Ins. Co., 927 F.2d 929, 938, 942 (7th Cir. 1991); Amplicon Leasing v. Coachmen Indus., Inc., 910 F.2d 468, 470 (7th Cir. 1990); Goldman v. Fadell, 844 F.2d 1297, 1301 (7th Cir. 1988); Spesco, Inc. v. General Elec. Co., 719 F.2d 233, 237 (7th Cir. 1983); Kuziw v. Lake Eng'g Co., 586 F.2d 33, 35 (7th Cir. 1978); Kudelka v. American Hoist & Derrick Co., 541 F.2d

reviewed under the federal test,[61] despite the potential similarity of those evidentiary inquiries.

In *Abernathy v. Superior Hardwoods, Inc.*,[62] Judge Posner, while reaffirming the state-standard jury sufficiency rule in the face of the federal new trial standard, characterized this dichotomy as leaving the court "in some tension."[63] He stated that the position "nevertheless can be defended, and maybe even reconciled,"[64] though noting that past opinions tended to ignore both contrary law and possible criticisms. In any event, in 1983, the court again noted a possible conflict between these similar review contexts but still deferred to a state jury test, finding no need to reconsider the issue or to resolve any inconsistency within the circuit.[65]

After these public statements of doubt appeared, the court over the next decade continued to apply its state-test rule consistently. Remarkably, these routine applications nearly always failed to discuss intervening Supreme Court precedent or otherwise urge modern reconsideration of the rule.[66] And even though *Abernathy* had thoughtfully identified a tension in the federal new trial test, later cases tended to recite each rule separately and without discussion of any dichotomy or need to reexamine the entire question.[67] This was so even though use of the state test may have been determinative in diversity actions borrowing state law from jurisdictions which apply a *scintilla* rule.[68] In many cases, however, courts have used the similar Illinois test.[69]

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651 (7th Cir. 1976); Lorance v. Marion Power Shovel Co., 520 F.2d 737 (7th Cir. 1975); Risse v. Woodward, 491 F.2d 1170 (7th Cir. 1974).

61. *E.g.*, Mercado v. Ahmed & Checker Taxi Co., 974 F.2d 863, 866 (7th Cir. 1992); Cook v. Hoppin, 783 F.2d 684, 687-88 (7th Cir. 1986); Huff v. White Motor Corp., 609 F.2d 286, 295 (7th Cir. 1979); Galard v. Johnson, 504 F.2d 1198, 1200 n.1 (7th Cir. 1974).

62. 704 F.2d 963 (7th Cir. 1983).

63. *Id.* at 970.

64. *Id.* at 971.

65. Robison v. Lescrenier, 721 F.2d 1101, 1103 (7th Cir. 1983) (Coffey, J.); *see also* Davlan v. Otis Elevator Co., 816 F.2d 287, 289 (7th Cir. 1987) (contrasting state sufficiency test and federal new trial test); Wassell v. Adams, 865 F.2d 849, 854 (7th Cir. 1989).

66. One panel that did note developing Supreme Court precedent read it wrong. The panal actually contrasted the Court's rule that jury review considers evidentiary burdens as involving "federal" law, with the applicable Illinois review rule. However, the cited "federal" case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), is federal only because it was itself treated as a typical diversity case and hardly supports a distinction as to diversity cases. *See infra* note 139.

67. *See, e.g.*, Allison v. Ticor Title Ins. Co, 979 F.2d 1187, 1196 (7th Cir. 1992) (separate section applies the federal new trial test without relating to opinion's long discussion of state sufficiency test); Ross v. Black & Decker, Inc., 977 F.2d 1178, 1181-82 (7th Cir. 1992) (both reviews stated consecutively without noting possible inconsistency), *cert. denied*, 113 S. Ct. 1274 (1993).

68. *See, e.g.*, *Allison*, 979 F.2d at 1193-96 (applying Wisconsin *any evidence* standard; limited review test appears decisive).

69. *See* Pedrick v. Peoria & Eastern R.R., 37 Ill.2d 494, 511, 229 N.E.2d 504, 514 (1967) (allowing the jury to render a verdict unless all the evidence, viewed in favor of the opponent, "so overwhelmingly favors [the movant] that no contrary verdict based on [that] evidence could ever stand").

All of this changed in 1994, when the Seventh Circuit joined the majority. The court first gave hints that the state rule was up for renewed attention, by questioning it generally in an opinion which clarified specifically that federal *de novo* review would apply on appeal in any event, though the content of that review test would be given by state law.[70] Finally, in *Mayer v. Gary Partners & Co.*,[71] in an opinion by Judge Easterbrook, the circuit wholly abandoned its traditional rule and decided to apply a uniform federal reasonableness test to all phases of jury review, even Rule 50 motions. The court found that consistency with other appellate review situations and *Erie* policy required this new rule.[72]

Following *Mayer*, the Court has recited an expressly federal sufficiency test for jury review,[73] and is perceived as clearly joining the majority position.[74] Occasional cases do, however, erroneously apply state standards under the prior law.[75]

V. THE MINORITY RULE: APPLICATION OF STATE STANDARDS

In contrast to the majority rule and this new trend, the Sixth Circuit, joined in many cases by the First Circuit, applies the relevant state jury standard to review evidentiary sufficiency. The Second, Third, and Eighth Circuits also have a troubled history of applying or at least discussing a state review test, but recently their positions are better described as continually "mooting" the issue by applying both federal and state standards in each case.[76] The Federal Circuit describes the sufficiency rule as one of procedure, and therefore tends to apply the standard drawn from the relevant regional law,[77] but has not yet confronted the diversity issue directly.

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70. Sokol Crystal Prods. v. DSC Communications, 15 F.3d 1427, 1431-32 (7th Cir. 1994).

71. 29 F.3d 330 (7th Cir. 1994).

72. *Id.* at 333-35 (citing CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 607-09 (4th ed. 1983); Steven A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271, 308-27 (1994)).

73. *E.g.*, Gruca v. Alpha Therapeutic Corp., 51 F.3d 638, 642 (7th Cir. 1995); *see* Desnick v. ABC, Inc., 44 F.3d 1345, 1349 (7th Cir. 1995) (acknowledging federalization of jury review test, but noting open question whether federal court should follow Illinois rule that libel "innocent construction" finding is given *de novo* review).

74. *See* MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 5.04, at 13-14 (Supp. 1994).

75. The court has done so in an unpublished 1995 decision and in Jackson v. Bunge Corp., 40 F.3d 239, 242 (7th Cir. 1994).

76. *See infra* text accompanying notes 99-121.

77. L.E.A. Dynatech, Inc. v. Allina, 49 F.3d 1527, 1530 (Fed. Cir. 1995) (standards of appellate review are procedural, and provided by regional court of origin); Sjolund v. Musland, 847 F.2d 1573, 1576 (Fed. Cir. 1988) (standard of review over denial of j.n.o.v. "is a common procedural question" and thus regional law applies); *but cf.* Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 893 (Fed. Cir. 1984) (applying Federal Circuit test on j.n.o.v.), *cert. denied*, 469 U.S. 857 (1984); Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 855 n.5 (Fed. Cir. 1991) (noting but not resolving interpanel conflict on whether review test is regional), *cert. denied*, 504 U.S. 980 (1992).

The most established minority court is the Sixth Circuit, which explicitly applies a state standard of review in a long line of cases.[78] In 1981, in *Gold v. National Savings Bank*,[79] the court reviewed its "well settled" rule in light of contrary circuits and then-recent Supreme Court language.[80] Yet the *Gold* court found no need to reconsider its position since the facts in that case satisfied the panel that the jury's verdict had to be reversed either as unreasonable or due to a complete absence of evidence, as Tennessee would require.[81] The court added, however, that the "continued vitality" of the state-standard rule "is open to question."[82]

Given this background, it might seem that the Sixth Circuit has become a prime candidate to join the majority's federal-test rule. It was all too easy to jump from the 1981 query to the conclusion that a change in the Sixth Circuit policy was necessarily imminent.[83] Yet it should be recalled that the court thirteen years earlier had noted that "recent developments would make a review of our position appropriate."[84] In this case as well, the question was left open.[85] After 1968, still, the court did not develop the internal conflict found in other circuits or abandon its questioned rule.

The public hand-wringing in *Gold* was merely *deja vu*. More fundamentally, since its later caution in 1981, the court has still consistently applied a state test as its "well established" rule,[86] usually without discussion. This includes rou-

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78. *E.g.*, American & Foreign Ins. Co. v. General Electric, 45 F.3d 135, 140 (6th Cir. 1994); Brooks v. ABC, Inc., 999 F.2d 167, 170 (6th Cir. 1993); Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 540 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993); J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co., 936 F.2d 1474, 1482-83 (6th Cir. 1991); Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (en banc); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Calhoun v. Honda Motor Co., 738 F.2d 126, 129 (6th Cir. 1984); Foster v. Caterpillar Tractor Co., 714 F.2d 654, 656 (6th Cir. 1983); Gootee v. Colt Indus., Inc., 712 F.2d 1057, 1062 (6th Cir. 1983); Garrison v. Jervis B. Webb Co., 583 F.2d 258, 261 (6th Cir. 1978); Chumbler v. McClure, 505 F.2d 489, 491 (6th Cir. 1974); Moskowitz v. Peariso, 458 F.2d 240, 244-45 (6th Cir. 1972); DeGarmo v. City of Alcoa, 332 F.2d 403, 404 (6th Cir. 1964).

79. 641 F.2d 430 (6th Cir. 1981), *cert. denied*, 454 U.S. 826 (1981).

80. *Id.* at 434 & n.3. The panel considered especially the Court's 1977 decision in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977), which applied a federal rule of waiver on appeal.

81. *Gold*, 641 F.2d at 434 & n.3.

82. *Id.* at 434 n.3; *see also* Toth v. Yoder Co., 749 F.2d 1190, 1194 n.2 (6th Cir. 1984)(expressing doubt on the state standard rule, but avoiding the issue by finding the standards to be "essentially the same").

83. *See* CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 92, at 609 n.21 (4th ed. 1983) (Seventh Circuit may be the last stronghold of the state-test rule; also cites *Gold* to indicate Sixth Circuit reexamination of issue).

84. Lones v. Detroit, Toledo & Ironton R.R., 398 F.2d 914, 919 (6th Cir. 1968) (referring to Hanna v. Plumer, 380 U.S. 460 (1965)), *cert. denied*, 393 U.S. 1063 (1969).

85. *See Lones*, 398 F.2d at 919.

86. Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1248 n.2 (6th Cir. 1984).

tine applications in opinions handed down recently,[87] even after further Supreme Court decisions and rule amendments instructive on the issue.[88]

In addition to ignoring recent precedent, the Sixth Circuit's position may not be entirely consistent with the circuit's uniform application of a *federal* test, when reviewing a *new trial* motion.[89] The Sixth Circuit, however, does distinguish without much analysis the circuit's usual federal rules on new trial[90] and on summary judgment.[91] The jury review rule is nonetheless important. To be sure, many cases do apply an almost identical Michigan test of reasonableness.[92] Yet Sixth Circuit cases may also apply Tennessee law which provides the stricter *complete absence* jury review standard,[93] or even Kentucky's more lenient jury test of *clearly erroneous*.[94]

The First Circuit has somewhat less consistently applied the state standard of sufficiency in diversity cases,[95] including a 1994 case which openly applied state law.[96] Although in practice the tests recited tend to resemble a federal *reasonableness* standard,[97] these cases nonetheless defer directly to a state standard, at least in passing, without also citing a federal test or otherwise mooting the issue. Thus, the circuit must be included within the list of courts which expressly employ state law review, even though its commitment to the rule

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87. *See also* Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 56 F.3d 726, 733 (6th Cir. 1995); Engerbretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 726 (6th Cir. 1994); Potti v. Duramed Pharm., Inc., 938 F.2d 641, 645 (6th Cir. 1991); Siggers v. Barlow, 906 F.2d 241, 247 (6th Cir. 1990).

88. *See infra* text accompanying notes 132-160. The cases generally do not discuss *Anderson*, *Browning-Ferris* or the 1991 amendment to Rule 50.

89. *E.g.*, Porter v. Lima Mem. Hosp., 995 F.2d 629, 635 (6th Cir. 1993); Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 541-42 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993); J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co., 936 F.2d 1474, 1487 n.20 (6th Cir. 1991) (noting similarity of Michigan test; no contrast drawn to earlier discussion of state j.n.o.v. test). Some cases find that the state test even on new trial review is "instructive." *See* Humble v. Mountain States Constr. Co., 441 F.2d 816 (6th Cir. 1971); Knight, *supra* note 54 (criticizing practice). Unlike the Seventh Circuit, this dichotomy may not be so obviously in tension since panels of this court find state law at least relevant or comparable to a new trial motion.

90. *See generally* Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1248 n.2 (6th Cir. 1984) (federal test used on new trial review).

91. *See* Lewis Refrigeration Co. v. Sawyer Fruit, 709 F.2d 427, 430 n.3 (6th Cir. 1983) (specifically distinguishing use of state review rule on j.n.o.v. from its federal summary judgment test).

92. *See* Kupkowski v. Avis Ford, Inc., 395 Mich. 155, 168, 235 N.W.2d 324 (1975) (whether "reasonable men could honestly reach different conclusions"); Caldwell v. Fox, 394 Mich. 401, 231 N.W.2d 46 (1975).

93. *See supra* text accompanying notes 9 and 44.

94. *See, e.g.*, Nilson-Newey & Co. v. Ballou, 839 F.2d 1171, 1176 n.1 (6th Cir. 1988) (describing and applying Kentucky law).

95. DeMedeiros v. Koehring Co., 709 F.2d 734, 737 (1st Cir. 1983); Wilson v. Nooter Corp., 475 F.2d 497, 501-02 (1st Cir.), *cert. denied*, 414 U.S. 865 (1973); *see* DaSilva v. American Brands, Inc., 845 F.2d 356, 359 (1st Cir. 1988) (merely reciting the *DeMedeiros* standard in a Massachusetts diversity case).

96. Lareau v. Page, 39 F.3d 384, 387 (1st Cir. 1994).

97. *See* DeMedeiros v. Koehring Co., 709 F.2d 734, 737 (1st Cir. 1983) (under Massachusetts test, the question is whether any circumstances permit a rational inference to be drawn for plaintiff).

appears intermittent. Some panels simply recite without comment a general test, which appears to be a federal one, in diversity cases.[98]

VI. THE "NEUTRAL" APPROACH AND DEFERRING TO STATE STANDARDS

Several courts repeatedly moot the diversity issue by reviewing the jury motion under both a federal and a state test, finding no real inconsistency in language or application. These courts tend to expressly apply both tests. Such cases often involve a similar test of reasonableness in which such an avoidance strategy is understandable.

One such "mooting" court is the Eighth Circuit, which, despite a few cases applying a federal test,[99] more commonly finds a way to avoid the issue by deferring to a state test but, at the same time, finding the identical result under federal review.[100] These courts thus follow a rule that states, "where state and federal tests for sufficiency of the evidence are similar and neither party has raised the issue, we would look to state law as controlling."[101] Several other panels simply apply the state standard with no comparison to federal law,[102]

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98. *See* Clemente v. Carnicon-Puerto Rico Mgmt. Ass'n, 52 F.3d 383, 388-89 (1st Cir. 1995); Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994); Gallagher v. Wilton Enter., Inc., 962 F.2d 120, 124-25 (1st Cir. 1992) (using reasonable person test and citing First Circuit precedent, though earlier this court had thoughtfully considered the *Erie* issue of whether jury trial exists and found the question to be federal).

99. *See, e.g.*, Essco Geometric, Inc. v. Harvard Indus., 46 F.3d 718, 723 (8th Cir. 1995) (reciting generic test, apparently federal, in diversity case without discussing open issue); Charles Woods Tel. Corp. v. Capitol Cities/ABC, Inc., 869 F.2d 1155, 1159-60 (8th Cir.) (reciting apparent federal test in a diversity case using circuit's *points one way* formula), *cert. denied*, 493 U.S. 848 (1989); Farner v. Paccar, Inc., 562 F.2d 518, 522 (8th Cir. 1977) (applying federal test).

100. *E.g.*, McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 n.2 (8th Cir. 1994) (noting "uncertainty" but need not resolve since Missouri test is "virtually identical"); Keenan v. Computer Assocs. Int'l, Inc., 13 F.3d 1266, 1269 & n.3 (8th Cir. 1994); City Nat'l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1314 (8th Cir. 1991); Bastow v. General Motors Corp., 844 F.2d 506, 508 (8th Cir. 1988) (Iowa test substantially the same); DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982) (finding Arkansas test similar); McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 158 (8th Cir.) (Missouri test similar), *cert. denied*, 439 U.S. 864 (1978); Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968).

101. Garoogian v. Medlock, 592 F.2d 997, 1000 n.3 (8th Cir. 1979) (quoted in DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982)); Gisriel v. Quinn-Moore Oil Corp., 517 F.2d 699, 701 n.6 (8th Cir. 1975) (citing cases); *accord* Carper v. State Farm Mut. Ins. Co., 758 F.2d 337, 340 (8th Cir. 1985); Sowles v. Urschel Laboratories, Inc., 595 F.2d 1361, 1364 (8th Cir. 1979). The rule likely has its origins in a 1960 opinion by then Circuit Judge Blackmun on this "provocative question" which merely did what the Supreme Court had done the year before, namely, avoid deciding the dilemma. *See* Hanson v. Ford Motor Co., 278 F.2d 586, 589 (8th Cir. 1960) (applying Minnesota test here since parties had not raised point and the test is similar, as in Dick v. New York Life Ins. Co., 359 U.S. 437, 444-45 (1959)). Yet nothing in *Hanson* signaled that its disposition be continued for thirty-six years as a circuit *rule*.

102. *See* Carpenter v. Automobile Club Interins. Exch., 58 F.3d 1296, 1301 (8th Cir. 1995) (stating emphatically that state law provides the sufficiency standard, with no mention of circuit's conflict, citing 1993 case); Ashley v. R.D. Columbia Assocs., 54 F.3d 498, 501 (8th Cir. 1995); St. Paul Fire & Marine Ins. Co. v. Salvador Beauty College, Inc., 930 F.2d 1329, 1332 (8th Cir. 1991) (applying Iowa

thus treating the issue as if it were clear that state law controls as in the settled minority circuits.

The usual mooting cases are not clear as to what the Eighth Circuit should do where the federal test is not similar, but presumably the state law would control in that situation as well, at least until the court reconsiders its position. Nor do these cases explain what they would do if a litigant actually raised the issue. This may be an unrealistic expectation given the typical, smarter appellate strategy to argue the result under both tests if either can support the desired result. Nor do they explain why a conflicting circuit position on the standard of review should not be addressed *sua sponte* by the court.[103]

This comparativist strategy is sometimes called a "neutral position,[104] though that adjective may make the approach sound better than it really is since it never resolves anything beyond the facts at hand and may force the courts to double their energies if two tests are involved.

Sometimes the reasoning becomes almost absurdly redundant or complicated. For example, one Sixth Circuit case determined that a jury was neither unreasonable nor clearly erroneous, and an Eighth Circuit case had to sort out the reviews for mixed federal and state claims.[105] Apparently the Eighth Circuit believes it need not decide the issue since in so many cases the state standard is "like" the federal one.[106] Perhaps this is true, but it may also be true that the approach is unnecessary under recent law, or worse, is inefficient, confusing, and misleading. All in all, this is not a very good compromise.

The dual-standard strategy is also used in many cases in the Second Circuit[107] and Third Circuit.[108] For example, the Second Circuit in 1989 again

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test); Yeldell v. Tutt, 913 F.2d 533, 539-40 (8th Cir. 1990); Glass Design Imports, Inc. v. Import Specialties, 867 F.2d 1139, 1142 (8th Cir. 1989).

103. *Cf.* United States v. Vonsteen, 950 F.2d 1086, 1091 (5th Cir.) (en banc) (standard of review often affects outcome and should be briefed; if parties fail to do so, court should decide issue sua sponte), *cert. denied*, 505 U.S. 1223 (1992); FED. R. APP. P. 28(a)(5) & (b) (litigants must brief the "applicable standard of review" for each issue).

104. Denneny v. Siegel, 407 F.2d 433, 443 n.8 (3d Cir. 1969) (describing Second, Third, and Eighth Circuits' approach).

105. Moskowitz v. Peariso, 458 F.2d 240, 244 (6th Cir. 1972) (citing Kentucky cases on both tests); Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808 (8th Cir. 1992) (since case contained both federal and state claims the panel held the rule is that which Illinois applies to state claims while the federal test applies to federal claims; although the jury did not identify the claims on which it found liability, the claims and tests were so similar that here this issue did not matter).

106. *See, e.g.*, City Nat'l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1314 (8th Cir. 1991) ("test under the law of Arkansas, in any event, is similar to the federal test").

107. *E.g.*, Brady v. Chemical Constr. Corp., 740 F.2d 195, 202 n.7 (2d Cir. 1984) (leaves unsettled question open); Billiar v. Minnesota Min. & Mfg. Co., 623 F.2d 240, 248 (2d Cir. 1980) (applying New York test but noting similar federal test); *see generally* Simblest v. Maynard, 427 F.2d 1, 4-5 (2d Cir. 1970) (discussing circuit conflict but finding same result under federal or Vermont test); Evans v. S.J. Groves & Sons Co., 315 F.2d 335, 342 n.2 (2d Cir. 1963) (comparing both sides of issue); *cf.* McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044-45 (2d Cir. 1995) (applying without discussion a general test of reasonableness, apparently federal, in diversity case); Milano v. Freed, 64 F.3d 91, 95 (2d Cir.

noted that it is unsettled whether federal or state law governs sufficiency of the evidence and, as in many cited cases, declined to resolve the issue "since there appears to be no material difference between the two standards, at least as applied here."[109] These courts tend to say that they defer to a state test, though perhaps more accurately "deferential" here means to defer the issue to a later panel or the en banc court.[110]

The Third Circuit, despite cases citing a state standard alone,[111] has appeared to be pushing toward applying its federal standard. For example, the court has cited without discussion, in some important diversity appeals, a general review test which certainly looks federal.[112] In one such case, the en banc court in 1979 cited for its test a diversity case which likewise recites a general test without explicit reference to state law.[113]

More significantly, in another Third Circuit case, Judge Aldisert offered reasoned dicta supporting a federal test.[114] Although this 1969 decision appears to avoid the issue by noting the similarity of federal and state standards, the clear import of the opinion is that the circuit is moving toward its federal standard, and his best arguments support that position. The court noted that early state-test cases had been replaced by recent cases largely using a federal test, or deferring to a state test where the difference is not decisive.[115]

However, since both this extensive discussion and the court's subliminal application of the federal test in 1979, the circuit has deferred to a state test where it would not appear to be decisive,[116] apparently again to avoid facing the issue

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1995) (same); Calvert v. Katy Taxi, Inc., 413 F.2d 841 (2d Cir. 1969) (applying state standard alone); Mull v. Ford Motor Co., 368 F.2d 713, 716 & n.4 (2d Cir. 1966) (assuming New York test applies but noting open question).

108. *E.g.,* Neville Chem. Co. v. Union Carbide Co., 422 F.2d 1205, 1211-12 (3d Cir.), *cert. denied,* 440 U.S. 826 (1970); Denneny v. Siegel, 407 F.2d 433, 437-39 (3d Cir. 1969) (noting internal dichotomy and citing both tests even though parties urged the court to decide the issue).

109. Willis v. Westin Hotel Co., 884 F.2d 1556, 1563 n.5 (2d Cir. 1989); *see* Mehra v. Bentz, 529 F.2d 1137 (2d Cir. 1975), *cert. denied,* 426 U.S. 922 (1976). That hardly seems true where the state uses *fair preponderance of the evidence* review, which evokes a new trial test and its discretionary elements. *See* Billiar v. Minnesota Min. & Mfg. Co., 623 F.2d 240, 248 (2d Cir. 1980)(court deferred since the New York test was inexplicably "virtually identical").

110. *See* Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969) (since tests are "substantially similar . . . we defer the choice of action urged upon us by the parties").

111. *E.g.,* Hadelman v. Bell Tel. Co., 387 F.2d 557 (3d Cir. 1967); Cooper v. Brown, 126 F.2d 874 (3d Cir. 1942); *see also* Leizerowski v. Eastern Freightways, 514 F.2d 487, 489 (3d Cir. 1975); Denneny v. Siegel, 407 F.2d 433, 437 (3d Cir. 1969) (citing older Third Circuit cases "uniformly" applying state tests).

112. *See, e.g.,* Simmons v. City of Philadelphia, 947 F.2d 1042, 1067 (3d Cir. 1991), *cert. denied,* 503 U.S. 985 (1992); Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 961 (3d Cir. 1988).

113. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979) (en banc).

114. Denneny v. Siegel, 407 F.2d 433, 437-38, 440 (3d Cir. 1969).

115. *Id.* at 438.

116. *See* Blair v. Manhattan Life Ins. Co., 092 F.2d 296, 304 n.1 (3d Cir. 1982) (Garth, J., dissenting on other grounds).

squarely. In a related vein, the court has explicitly held that it applies a state rule preventing the waiver of an immunity defense which would be waived if the normal federal prerequisites of a Rule 50 motion were enforced,[117] an issue of Rule 50 review arguably more procedural than the rule's review standard. A more recent panel, by some contrast, stated flatly, albeit without much support, that it "applies the federal standard for judging the sufficiency of the evidence in diversity actions,"[118] yet nevertheless noted that Pennsylvania law is similar.[119]

The latter federal-rule case may be treated as if it restates a rule that has always existed.[120] However, the number of cases which are contrary, or moot the issue by also citing a state test, signifies that it would be premature to consider the Third Circuit as having truly resolved its internal split. At this time it is still fairly described as a dual-strategy court.

In all these circuits, what looks like a practice of judicial conservatism (avoid, moot, or defer) may in reality be problematic and inefficient. Although the strategy may be consistent, albeit anachronistic, with *Hanna*'s apparent direction to apply state and federal law where there is no conflict,[121] it often affects analysis where consistency is not so easily found and it fails to recognize other cases within the same court which contradict. Even where it makes no difference in the outcome, it is an affirmative political statement that another judicial body's law applies, which is an act of deference arguably not justified by precedent or policy. It is better described as a state of denial.

VII. THE SUPREME COURT: MORE AVOIDANCE AND RECENT GUIDANCE

The circuits have taken these various positions long after the Supreme Court in 1959 expressly recognized the dilemma in *Dick v. New York Life Insurance Co.*,[122] and mooted the issue five years later in *Mercer v. Theriot*,[123] in which the Court granted certiorari to address the conflict.

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117. Simmons v. City of Philadelphia, 947 F.2d 1042, 1085-86 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). Yet elsewhere the court seems to apply a federal standard for evidentiary sufficiency. *See id.* at 1067. For its state waiver rule, the court does not discuss or distinguish *Penn Shipping*, in which the Supreme Court held that a federal waiver rule applies in remittitur review, a similar context.

118. Rotondo v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992). For this rule, the court cites only a 1965 federal case, a treatise, and the *Kinnel* case [which had applied a federal test without discussion] and does not discuss ample contrary precedent.

119. *Id.*

120. *See* Garrison v. Mollers North Am., Inc., 820 F. Supp. 814, 817 (D. Del. 1993) (Rule 50(b) motion presents a federal question, citing *Rotondo* without noting contrary cases); McKenna v. Pacific R.R., 817 F. Supp. 498, 507 (D.N.J. 1993), *vacated on other grounds*, 32 F.3d 820 (3d Cir. 1994); 5A JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 50.06 (Supp. 1992-93) (citing *Rotondo* as stating the issue is federal; the supplement does not discuss contrary cases and errs in describing *Rotondo* as holding review is for *abuse of discretion* only).

121. *See* Hanna v. Plumer, 380 U.S. 460, 469-70 (1965).

122. *Dick*, 359 U.S. at 444-45.

Even before, the Court had anticipated the issue. In 1958, in *Byrd v. Blue Ridge Rural Electrical Cooperative*,[124] the Court, noting "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts,"[125] held that federal law controls whether a particular issue should be submitted to the jury or judge, assuming sufficient evidence exists to support a jury trial on the issue if it is triable to a jury.[126] Yet that Court reserved the sufficiency issue, noted its own inconsistencies, and provided dicta implying that sufficiency is state substantive law. It footnoted a reference to a 1940 case which it characterized as having established that state standards apply for sufficiency "to raise a jury question."[127]

By leaving the question open in *Dick* and *Mercer*, the Court did implicitly clarify that the cited 1940 case had not really settled the issue by its dicta on state jury review since no directed verdict question was before the earlier Court.[128] That new forms of analysis would apply to this particular issue was also foreshadowed by *Hanna v. Plumer*,[129] in which the Court made *Erie* analysis more flexible and refined, in the course of deciding to apply a federal rule allowing substituted service of process despite a conflicting state rule.

More recently, the Court has provided language in similar contexts that would appear to support use of a federal test in the sufficiency situation as well. In 1977, in *Donovan v. Penn Shipping Co.*,[130] it held that a federal waiver rule would control in remittitur situations, requiring that one accepted at trial would preclude review of the issue on appeal. Echoing *Byrd*, the Court specified: "The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law."[131]

In 1989, the Court extended this ruling in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[132] In finding that new trial motions on damages are subject to an *abuse of discretion* standard, the Court held that in a diversity case federal law governs "those issues involving the proper review of the jury award" in federal courts.[133] This is so even though state law controls "the pro-

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123. *Mercer*, 377 U.S. at 156; *see supra* notes 16-20 and accompanying text.

124. 356 U.S. 525 (1958).

125. *Id.* at 538.

126. *Id.* (Court cited at length and apparently reaffirmed a pre-*Erie* decision that held that federal law governs to allow a judge to take an issue from the jury, because it is the kind of issue which may be decided by a judge, despite a contrary state rule).

127. *Id.* at 540 n.15 (citing Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940)).

128. Cooper, *supra* note 15, at 973 & n.210; *see* CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 92, at 608 (4th ed. 1983) ("It is hard to believe that *Stoner* held what the Court later said it held.").

129. 380 U.S. 460 (1965).

130. 429 U.S. 648 (1977).

131. *Id.* at 649.

132. 492 U.S. 257 (1989).

133. *Id.* at 279 (citing Donovan v. Penn Shipping Co., 429 U.S. 648 (1977)).

priety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount."[134]

A federal rule precluding review, in *Penn Shipping*, now had supported — with merely a citation — something of a federal review standard in this context. Because Rule 59 (governing new trials) no more provides a review test than did Rule 50 (traditionally governing directed verdicts and j.n.o.v.), *Browning-Ferris* may support the assumption that federal law will provide the standard to review a jury verdict in either of these contexts.[135] And because many of the same *Erie* policies would seem to apply for sufficiency review as well as damages,[136] it is not a big jump from either *Penn Shipping* or *Browning-Ferris* for lower courts to conclude that the propriety of a jury verdict, as well as its preclusion or size, is a federal matter.

In 1986, the Court may have even more subtly determined the issue in two landmark cases handed down the same day, in which the Court refined summary judgment law. These cases were *Anderson v. Liberty Lobby, Inc.*[137] and *Celotex Corp. v. Catrett*.[138] Both were treated as diversity cases, both applied federal summary judgment law extensively, and both fashioned summary judgment rules by analogy to federal directed verdict standards under Rule 50(a).[139] No mention was made of any controversy over state standards in diversity cases, and in fact, the Court discussed the "run-of-the-mill civil case,"[140] presumably including diversity cases, to support its analogy to what look like broad federal rules of jury review. More on point, the Court rejected a *scintilla*

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134. *Id.* Once the award is found to be within the confines set by state law, review is made by a federal standard of review. *Id.* The Second Circuit had been unclear which standard it used. *Id.* at 280.

The uncertainty reflected by the Second Circuit's review process, and remaining even after the Court's affirmance, has led the Court to reexamine the issue of review for excessiveness, particularly in diversity cases. Gasperini v. Center for Humanities, Inc., 116 S. Ct. 805 (1995) (granting certiorari). The Second Circuit had granted remittitur by comparison to similar New York verdicts, and the Court may speak to the appropriateness of that inquiry, perhaps answering the jury question here too.

135. Courts less controversially apply federal tests on new trial motions, and that context has been distinguished as more readily federal, even in courts which use state standards on legal sufficiency of the evidence. *See supra* text accompanying notes 61-64 and 89-90. The analogy is not complete, but both do involve "review of the jury" in a broad sense, and *Browning-Ferris* gave no hint it was distinguishing jury review writ large. Of course, it did not purport to decide the much-mooted sufficiency issue, either.

136. *See infra* text accompanying notes 174-216.

137. 477 U.S. 242 (1986).

138. 477 U.S. 317 (1986).

139. *See id.* at 322-23; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-56 (1986). Although both came from the District of Columbia, they apply local substantive law and otherwise treat the cases as diversity actions. The Court in *Anderson* explicitly describes it as a "diversity libel action." 477 U.S. at 245.

140. *Anderson*, 477 U.S. at 252.

rule for both summary judgments and directed verdicts[141] without any noted hesitation for diversity cases which arise in states using the *scintilla* test.

To the extent summary judgment is analogous to jury review — and the Court indeed expressly made them more "mirror"-like[142] — federal courts may similarly decide to apply federal jury standards in all cases.[143] And the Court treated summary judgment as a question of law for testing the sufficiency of the evidence[144] with no distinction drawn from the mid-trial or post-trial sufficiency process. Yet even if the analogy fails, the Court had spoken directly to broad jury tests and expressly made them applicable to the directed verdict, a procedure obviously provided by federal law even in a diversity case.

The Court provided a similar description of Rule 50(a) review more recently, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[145] In reviewing the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence, Justice Blackmun cautioned that other protective procedures are available to ensure against misuse of junk science. He stated, "[such] conventional devices, rather than wholesale exclusion," include summary judgment and judgment as a matter of law.[146] The trial court "remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a)."[147] Significantly, *Daubert* is itself a diversity case,[148] cites diversity cases to illustrate this power,[149] and generally makes no distinction for diversity cases in its evidentiary analysis or its comparison to sufficiency reviews such as Rule 50.

Finally, lower courts may consider the import of the Court's 1994 decision in *Honda Motor Co. v. Oberg*,[150] in which the Court considered federal constitutional limits which may be placed on state appeals courts, requiring meaningful appellate review of state court punitive damage awards. The Court found Ore-

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141. *See id.* at 251-52 (all the cited cases are federal law cases, though many are pre-1938 cases which would not raise an *Erie* concern).

142. *See Anderson*, 477 U.S. at 250 (standard for summary judgment "mirrors the standard for a directed verdict"); Rotondo v. Keene Corp., 956 F.2d 436, 442 (3d Cir. 1992); *see generally* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (discussing Court's overlap of two motions).

143. Although in 1986 it was possible to distinguish summary judgments as arguably more controlled by federal rule, Rule 56 no more provides the controlling *reasonableness* test than did former Rule 50. It was read into Rule 56's *genuine issue* by the Court, and only by paralleling federal jury review generally.

144. *See Anderson*, 477 U.S. at 249-52; *see also* Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2279 (1993) (citing *Anderson* generally for *unreasonableness* test); Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 & nn.2-3 (9th Cir. 1978) (treating summary judgment sufficiency question as related to j.n.o.v. sufficiency and therefore federal).

145. 113 S. Ct. 2786 (1993).

146. *Daubert*, 113 S. Ct. at 2798.

147. *Id.*

148. *Id.* at 2791 (removal by diversity).

149. *Id.* at 2798 (citations omitted).

150. 114 S. Ct. 2331 (1994).

gon's damages-review scheme, which applied deferential *no evidence* review, to be insufficient under the Fourteenth Amendment. As a matter of constitutional law, the Court appears to have required if not a searching substantive review of punitive damages then at least a minimum of appellate process and scrutiny, in turn defined as a substantive (outer) limit on punitive damages.

The Fourteenth Amendment at least requires appellate scrutiny beyond a *no evidence* review, the Court striking down the Oregon process of insulating awards absent such a finding. This is notable because the rejected process was repeatedly described as lacking in judicial review, even though it was not unreviewability but rather the traditional *complete absence* standard.[151] The irony is that a rule of *no evidence* review that the Court a few decades ago apparently viewed as constitutionally required in most or all jury cases[152] now had become a source of unconstitutionality itself. And safeguards at trial were deemed insufficient,[153] requiring appellate protections as well.

It is not a great leap, then, to assume that a federal court should refuse to apply *no evidence* review, even if state law would, in federal cases governed by the Seventh Amendment. Federal courts should apply a uniform test, and if a state's law is inconsistent with either the federal rule or a due process minimum then it is trumped. At least *Oberg* reveals the current Court's hostility to appellate abdication (and its regarding *no evidence* review as that), as well as a willingness to override state review rules, even in state courts, with a federal interest. So much less controversial should be a minimum and uniform federal review applied in federal courts.

Even if none of these cases actually fashioned a holding as to jury review for sufficiency of the evidence, in the aggregate they leave little doubt how the Court now views that process. They may be read to foreclose the minority position on all forms of jury review.

VIII. THE 1991 AMENDMENT TO RULE 50 AND THE SEVENTH AMENDMENT

Although directed verdicts traditionally did not have the advantage of having their review test spelled out by a federal rule,[154] the motion always set out a relationship between judge and jury, and among courts, in a way that could be

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151. *See, e.g., Oberg*, 114 S. Ct. at 2338 ("In the federal courts and in every State, except Oregon, judges review the size of damage awards.").

152. *See* 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.01, 3.03 (2d ed. 1992).

153. *See Oberg*, 114 S. Ct. at 2341.

154. *Cf.* Hanna v. Plumer, 380 U.S. 460, 470-74 (1965) (often read as indicating issues specified by Federal Rules of Civil Procedure, if arguably procedural, preempt state practice); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988) (rules capable of classification as procedural are constitutionally authorized); Morse v. Elmira Country Club, 752 F.2d 35, 38-39 (2d Cir. 1984) (because specific federal rule governs service, it applies in diversity even if state law conflicts); Seltzer v. Chesley, 512 F.2d 1030, 1036 (9th Cir. 1975) (Rule 51 applies under *Hanna*).

seen as procedural even if it does affect how the merits are finally viewed.[155] More significantly, Rule 50(a), as amended in 1991, now actually specifies that evidence must constitute a "legally sufficient basis" such as to allow "a reasonable jury to have found" for a party on an issue.[156] Rule 50 is thus interpreted as including the standard of review within the rule itself.[157]

This language may encourage courts to find sufficiency now to be more of a procedural rule issue where federal law controls. In a minority of courts, retention of a state standard for sufficiency review has at times been justified by the lack of a federal rule on point, especially where the panel must acknowledge and distinguish the use of a federal new trial test.[158] That missing link is no longer absent.[159] Locating the standard within the amended rule certainly bolsters the case for treating the issue as procedural and implicitly resolved, especially in the way courts really do apply this aspect of *Hanna*.[160]

Perhaps the federal courts have always had their jury review standard specified by another federal "law," namely the Seventh Amendment, without actually acknowledging it. That provision limits the federal court power to review civil juries[161] since "[n]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common

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155. *See infra* notes 176-179 and accompanying text.

156. FED. R. CIV. P. 50(a)(1).

157. *See* FED. R. CIV. P. 50(a) advisory committee's note (1991) (subdivision (a)(1) "articulates the standard for the granting of a motion for judgment as a matter of law [as taken from] long-standing case law").

158. *See, e.g.*, Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (en banc) (stating one reason to apply state sufficiency test was that Rule 50 did not set out a review standard); Kingsley v. Del-met, 918 F.2d 1277 (6th Cir. 1990) (same); *see also* Cooper, *supra* note 15, at 983 n.238 (Rule 50 [1971 version] lacked standard within it, so *Hanna*'s mandate to use federal rules "does not affect the present problem").

159. Of course, placing a review standard into the rule does not quite resolve the *Erie* question. It merely changes it (perhaps from an exclusively Rules of Decision Act problem to principally a Rules Enabling Act one); *see generally* Kane, *supra* note 23, at 675-76 (carefully distinguishing inquiries about "substantive" by which statute is involved). The first inquiry is whether the specified standard is so substantive that its inclusion in a federal rule offends the limits of the Enabling Act. *See id.* at 675. This is where *Hanna*'s language of "arguably procedural" better fits: the rulemaking is acceptable because it is rationally classified as procedural. *See Hanna*, 380 U.S. at 472. And then it is acceptable under the Rules of Decision Act, to the extent that inquiry remains, because it does not violate *Erie*'s central concerns, including forum-shopping and inequitable administration of the laws.

160. *See* Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 980 (1988) (policy of preventing forum-shopping generally outbalances a competing policy-based common law rule, but yields to specific Federal Rule based on statutory authority). Even critics of courts which fail to sort out the various *Erie* inquiries recognize that, after *Hanna*, a Federal Rule of Civil Procedure found valid under the Enabling Act likely controls over conflicting state law. *E.g.*, Kane, *supra* note 23, at 675. Indeed, a strong presumption exists that rules put through the enabling process are procedural. *Id.* at 678.

161. *E.g.*, Haines v. Liggett Group, Inc., 975 F.2d 81, 92 (3d Cir. 1992) (judge findings "need a stronger evidentiary base" than jury because jury is protected by amendment); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 & n.1 (4th Cir. 1991).

law."[162] To be sure, this does not provide or even authorize a specific standard of review.[163] But courts routinely present their standard of review as an application of the Seventh Amendment[164] and justify strict Rule 50 procedures in part by reference to the limited power to grant j.n.o.v. implied by the amendment.[165] The circuits may have had the key to the federal-rule dilemma in their own backyard all along, such that the *Erie* issue should have been resolved long before the Supreme Court spoke and Rule 50 changed. Perhaps the recent law will spur minority courts to realize that they finally need to change too.

IX. WILL THE COURTS DECIDE THE ISSUE?

Given this impressive body of doctrine, (especially the amending of Rule 50 and recent Supreme Court guidance touching on the issue if not deciding it outright) the minority position, as a matter of doctrinal consistency at least, can no longer stand.

Perhaps the Supreme Court itself will grant certiorari to resolve the circuit conflict in favor of a federal test, using its own precedent and rule change to sanction the majority view. Indeed, the Court has increasingly granted certiorari on standards of review issues in other contexts.[166] However, ultimately one wonders whether the current Court has the energy to revisit a question for which the parties likely will not urge an outcome-determinative position in their petitions.

Nevertheless, any minority panel otherwise now skeptical of a state-standard rule need not await further High Court direction. To the extent these circuits wish to change or cement their review rule in favor of federal law, they can do so by en banc resolution, as the Fifth Circuit did in part on the *Erie* issue in *Boeing*.[167]

Even that drastic remedy, as en banc resolution is less likely for busy courts, is not required. This is because these circuits' panels themselves may choose a

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162. U.S. CONST. amend. VII.

163. Cooper, *supra* note 15, at 976-78, 990 (arguing that since Seventh Amendment does not sanctify a particular standard, it does not mandate a federal test in diversity cases).

164. *See, e.g.*, *Mattison*, 947 F.2d at 99 (justifying use of federal sufficiency review in part by amendment which "always" applies to federal judges); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc) (patently unreasonable verdicts do not merit constitutional protection, so courts may review verdicts for sufficiency as a question of law consistent with amendment); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1065-66 (4th Cir. 1969) (review rule has amendment interplay); FED. R. CIV. P. 50(a) advisory committee's note (1991) (jury review is only "to assure enforcement of the controlling law and is not an intrusion on any responsibility for the factual determinations conferred on the jury by the Seventh Amendment").

165. *See* FED. R. CIV. P. 50(a) advisory committee's note (1991) (noting constitutional issue but preferring to rest timing rules on policy of allowing parties to cure defects).

166. *See, e.g.*, 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.02 (2d ed. 1992).

167. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc).

uniform federal rule whatever their mixed precedent on point. This is so, despite a rule of *panel stare decisis* normally used in all courts,[168] because they further recognize that panels need not defer to cases decided before an intervening change in governing case law or amendments to applicable rules.[169] In this context, both Supreme Court precedent and the 1991 amendment to Rule 50, even if not precisely on point,[170] act as sufficient fodder for a panel to reexamine and alter its own precedent in light of that intervening authority.

An indication that this course of conduct may gain momentum is the Seventh Circuit's 1994 about-face. Although the *Mayer* court relied on a discussion of *Erie* policy and uniformity with other review rules as opposed to citing new precedent,[171] the court has sent a message to the remaining minority or neutral courts that modern reexamination is in order.[172] Even so, as noted above, many of the remaining circuits have reconfirmed, albeit without discussion, routine application of their state or dual-standard approach.

That the minority circuits should adopt a settled test, and choose their federal one, is indeed supported not only by intervening law, but also by *Erie* theory and policies. If the state-standard rule was wrong all along for such reasons, its change may now be triggered by use of the newer authority, even if the position chosen is justified more satisfyingly and less technically by considering the modern scope and goals of *Erie*.

X. *ERIE, HANNA*, AND THE POLICY OF FEDERAL UNIFORMITY

Using traditional *Erie* analysis as it has developed under *Hanna v. Plumer*, it appears that the issue is necessarily federal. *Hanna* loosened *Erie*'s apparently tight reins by rejecting "application of any automatic, 'litmus paper' criterion,"[173] instead emphasizing the twin "principles of outcome determination

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168. This doctrine requires each circuit panel to defer to previous panels' rulings on law within the circuit, subject to en banc modification. *See* Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 (1st Cir. 1992); Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); Richard Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 713 (1984).

169. *See, e.g.*, Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221, 224 n.3 (3d Cir. 1984); Davis v. Estelle, 529 F.2d 437, 441 (5th Cir. 1976); 1B JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.402[1] (2d ed. 1991) (collecting cases).

170. *See Gallagher*, 962 F.2d at 124 (stating that the force of *panel stare decisis* rule dissipates when newly emergent authority, if not directly controlling, convinces the panel that the previous panel would have changed its course).

171. *See* Mayer v. Gary Partners & Co., 29 F.3d 330, 333-35 (7th Cir. 1994) (To handle the problem of stare decisis, the court noted its change in existing law and circulated the opinion among active judges, none of whom requested en banc review. The court did find that the recent cases linking summary judgment and sufficiency review "leave no other option," but did not present it as intervening authority that warranted a departure from stare decisis.).

172. *Cf.* MICHAEL E. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 5.04, at 13-14 (Supp. 1994) (citing *Mayer* as confirming the uniform federal rule).

173. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

and the deterrence of forum shopping that underlie *Erie*."[174] Lower courts, in turn, stress these factors in sorting out federal/state dilemmas.[175]

Use of federal review does not appear to be outcome-determinative in any sense the courts actually employ, as one prior state-rule court nearly conceded.[176] Of course, the review test may make a difference in a particular case, but for this factor the courts tend to focus on the necessary and inevitable impact across nearly all such cases.[177] At any rate, the impact of "outcome determination" has obviously lessened since *Hanna* because it would mean little if read to its extreme: "It is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case."[178]

In most jury review cases, the test's impact is slight or none. This allows many courts, noted above, to moot the *Erie* issue itself. Any change in outcome only occurs after some part of the trial has occurred, and it varies on the facts of each trial which is hardly a predictable or generic effect (unlike a statute of limitations). The appellate review process is even further removed. Thus, it should not be found to violate *Hanna*'s policy that a state rule control if it would "make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum state."[179] The choice does not seem to broadly implicate the inequitable administration of justice because most versions of jury review are long-standing, have support in ample precedent, and are similar or lead to similar results.[180]

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174. *Id.*; *see* Chambers v. NASCO, Inc., 501 U.S. 32, 52 (1991) (outcome-determination must be read in terms of the *Erie* goals of avoiding forum-shopping and inequitable administration of laws).

175. *See, e.g.*, Hines v. Elkhart Gen. Hosp., 603 F.2d 646 (7th Cir. 1979); Jarvis v. Johnson, 668 F.2d 740 (3d Cir. 1982) (emphasizing three factors: (1) the effect on the outcome, (2) the likelihood and prevention of forum-shopping, and (3) any overriding federal interest). Of course, the courts have been criticized for not clearly sorting out the two different statutory contexts in which *Erie* issues arise (and then applying the specific test for that context), as well as turning supporting language from *Hanna* into "tests" or policy-balancing. It is clear, however, that these forms of analysis are actually used by most courts, and it may nonetheless be true that the *Byrd* balancing approach is still viable. At any rate, all such factors are considered here individually, as this article argues that a federal test is mandated under any of the competing views of *Hanna*.

176. *See* Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983).

177. *See* Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061, 1066 (4th Cir. 1969) (federal test applies since outcome-determinative test is neither inflexible nor universal); FLEMING JAMES ET AL., CIVIL PROCEDURE § 2.37, at 128-30 (4th ed. 1992) (*Byrd* and later cases mean that outcome-determination in strict sense is not controlling).

178. Hansen v. Harris, 619 F.2d 942, 962 (2d Cir. 1980) (quoting CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS 273 (3d ed. 1976)), *rev'd on other grounds sub nom.* Schweiker v. Hansen, 450 U.S. 785 (1981).

179. *See Hanna*, 380 U.S. at 468 n.9.

180. *See generally id.* at 468; Herbert v. Wal-Mart Stores, 911 F.2d 1044, 1047 (5th Cir. 1990) (interpreting that *Hanna* means for the courts to look at the twin aims of *Erie*, namely, avoidance of forum-shopping and the inequitable administration of the laws); Cates v. Sears, Roebuck & Co., 928 F.2d 679, 687 (5th Cir. 1991).

The other strong concern is forum-shopping. It seems unlikely that lawyers, even in states with a different review test, will choose a federal forum just because they want a verdict more easily overturned on review. Such a strategy would defy the optimism and immediacy of trials because it would assume a focus on post-trial remedies to an anticipated failure of proof or strategy at trial.[181] The fear of forum-shopping is more realistic for issues that are closely related with the state issues raised, such as trial burdens. For sufficiency, however, it is hard to believe that applying the state rule "would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court," as *Hanna* requires.[182] Moreover, forum-shopping seems far more likely to occur where summary judgment practice differs, yet this is an area where all circuits agree that federal practice governs federal courts.[183]

Beyond these two factors, courts often ask whether an overriding federal interest exists.[184] Use of a federal standard is supported by the oft-cited sanctity of the judge/jury relationship in federal courts: one "essential characteristic" of the federal system "is the manner in which, in civil common-law actions, it distributes trial functions between the judge and the jury."[185] Thus, there is "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[186] In similar contexts, the Court has cited that

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181. Judge Posner once argued that jury review may have a disproportionate and systemic impact, and therefore may (if the federal test is more liberal) induce diversity plaintiffs "to shun federal court" and defendants to remove; or (if less liberal) cause plaintiffs "to flock to federal court." Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983). Note, however, that such a party would have to anticipate the result at trial and not fear the impact of the opponent's own review test if that guess is wrong.

182. *Hanna*, 380 U.S. at 468 n.9. Nor does the choice of law seem to "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Id.* at 475 (Harlan, J., concurring); *see also* Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061, 1065-66 (4th Cir. 1969) (sufficiency rule plays no role in the ordering of the affairs of anyone); Cooper, *supra* note 15, at 982 (though arguing for state law on some aspects of review, notes that "it is extremely difficult to conjure up a situation in which disregard of state directed verdict standards would interfere with private planning of private activity").

183. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 438-40 (1992) (finding that defendants shop forums for liberal summary judgments).

184. *See, e.g.*, Jarvis v. Johnson, 668 F.2d 740 (3d Cir. 1982) (*Erie* analysis asks, *inter alia*, whether any overriding federal interest is served); Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165 (D.C. Cir. 1977). There exists an academic debate over the extent to which broad policy-balancing survived *Hanna* and when it rightly is invoked. But there is no doubt that courts routinely ask what federal interest is promoted (as the Supreme Court has, specifically as to related review problems), even if it is not really weighed against a comparable state interest. It is at least a relevant factor in *Hanna*'s larger policy inquiry reflected in such concerns as the equitable administration of justice.

185. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

186. *Id.* at 538.

relationship as an inherently federal one which justifies federal review rules.[187] On the sufficiency issue itself, some courts likewise cite this relationship as inherently procedural, requiring a federal review rule.[188] Consequently, a balancing of federal interests has evolved in favor of promoting judge/jury symbiosis.

The relationship is especially protected when one concentrates on the exact issue presented by pure sufficiency review, namely legal reasonableness of the jury, rather than on similar but decoy issues, such as trial burdens and *res ipsa loquitur*. The "similar" issues arguably do affect substantive interests because they intertwine sufficiency in a factual sense with state law issues that incorporate the primary rights and duties of the parties. By contrast, standards of review measure the extent to which these rights and duties are satisfied in the way that any procedure sets up a process to determine rights and duties.

More to the point, review for sufficiency (even more than the underlying law, burdens, and presumptions), by definition, specifies the relationship between a judge and jury. Standards of review in general are now understood as a system of allocating decisional authority among judicial actors.[189] This is no less so when the allocation is between the two actors judge and jury.[190] Indeed, sufficiency review, in its modern understanding, is the paradigm of distributing power between them.

The Supreme Court has recently made clear that trial burdens and other standards of proof are not the same as review standards. The latter "describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that fact had been proved under the applicable standard of proof."[191] That state-law burdens and presumptions must always be kept distinct from jury sufficiency is illustrated by the Court's analysis in *Dick*. In deciding that state presumptions must be followed, the Court simultaneously found no need to decide whether state directed verdict practice also controls.[192]

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187. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279-80 (1989) (review rule over propriety of damages award justifying new trial); Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (waiver rule in remittitur context).

188. *See, e.g.*, Garrison v. Mollers North Am., Inc., 820 F. Supp. 814, 817 (D. Del. 1993).

189. Martha S. Davis & Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 464 (1986) (issue is not the stated standards themselves but rather the allocation of power among decisionmakers they reflect); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 997-98 (1986) (review standards are principal means by which decisional power is divided between trial and appeal).

190. *See* Louis, *supra* note 189, at 1027-29 (law-fact classification also controls assignment of power between judge and jury); Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (en banc) (describing allocation between judge and jury as necessarily procedural).

191. Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2279 (1993).

192. Dick v. New York Life Ins. Co., 359 U.S. 437, 445-46 (1959).

Thus, burdens and presumptions are part of the substantive package in a way that is simply not shared by the review test itself, even to the extent the test necessarily includes their application as part of the substantive law reviewed. The Court in *Anderson* incorporated standards of proof into the jury review test itself without hinting that the review test thereby becomes state law.[193] Indeed, the measure of sufficiency appears generically federal in such a diversity case at the same time the burden is applied as part of the test. Even though "what" is proved now considers substantive burdens and presumptions, the "whether" should be no less procedural.

In a related vein, the Supreme Court, by recently incorporating standards of proof into the total review-standard package, has effectively deflected the most powerful justification which could have been used by the minority circuits. Perhaps the state-standard rule could be supported, at least as to some aspects of sufficiency review, by arguing that standards of proof are state substance so that a federal review test would ignore that important point by failing to give the state burden its proper due.[194] Now, however, the Court has included that "due" within the standard of review itself by making sure review is understood to build the burden into the review process. Thus, the minority courts seeing state substance within sufficiency review can now clearly sort out and maintain the substance (e.g., standards of proof) while newly recognizing the issue to be governed by a federal process.

The confusion may also reflect a mixing of the question of whether the evidence suffices generally and factually with whether a certain issue is the kind that is legally submitted to a jury, which is arguably more a substantive issue. Even so, as noted above, the Court has indicated that the jury-right issue is itself provided by federal law, and this rule is recognized even in courts which apply state sufficiency rules.[195] If a substantive/procedural distinction is to be urged, it would seem to apply more powerfully to the jury-right problem. The sufficiency issue, however, as a measure and a review process, seems less substantive.

Even to the extent these tests for rejecting a verdict as legally insufficient seem substantive,[196] that label over the years has become less decisive on many *Erie*-type issues.[197] Modern courts find more guidance in looking to the underlying principles of *Erie* and its progeny than in falling back on amorphous char-

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193. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

194. *See* Cooper, *supra* note 15, at 976, 983-90 (arguing for deference to state law on this and similar aspects of sufficiency review).

195. *See, e.g.*, Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 122 (1st Cir. 1992).

196. *See* Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983) (sufficiency review intertwines with substantive law and thus justifies use of state rule); Boeing Co. v. Shipman, 411 F.2d 365, 368 (5th Cir. 1969) (en banc) (federal test controls though arguably substantive).

197. *See* Gelfand & Abrams, *supra* note 160, at 941 ("[c]oncentrating on what is procedure and what is substance, however, has little to do with what is really at issue"); Kane, *supra* note 23, at 673

acterizations.[198] This returns the inquiry to outcome, forum-shopping, and federal interests, all which support the application of federal law.

Another policy that *Erie*'s progeny often invokes is a concern about uniformity, apparently of both substantive law and, to some extent, outcome. These issues are answered by applying the traditional and modern *Erie* analysis considered above. A different set of policies favoring uniformity, however, actually supports applying a federal test of sufficiency.

Admittedly, *Erie* was not primarily about uniformity within federal courts, but rather it emphasized the evil of forum-shopping between a state and federal court. This concern, however, seems most obviously to apply to a Rules of Decision Act problem rather than a Rules Enabling Act one, where federal uniformity may be valued. At any rate, federal uniformity is still a factor to be generally considered and a policy worth promoting,[199] even if it is not controlling. It appears to be a legitimate concern involved in the weighing of federal interests that *Byrd* requires. In addition to the usual federal interest in protecting the judge/jury allocation, federal uniformity promotes the fair and efficient administration of justice.

At the very least, policies of uniformity serve as a good justification to adopt federal review if it is allowed, even if the *Erie* analysis which allows it focuses on different factors. Moreover, *Erie* is often read as a decision crucially about predictability,[200] and a more uniform federal rule, especially abandoning the "neutral" rule, necessarily promotes such a federal policy. Thus, use of a federal rule is supported, however decisively, by four forms of federal uniformity.

First, the circuits should be uniform among themselves in their choice-of-law rule on this issue. The fact that the circuit split exists and persists serves no useful purpose. It is even wasteful to the extent it encourages courts to redouble their decisionmaking effort in each case. If courts could conceivably worry about forum-shopping along the state/federal hierarchy, they could similarly dread conscious decisions to select a specific federal forum, if jurisdiction and venue allow, which has a desired standard. For example, a plaintiff seeking eventual *any evidence* affirmation would choose a federal forum applying a strict state test, or at least avoid a federal court among federal courts which would apply the less-generous general federal test. Unlikely? Probably human

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(*Erie* created new "balance of power . . . controlled by the wavering (sometimes almost evanescent) line between substance and procedure").

198. Stoner v. Presbyterian Univ. Hosp., 609 F.2d 109 (3d Cir. 1978).

199. *See* Darrell N. Braman & Mark D. Neumann, *The Still Unrepressed Myth of Erie*, 18 U. BALT. L. REV. 403, 412 (1989) (one interpretation of *Byrd* requires courts to weigh outcome-effect against "federal interests in promoting a uniform and efficient federal system"); Gelfand & Abrams, *supra* note 160, at 954-55 & n.55 (*Erie* is more concerned with federal/state shopping than state/state shopping, but existence of diversity jurisdiction presumes some positive value in federal/state shopping).

200. *See, e.g.*, Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954).

conduct is not so foresightful, but that is why the traditional forum-shopping factor was not realistically a problem in the first place.

Second, and more significantly, resolution of the choice-of-law issue should be uniform as to the different review postures that arise in litigation. No reason exists for having state standards of review specified for some types of review while federal review is prescribed in other contexts within the same court and often in the same case. The *Erie* problems would appear to be the same, yet have uncontroversially been resolved in favor of federal law in so many other litigation settings.[201] Can it be denied that decisions on summary judgment have similar (if not worse) odds of outcome-determination and forum-shopping? Is factfinding of a judge after a bench trial so different for its *Erie* evils? Most courts and sources simply do not draw the comparison, though generally it should be recognized that the review process is similar, with varying levels of deference and scrutiny defined by the standard of review.

One contrast sometimes drawn is between new trial and sufficiency reviews in those courts which apply state j.n.o.v. review. Occasional efforts to distinguish the two contexts appear half-hearted at best, and focus on possible outcome-determination or forum-shopping differences.[202] Perhaps the minority courts could focus instead on a more fundamental distinction between the two types of motions, i.e. between law and discretion. The appellate court defers to a trial court's discretion to grant or deny new trial, while the legal sufficiency of the evidence must be reviewed with no real interim contribution by the trial court.[203] But while it is true that sufficiency is by definition a question of law, that label is more a convenience necessary to avoid Seventh Amendment problems than it is a true description of the process. Jury review for sufficiency is, at the very least, a review of the facts and evidence supporting a verdict. The process is steeped in the record and only its defining threshold uses (must use) the term *question of law*.

In other words, a verdict is "legally" insufficient because the record support fails. While that process is stricter and less discretionary than is new trial review, it cannot be seen as defining any less the relationship between a federal court and its jury. Moreover, such motions are very often brought together and are thought to frame similar inquiries, but with different thresholds and reme-

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201. The traditionally minority circuits have systematically applied federal standards to review non-jury findings, new trial decisions, remittitur, summary judgments, and jury charge procedure. *See, e.g.*, Mayer v. Gary Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994) (noting settled federal law in these and other procedural contexts to justify in part its move to federal sufficiency test).

202. *See* Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983) (sufficiency review [state] distinguished from new trial test [federal], but notes counterarguments and recognizes the "usual assumption" [again supporting uniformity] that whether state law applies "must be answered the same way" for sufficiency and excessiveness).

203. *See* cases cited *supra* note 31.

dies.[204] The Court in other contexts has recited general federal review over questions equally about the sufficiency of a verdict "as a matter of law," notably review of summary judgment or judgment on partial findings. Interestingly, this more realistic distinction between such motions is not generally used to justify a different *Erie* choice, possibly because upon examination it too seems like a distinction without a difference, at least for *Erie* purposes.

The Supreme Court increasingly seems to support a more uniform approach to the *Erie* issue for standards of review (even if the standards themselves necessarily diverge by context). It has discussed summary judgment practice by citing directed verdict cases (without a distinction for diversity cases). It has stated even more broadly, in applying a uniform *de novo* review over district court decisions about state law, "Nothing about the exercise of diversity jurisdiction alters these functional components of decisionmaking."[205] Likewise, nothing about the functional components of decisionmaking should alter the *Erie* choice of law.

Third, the courts need to establish uniformity among appellate issues generally. Appellate review is a package of three parts: timing (jurisdiction), scope of review (what issues are addressed), and standard of review (how they are addressed).[206] No reason exists to distinguish these for *Erie* purposes, especially since all are part of the broader process of appellate review and again seem to raise similar *Erie* concerns. The Court has already made an effortless leap between them by citing its federalized remittitur waiver rule in order to justify a federal new trial standard of review.[207] Similarly, the Court has expressly applied federal, not state, law on the jurisdictional issue of appealability and timing[208] with no mention of any concerns or qualifications which would distinguish standards of review. Placing all appellate issues into one box for *Erie* purposes allows the courts to develop a consistent practice in all phases of what is most accurately described as three aspects of one institutional function and allocation of authority.

Finally, courts should have a uniform *Erie* stance regarding all jury procedures specified by Rule 50. It is relatively settled that the rule's preservation and waiver aspects apply in federal court despite state leniency.[209] Yet these

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204. *See* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237 (discussing the Rule 50 procedure for combining sufficiency and new trial motions as well as their similar review process).

205. Salve Regina College v. Russell, 499 U.S. 225, 233 (1991).

206. James Dickson Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 1-2 (1984).

207. *See supra* text accompanying notes 132-136.

208. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-99 (1988); *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (applying federal doctrine of interlocutory appealability in a diversity case); Napolitano v. Flynn, 949 F.2d 617, 621 (2d Cir. 1991) (appealability is federal law).

209. *See* 5A JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 50.06, at 68-69 (2d ed. 1991) ("federal law clearly governs matters specifically covered by Rule 50," such as preclusion

aspects are only marginally more "procedural" and certainly more outcome-determinative[210] than are the standards of review aspects currently embedded in Rule 50.

Thus, four versions of federal uniformity suggest that jury review fall into line. Indeed, to rule otherwise is to isolate jury sufficiency review as the only appellate review issue, the only jury issue, and the only standard of review issue which is not uniformly federal law.

XI. ALLOCATION OF DECISIONAL AUTHORITY REVISITED

Ultimately, appellate and review authority, along with its shadowing *Erie* question, must be about the proper allocation of institutional roles, power, and respect. By this measure, the context of sufficiency review is paradoxically the best paradigm of federal decisionmaking. It invokes three separate and important relationships.

First, sufficiency review defines the recognized relationship between judge and jury, and perhaps more so than in other contexts where that factor seems determinative. The waiver rule in *Penn Shipping*, for example, is really about reviewability, and as such only defines the relationship between a district court (offering remittitur in its discretion) and its appellate court. Yet the Court echoes the judge/jury analysis to make its point.[211] In *Browning-Ferris*, the Court's consideration of remittitur may look like review of the jury, but technically it is a review of the district judge's review of the jury. At least for the district court considering sufficiency, review of the jury is more direct.[212] Thus, the discretion given a district court on new trial, rather than justifying a distinction for *Erie* purposes, actually defines the judge/jury relationship less than it does a trial/appellate assignment of decisionmaking authority.[213]

Second, that trial/appellate relationship (which most review cases really address) is indeed important. This relationship is no less absent in sufficiency review, which defines both the trial judge's evidentiary review and the appellate court's response to both judge and jury.[214] The fact that the trial court's initial decision is effectively taken out of the appellate review does not deny the trial/appellate allocation. Indeed, it defines it. It is the appellate review standard.

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rules); *but cf.* Simmons v. City of Philadelphia, 947 F.2d 1042, 1085-86 (3d Cir. 1991) (treating Rule 50(a) waiver in that case as "substantive"), *cert. denied*, 503 U.S. 985 (1992).

210. *See Simmons*, 947 F.2d at 1085-86 (applying state rule against waiver due to effect on outcome).

211. *See supra* text accompanying notes 130-131.

212. Even on appeal, sufficiency review is more direct in the sense that it is *de novo*, while new trial has to consider two different decisionmakers below.

213. The trial judge's own review of the jury is discretionary but limited, and the limitation is a federal matter under *Browning-Ferris*. Sufficiency review is simply more limited.

214. *See supra* text accompanying notes 38-40.

Even direct review by the trial judge has overtones of "appellate" authority because the court is acting in a reviewing capacity.

Some other contexts only concern appeals. For example, *Salve Regina*'s assignment of lawmaking power in diversity cases to the appellate court is missing the judge/jury relationship deemed so federal yet are no more defining of the appellate role than is Rule 50. Using a policy analysis which focused on the institutional competencies and roles of district and circuit judges, that Court found the appellate courts to be "structurally suited to the collaborative juridical process that promotes decisional accuracy."[215] Similar analysis (though with a different outcome—deference) must inform the assignment of power to juries.

Third, modern courts considering the impact of *Erie* on difficult choice-of-law issues cannot escape falling back on some view, articulated or not, of the proper allocation of decisionmaking authority within a federal/state system.[216] In that light, the crucial federal/state relationship is not hindered by application of a federal review rule. This relationship has been worked out, albeit crudely, over years of case law interpreting *Erie*. *Hanna* especially must be seen as allowing significant rulemaking authority to Congress and the federal courts, and nothing in the balance that has evolved since then denies a proper place for federal court decisionmaking. Indeed, all indications are that the institutional allocations within federal courts and among state and federal courts (the latter through *Erie* and its progeny) justify a uniform federal review process.

The particular sufficiency issue has been avoided so long and so often, possibly because it so starkly becomes a decision about a similar assignment of roles within the federal system itself. Yet therein lies the theoretical, policy, and precedential solution to this long-standing *Erie* problem. Jury review for sufficiency of the evidence is about the only litigation context which leans to the federal end of three accepted continua, to an extent not even found in more settled settings.

CONCLUSION

The applicable scope of jury review in diversity cases is not as settled as commentators tend to paint it, although a majority of federal courts use a federal test while others note that there is no real conflict in application. Continued use of a state-standard rule, applied sporadically in at least four circuits and infecting sporadic cases in others, is a controversy that has outworn its welcome. The better view seems to be that federal standards should define the propriety of a federal jury's action, though not its substance, and that those courts which

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215. Salve Regina College v. Russell, 499 U.S. 225, 231-32 (1991) (*de novo* review "best serves the dual goals of doctrinal coherence and economy of judicial administration").

216. *See generally* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 806, 812-15 (1989) (arguing that *Erie* is a decision about orbits of and limits on lawmaking competence).

tend to avoid the issue might use recent Supreme Court pronouncement to fix their test in one predictable spot.

Even so, recent cases decided after further Supreme Court guidance tend to simply repeat earlier positions on this controversial issue, merely citing a case which cites a case.[217] Usually the state-review courts do so with no analysis of *Erie*'s principles and goals as applied in modern courts, and even without discussing whether recent precedent forces a change in their traditional rule.

Instead, following the lead of the recent Seventh Circuit, the remaining state and dual-standard courts should reconsider the issue in light of recent case law, rules changes, and the policies and theories driving *Erie*-type decisions today. All of these point to choosing a uniform federal rule of review. Even the dual-standard courts should perceive a value in choosing to choose, at long last. As the *Mayer* Court observed, "A court has a hard enough time keeping track of one set of procedural rules."[218]

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217. *Cf.* Braman & Neumann, *supra* note 199, at 472 ("[s]tare decisis often plays a role by binding later courts to earlier versions of incorrect analyses") (footnote omitted).

218. Mayer v. Gary Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994).

The Firm Revisited: Somebody at The Justice Department Has Been Reading John Grisham

MICHAEL VITIELLO†

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I. INTRODUCTION

The recent unsuccessful prosecution of highly regarded criminal defense lawyer Patrick Hallinan[1] and the indictment of six American lawyers along with members of the Cali cocaine drug cartel[2] have renewed concerns that the United States Attorney's office has targeted for prosecution aggressive criminal defense lawyers. A significant majority of the criminal defense bar believes that the government targets members of the defense bar in order to deter them from vigorously representing their clients.[3]

This essay reviews those cases but does not resolve claims of governmental overreaching. Instead, this essay accepts as a premise that lawyers attract the attention of federal prosecutors because of the power and influence that they exert in American society. A United States Attorney may believe that successful prosecution of highly visible attorneys will give maximum deterrent impact to the criminal law. Everyone is watching.

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† Professor of Law, McGeorge School of Law; B.A., Swarthmore College, 1969; J.D., University of Pennsylvania, 1974. I wish to thank McGeorge Law student Carolyn Burton for her excellent research assistance.

1. *See* discussion *infra* at notes 16-36.
2. *See* discussion *infra* at notes 37-52.
3. William J. Genego, *The New Adversary,* 54 BROOK. L. REV. 781, 812 (1988).

If lawyers are of special interest to the government, there may be other justifications for that attention: lawyers hold special power and have a duty to live up to special obligations to maintain the public trust.[4] The profession has lost public trust from Watergate through sleazy public advertising all the way to the O.J. Simpson trial. The local bar associations do not appear up to the task of effectively policing their own.

Given that the government may have incentive to investigate professionals, lawyers ought to be aware of how they may become federal criminal defendants. This essay does not canvass all of the ways in which lawyers may violate federal criminal law. That task is monumental.[5] Instead, this essay touches on a theme suggested by the popular author John Grisham.

In Grisham's best selling novel, *The Firm*, hero, Mitch McDeere, is able to topple his corrupt firm, gain the release of his brother from state prison, coax $750,000 from the federal government, and hold the Mafia at bay, when he discovers that his firm has been systematically overbilling its clients. No doubt, most Grisham-reading lawyers marveled at the clever plot device, but found McDeere's legal theory, that the government could or would indict the lawyers at Bendini, Lambert & Locke with multiple counts of mail fraud, highly unrealistic. Or so I thought.

Recent headlines prove that life imitates art or that someone at the U.S. Attorney General's office reads Grisham. Clinton associate and the First Lady's former law partner Webster Hubbell is only the most prominent defendant in what now appears to be a common strategy of the government, whereby the government charges lawyers with mail fraud for overbilling clients.[6] It demonstrates one more "flexible" use of mail fraud to federalize local fraud, especially surprising in that regulation of the bar has traditionally been a state function relatively immune from federal regulation.[7]

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4. *See, e.g.*, United States v. Benjamin, 328 F.2d 854 (1964) (holding that government can prove that an attorney acted willfully if he "deliberately closed his eyes to facts he had a duty to see."); *see* MODEL RULES OF PROFESSIONAL CONDUCT.

5. The following are a few of the legal issues that face lawyers in the white collar crime arena: 1) fighting for one's fee; *see, e.g.*, Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (upholding against a Sixth Amendment challenge the right of the government to forfeit funds that a client seeks to use to pay attorney's fees); 2) violating federal criminal law by receiving and not reporting a fee in cash in excess of $10,000; *see* 26 U.S.C. § 60501; United States v. Goldberger & Dubin, 935 F.2d 501 (2d Cir. 1991); United States v. Ritchie, 15 F.3d 592 (6th Cir. 1994) (upholding requirement to report cash transaction and client's name); 3) obstructing justice by corruptly persuading client to refuse to testify by invoking his Fifth Amendment right not to testify and to accept jail sentence when held in contempt after grant of immunity. *See* United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987).

6. *See* United States v. Crymes, Hardie & Heer, No. 93-109 (E.D. Cal. 1993); *see also* Debra Cassens Moss, *Fairchild Guilty Plea*, 81 A.B.A. J. 26 (Feb. 1995); Benjamin Wittis, *It Could Happen to You Too*, 138 N.J. L. J., Dec. 19, 1994 (discussion Webster Hubbell's guilty plea to charges of tax evasion and mail fraud).

7. *See* Lathrop v. Donohue, 367 U.S. 820 (1961) (rejecting federal constitutional attacks on mandatory lawyer membership in state bars); *see* also GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND

This essay examines some of the ways in which lawyers can run afoul of the federal mail fraud statute.[8] In addition to overbilling,[9] it also reviews a more general theory relied on by the government whereby a breach of a fiduciary duty may become actionable as a deprivation of an intangible right to loyal service.[10] This essay also examines consequences that flow if one commits a number of acts of mail fraud. Simply stated, mail fraud provides the predicate for a RICO[11] indictment or, even if the government reserves RICO for bigger fish, a private right of action for treble damages and attorneys' fees.[12]

Lawyers and lay observers of the justice system often scoff at the lack of enforcement of ethical rules. Local bar associations may be unwilling or ill equipped to police the profession. But this essay discusses a far greater deterrent than punishment by the local bar association. It examines how easily lawyers may cross the line between practicing law and violating federal law.

II. WHY ARE LAWYERS GETTING PARANOID?

In 1988, the Brooklyn Law Review published a study based on a nationwide survey of 4,000 criminal defense lawyers. The survey "asked questions about government practices that directly affect attorneys in their representation of criminal defendants including the frequency of the government practices, and the effect the practices have upon criminal defense representation."[13]

Eighty percent of the attorneys believed that the Justice Department targeted attorneys to deter them from zealously representing their clients.[14] Two thirds of the attorneys responding to the survey reported that they had some contact with the government relating to their law practice. "Among the specific practices inquired about were the receipt of grand jury subpoenas, the receipt of summonses from the Internal Revenue Service, the government's use of confidential informants at defense meetings, attempts to forfeit fees paid attorneys or to prevent a defendant from using assets to pay attorneys' fees, and efforts to disqualify an attorney from representing a particular defendant."[15]

ETHICS OF LAWYERING 855-69 (2d ed. 1994) (describing historical role of bar in regulating practice of law).

8. 18 U.S.C. § 1341 (1988). The statute was recently amended to include the use of private carriers who do business in interstate commerce. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796.

9. *See* discussion *infra* at notes 74-111.

10. *See* discussion *infra* at notes 112-34.

11. Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

12. 18 U.S.C. § 1964(c) (providing for treble damages and attorneys' fees).

13. *See* Genego, *supra* note 3, at 788.

14. *See* Genego, *supra* note 3, at 812.

15. *See* Genego, *supra* note 3, at 806.

The recent prosecution of prominent criminal defense lawyer Patrick Hallinan lends some support to the claim that the government abuses its power to deter zealous representation.

A. CHARGES AGAINST PATRICK HALLINAN

On March 7, 1995, Patrick Hallinan was acquitted of all drug conspiracy and obstruction of justice charges brought against him by the United States District Attorney's office in Reno, Nevada.[16] Hallinan's acquittal came after the jury deliberated for a mere five hours. The prosecution's case rested primarily on testimony from drug smugglers, most notably Ciro Mancuso.[17] The jurors discounted the government's witnesses, especially Mancuso, whom the jurors likened to a used car salesman.[18]

Hallinan, a well known and well-respected defense attorney, was arrested at his Marin County home on Friday evening August 6, 1993.[19] Hallinan was released from custody three days later on $300,000 bond.[20] At the time of his arrest, Hallinan was reading in his library as DEA agents surrounded his home and burst in with their guns drawn.[21] Moments later, Hallinan realized that his home was not being burglarized, but that the intruders were federal agents and he was being arrested.[22]

The original sixty-two page indictment was filed under seal in Reno on August 4, 1993. The indictment identified Hallinan as counsel to the Mancuso drug trafficking organization and charged him with thirteen counts of drug importation and trafficking, money laundering and obstruction of justice.[23] More specifically, the indictment alleged that Hallinan received cardboard boxes filled with cash; advised Mancuso how to launder drug-sale proceeds; and created a fictitious person to act as the director of a shell corporation to launder Mancuso's drug money.[24] Most strikingly, however, was an allegation that Hallinan advised Mancuso to "get rid of" Edwin James Vallier, a witness who was cooperating with law-enforcement officials.[25]

Further allegations against Hallinan appeared in an affidavit used to support search warrants for his San Francisco office and his Kentfield residence. Ac-

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16. Howard Mintz, *Hallinan Verdict: Total Acquittal*, THE RECORDER, Mar. 8, 1995, at 1.
17. *Id.*
18. *Id.*
19. Rob Haeseler, *U.S. Reveals Case Against Hallinan Document Says Pot Smugglers Informed on S.F. Attorney*, S.F. CHRON., Oct. 8, 1993, at A21.
20. *Id.*
21. Maureen Dolan, *Putting the Heat on the Defense*, L.A. TIMES, May 31, 1994, at 1.
22. *Id.*
23. Victoria Slind-Flor, *Defense Lawyers Arrested Forfeiture of Practices Sought*, NAT'L L. J., Aug. 23, 1993, at 3.
24. *Id.*
25. *Id.*

cording to the affidavit, Hallinan "forwarded hush money to witnesses, helped Mancuso launder $280,000 by inflating the value of a piece of property in Mexico and then selling it to a smuggling confederate, created a fictitious intermediary to enable Mancuso to bank his drug proceeds offshore, and tipped off two suspects that they had been secretly indicted so they could flee the country."[26]

On July 13, 1994, federal prosecutors in Reno filed a second indictment against Hallinan which included charges of criminal racketeering.[27] The indictment named Hallinan in twenty of twenty-two counts alleging that he tampered with witnesses in drug cases, destroyed evidence, concealed the source of drug proceeds, discouraged clients from cooperating with authorities, advised members of the drug ring to flee the country and told others to lie to the Nevada grand jury.[28]

Shortly after Hallinan's arrest, Jack Sullivan Grellman, a Reno lawyer who had conducted real estate transactions for Mancuso upon Hallinan's request, was indicted on three federal counts alleging drug importation, conspiracy and obstruction of justice. Unlike the arrest of Hallinan, however, Grellman was allowed to surrender to authorities voluntarily.[29] On the eve of trial, Grellman pled guilty to one count of money laundering and agreed to testify against Hallinan.[30]

There were sixteen charges pending against Hallinan when jury selection began on January 24, 1995. However, during the course of trial ten charges were dropped by the prosecution or dismissed by Judge McKibben.[31] Specifically, Judge McKibben threw out charges of racketeering and racketeering conspiracy. The judge ruled that prosecutors failed to prove the existence of a RICO enterprise.[32] Thus, by the time the case was submitted to the jury, Hallinan faced six counts: two counts of conspiracy; three counts of obstruction of justice; and one count of interstate travel to aid racketeering.[33]

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26. Haeseler, *supra* note 19, at A21.

27. William Cansen, *S.F. Lawyer Faces More Charges Patrick Hallinan's Second Indictment*, S.F. CHRON., July, 16, 1994, at A17.

28. *Id.*

29. Victoria Slind-Flor, *Lawyers Arrest Is Criticized by Colleagues*, NAT'L L. J., Aug. 30, 1993, at 1.

30. "Grellman admitted that he acted as the Nevada attorney for Keystone Investments, the offshore shell corporation used by the smugglers' kingpin — Squaw Valley developer Ciro Mancuso — to launder drug profits." Rob Haeseler, *Bombshell as Hallinan Trial Begins Co-Defendant Cops Plea, Turns State's Evidence*, S.F. CHRON., Jan. 27, 1995, at A13; Several months later, Grellman was sentenced to four years' probation, ordered to perform 150 hours of community service and to pay a $5,000 fine. *Reno Lawyer Gets Four Years Probation*, SACRAMENTO BEE, May 5, 1995, at B3.

31. Victoria Slind-Flor, *Patrick F. Hallinan at Half Time, Some Dismissals*, NAT'L L. J., Mar. 6, 1995, at A4.

32. Rob Haeseler, *Hallinan Judge Tosses Racketeering Charges*, S.F. CHRON., Feb. 22, 1995, at A20.

33. Sandra Chereb, *Acquitted Lawyer Joyful, Still Upset San Francisco Defense Attorney Cleared of Role in Client's Drug Ring*, S.D. UNION-TRIB., Mar. 9, 1995, at A3. The fact that the court dismissed

The bulk of the evidence against Hallinan was presented to the jury by Ciro Mancuso, a confessed drug smuggler who cut a deal with prosecutors in return for his cooperation.[34] During direct examination, Mancuso testified that "Hallinan told him how to hide drug money, assisted in laundering money and hid documents at his law office."[35] This testimony was rejected by the jurors who likewise discredited testimony given by other drug smugglers. Jurors reported that "the government's witnesses came across as well-scripted during government examination . . . [but that] [d]uring cross-examination, it all fell apart."[36]

B. CHARGES AGAINST MICHAEL ABBELL AND WILLIAM MORAN[37]

A one hundred sixty-one page indictment, unsealed on June 5, 1995, revealed that federal prosecutors were once again pursuing criminal defense attorneys alleged to have committed crimes on behalf of their clients. Mindful of the botched case against Hallinan, federal prosecutors strongly defended the new indictment and reported that the case was allowed to proceed "only after it was carefully scrutinized by lawyers at the highest levels of the Justice Department."[38]

The Miami indictment targeted the notorious Cali drug cartel and six American lawyers "accused of aiding and abetting the Cali cartel in return for staggering fees."[39] Specifically, the indictment alleged that the former chief of international affairs at the Department of Justice, Michael Abbell, secured false sworn statements from drug smugglers and arranged for payment of attorney's fees with drug money.[40] It further alleged that William Moran arranged bail for a drug smuggler he knew would flee.[41] The government also charged Abbell and Moran with racketeering and participating in a cocaine conspiracy.[42]

The Miami indictment charged that lawyers helped to enforce the cartel's code of silence by passing hush money and/or death threats to arrested employ-

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the charges is certainly some indication that the government's case was weak and was at least overly eager to charge Hallinan.

34. "In a lucrative plea bargain that Hallinan helped negotiate, Mancuso was allowed to keep millions of dollars, some of which he hid from authorities. He also retained his Lake Tahoe development company and lives in a [Squaw Valley] mansion." *Hallinan Lawyers Attack Key Witness' Credibility*, SACRAMENTO BEE, Feb. 10, 1995, at B1.

35. *Id.*

36. Mintz, *supra* note 16, at 1.

37. Michael Abbell of Washington, D.C.'s Ristau & Abbell is a former high ranking United States Justice Department official and is considered a leading expert on extradition. William Moran of Miami's Moran & Gold is a former Dade County assistant state attorney.

38. David Adams, *Cartel's Lawyers, Legal Profession Also on Trial in Miami Series: The Cali Connection*, ST. PETERSBURG TIMES, Aug. 1, 1995, at 1A, 1B.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Deal May Aid U.S. in Cartel Case*, CHI. TRIB., July 4, 1995, at 4.

ees.[43] It is further alleged that Moran and Abbell fingered a confidential informant who was later murdered.[44] Several of the lawyers were also accused of preparing false legal statements, securing false testimony, and tipping off cartel members of possible legal action against them.[45] Much of the evidence against the attorneys consisted of tape-recorded conversations and records seized from their offices.[46]

To date, four of the six lawyers charged by the government have pled guilty to criminal charges. Three men, Robert Moore,[47] Francisco Laguna[48] and Joel Rosenthal,[49] pled guilty to reduced charges before the indictment was unsealed.[50] The fourth, Donald Ferguson, pled guilty to obstruction of justice and money laundering shortly thereafter.[51]

Prosecutors are confident that the guilty pleas and the testimony of the four attorneys, unlike the discredited testimony of admitted drug smugglers in the Hallinan case, will have a tremendous impact on the jury. A federal attorney involved in the Miami case indicated that we will "absolutely see all or some of these lawyers testifying in this case because they have all entered pleas, and whether they will be getting any benefit when it comes to sentencing depends on their cooperation."[52]

C. COUNTERCHARGES TO THE CHARGES

The arrests of Hallinan and Abbell have renewed concern in the legal community that the government is improperly targeting criminal defense lawyers to punish zealous lawyers.[53] Many attorneys believe the arrests reflect a dangerous federal policy to fight the war on drugs by fighting a war against the defense attorneys.[54]

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43. Adams, *supra* note 38, at 1A, 1B.

44. William Booth, *Wild Life's High Price; Miami Vices Lures Drug Dealers Lawyers*, WASH. POST, June 13, 1995, at A1.

45. Adams, *supra* note 38, at 1A, 1B.

46. David Lyons, *Fourth Guilty Plea in Cali Case; Ex-Federal Prosecutor Expected to Turn State's Evidence*, HOUS. CHRON., July 4, 1995, at 8.

47. Moore was "accused of carrying a death threat from Miguel Rodriguez Orejuela, a major cartel figure, to a cartel manager who was in jail . . . [a]uthorities said that Moore told the man that he and his family would be killed if he cooperated with authorities." Saundra Torry, *Case Prompts Lawyers to Ask Just How Far They Can Go in Defense of Client*, WASH. POST, June 7, 1995, at A6.

48. Laguna, employee of Ristau & Abbell, pled guilty to conspiracy to import cocaine and obstruction of justice. *Colluding with the Cali Thugs the Issue: Is Defense Bar Being Targeted? Our View: Not if Guilty Pleas Mean Anything*, ROCKY MOUNTAIN NEWS, June 9, 1995, at 64A.

49. *Id.* (Rosenthal, former Assistant U.S. Attorney in Miami and New York, pled guilty to money laundering)

50. *Supra* note 42, at 4.

51. *Id.*

52. Stan Yarbro, *Miami Drug Prosecutors Tread Carefully*, THE RECORDER, June 12, 1995, at 1.

53. Dolan, *supra* note 21, at 1.

54. Genego, *supra* note 3, at 812.

Federal prosecutors insist that there is no policy to target defense attorneys to prevent qualified representation of suspected drug distributors. Prosecutors dismiss the "so-called war against the criminal defense as a figment of the lawyers' overwrought imagination and deny claims that they have encouraged defendants to inform on their lawyers."[55] According to Assistant U.S. Attorney Stephen Nelson, lawyers become suspects only when they cross the line from representation to promoting or facilitating illegal acts.[56]

In this regard, some attorneys suggest that Hallinan asked for trouble if he in fact put money that belonged to a client in his personal bank account and created a fictitious officer for an offshore corporation as charged by federal prosecutors.[57] Hallinan admitted that he made mistakes in representing Ciro Mancuso, mistakes including attending events from weddings to baptisms, travelling to Mexico with Mancuso, allowing Mancuso, a developer, to build a nursery for the Hallinans, and selling his mother's home to Mancuso.[58]

A closer look at recent arrests of attorneys, however, indicates that the government may be targeting defense attorneys to aid its fight against drugs. For example, in the case of Patrick Hallinan, critics have been quick to point out that he was arrested at gun-point late on a Friday evening, thus ensuring that he would spend a weekend in jail prior to release.[59] "Speaking of how federal agents had ordered Hallinan to the floor at gunpoint inside his Marin County home on August 6, and then forced him to spend a weekend in jail before he could see a magistrate and post bond, former San Francisco Mayor Joseph L. Alioto said, 'It's outrageous and vindictive.' "[60]

According to many attorneys, the most striking aspect of the Hallinan-Grellman arrests was the government's aggressive and unprecedented attempt to use federal forfeiture laws to confiscate the suspects' law firms. As spelled out in the indictment, prosecutors used Title 21, Section 853(a) of the federal drug-trafficking laws to go after the homes, offices and law practices of Hallinan and Grellman "[i]n what forfeiture experts say is the first seizure attempt of its kind."[61] The government has used forfeiture provisions aggressively in recent years, but Hallinan's and Grellman's cases are unusual in that the government attempted to forfeit their law practices.[62]

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55. Dolan, *supra* note 21, at 1.

56. Dolan, *supra* note 21, at 1.

57. Dolan, *supra* note 21, at 1.

58. Howard Mintz, *Hallinan Admits Mistakes Says Mancuso Exploited Them*, THE RECORDER, Mar. 10, 1995, at 1.

59. Slind-Flor, *supra* note 29, at 1.

60. Michael Checcio, *Famed Lawyer's Arrest Shocks San Francisco*, THE OREGONIAN, Sept. 5, 1993, at A23.

61. Slind-Flor, *supra* note 23, at 3.

62. "Typically in drug and racketeering cases, the government seeks the forfeiture of property used to carry out a crime or property obtained with ill-gotten gains. While other businesses and partnerships have been seized, the Hallinan and Grellman case is one of the first in which the government has sought

The forfeiture request is bizarre because "[u]nlike most other seized businesses or property, which can be sold by the government, a law firm isn't worth two cents without the lawyer running it."[63] The only purpose critics have found to justify the government's request to confiscate law firms would be to prevent them from providing legal services.[64]

Accordingly, the government's attempt to seize the three-partner law firm of Hallinan, and the solo practice of Grellman, is what makes "the case far from routine — and, to defense lawyers, vindictive and ominous."[65]

In the case of indicted lawyer Michael Abbell, critics maintain that he was once again targeted by federal prosecutors in an effort to intimidate the defense bar.[66] However, Abbell may also have been targeted because of his former position as a high-ranking official in the Justice Department.

Abbell, considered one of the leading experts on extradition, worked for the federal government for over seventeen years and once headed the Justice Department's office of international affairs. In this position, Abbell investigated one of the Cali cartel's co-founders and learned many of the sophisticated techniques the government uses to seek out international drug suspects.[67] In 1984, however, Abbell left his position at Justice and angered many federal employees when he began giving legal advice to reputed cartel leaders, advice which included helping major drug suspects fight extradition.[68] Abbell ruffled more federal feathers in 1988 when "he lobbied staff members of the Senate Foreign Relations Committee to create amendments that would have made it harder to extradite drug kingpins."[69] According to disgruntled Senator John Kerry, Abbell was wrongfully "providing expertise to major cocaine traffickers that he obtained while he was working for the U.S. Justice Department."[70]

The acquittal of Hallinan and the guilty pleas in the Abbell case neither prove nor disprove allegations of governmental overreaching. Certainly, the timing of Hallinan's arrest and efforts to secure a forfeiture of his law practice suggest improper motive. But available records do not prove that the government is targeting aggressive criminal defense lawyers to deter the defense bar from zealous representation of their clients. However, those and other prosecutions

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to take over a law firm." Wade Lambert, *Defense Lawyers Decry Attempt to Seize Law Firms in Drug Case*, WALL ST. J., Aug. 31, 1993, at B5.

63. *Id.*

64. Slind-Flor, *supra* note 23, at 3.

65. Checcio, *supra* note 60, at A23.

66. Brian McGrory, *Cartel Arrests Shake the Miami Bar*, BOSTON GLOBE, June 13, 1995, at 1.

67. Torry, *supra* note 47, at A6.

68. *Id.*

69. Peter Bensinger, *Crossing the Powdery White Line*, THE FORT WORTH STAR-TELEGRAM, June 11, 1995, at 2.

70. *Id.*

of prominent lawyers like Clinton friend Webster Hubbell demonstrate that the government does not hesitate to investigate and prosecute lawyers.

III. HOW PRACTICING LAW BECOMES A RISKY BUSINESS: MAIL FRAUD

Some of the headline cases in which lawyers become criminal defendants involve serious and unquestionable violations of the law.[71] No one can question the need to prosecute a lawyer for passing along a death threat from a cartel member to a witness against his client. But many criminal charges against lawyers involve conduct less obviously criminal and may involve behavior common within the profession. As developed in more detail below, giving legal advice with an improper motive may violate federal law.[72] A potential inequity arises when the lawyer's advice is the product of incompetence or negligence rather than through willful or intentional misconduct.[73] Given that the government is willing to prosecute attorneys and in some instances seems eager to do so, the profession must become aware of the myriad ways in which lawyers can cross the line and become law violators. This section discusses some examples of behavior that cross that line.

A. LIFE IMITATES ART OR SOMEBODY AT JUSTICE READS GRISHAM

This article opened by positing that most lawyers probably have difficulty understanding how overbilling a client can become a federal offense. Especially during the 1980's, when clients began shopping for legal services and comparing hourly rates, many lawyers responded by double billing for legal services.[74] Another common practice is charging a standard fee for a phone call, typically, a quarter of an hour whether the call takes two or twelve minutes. Lawyers offer various justifications for those practices, some more convincing than others.

For example, client phone calls may interfere with an attorney's work on a project; the actual time on the phone may not reflect the time it costs the attorney to start up the project interrupted by the call.[75] A similar explanation may be offered for adding a charge for services, like copying, based on a percentage of the bill rather than on actual costs. Actual costs may be expensive to keep track of, requiring a notation every time a few pages are copied.

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71. For example, Hallinan allegedly advised his client to get rid of a witness cooperating with the government. Slind-Flor, *supra* note 23, at 3. Moran and Abbell are charged with identifying a confidential informant who was later murdered. Booth, *supra* note 44, at A1.

72. *See* discussion *infra* at notes 136-47.

73. *See* discussion *infra* at notes 141-47.

74. *See* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 37-38 (1991) (discussing billing for "recycled" work product).

75. *Id.* at 59 (describing practice of billing for small amounts of time); some lawyers explain overbilling as a corrective for underbilling. *see* Hallye Jordan, *Lawyers, Firm Facing Charges of Overbilling*, L.A. DAILY J., Nov. 10, 1993, at 5.

Further, even if improper, such charges may appear to the practitioner to be a matter properly settled between attorney and client. Overbilling may be understood as a breach of contract, but hardly a crime.[76] Insofar as it involves unethical conduct (and here, as older lawyers remember when ethical codes required certain *minimum* billing for services), one might believe that the matter is within the purview of the state bar association. There, the appropriate remedy might typically be a sanction short of disbarment, and certainly, far less than a criminal penalty.[77]

Even if seen as criminal, overbilling may seem like a matter for state criminal law. The practice of law is uniquely within the control of the states which set standards for the practice of law free from federal interference.[78]

Those arguments are unavailing. John Grisham's plot device in *The Firm* is no longer the material of fiction. For example, in *United States v. Crymes, Hardie & Heer*, the government's theory mirrored Mitch McDeere's solution to his dilemma, turning in the partners in his law firm without revealing client confidences.[79] The indictment in *Crymes, Hardie & Heer* alleged, for example, that members of the firm instructed the clerk responsible for firm billing to add additional time to the firm's billing according to a pre-established schedule; that the firm charged fifteen percent of each bill for out-of-pocket costs instead of actual expenditures as represented to the client; and that members of the firm encouraged all of the lawyers, paralegals, law clerks, and secretaries to bill standardized minimum charges instead of actual time expended for various services performed. Typically, Crymes, Hardie & Heer sent clients their bills through the mail.[80]

Transforming that conduct into multiple federal crimes is remarkably easy for a federal prosecutor. As observed by a former member of the U.S. Attorney's office in charge of business fraud, "[t]o federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart — our true love."[81] Section 1341, according to Mr. Rakoff, is simple, adaptable and, for the experienced prosecutor, has a comfortable familiarity.[82]

Before recent expansion of the mail fraud statute, it read, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter,

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76. *See* Ross, *supra* note 74 (describing wholesale acceptance of some forms of overbilling).

77. Ross, *supra* note 74, at 22-28 (describing amorphous guidelines to reasonable billing in codes of professional responsibility).

78. *See* authorities cited *supra* note 7.

79. *See* Government's Trial Memo (filed Nov. 2, 1993) *submitted in* United States v. Crymes, Hardie & Heer, No. 93-109 (E.D. Cal. 1993).

80. *Id.*

81. Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771, 771 (1980).

82. *Id.*

> any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.[83]

Enhanced penalties are available if the fraud affects a financial institution.[84] In 1994, Congress further expanded the sweep of the mail fraud statute in a little noticed provision of the Violent Crime Control and Law Enforcement Act of 1994, by extending its provisions to cases that involve use of a "private or commercial interstate carrier,"[85] as well as those involving the U.S. Postal Service. Section 1343 includes a similar provision for cases in which the scheme involves use of "wire, radio, or television communication."[86]

Thus, the elements of mail fraud include a scheme to defraud, including an intent to defraud and the use of the mails (or under the 1994 revision, the use of a private interstate carrier). Originally modest in scope,[87] Congress almost certainly intended to limit the statute to cases in which some direct misuse of a post office was established.[88] One recent commentator has argued, for example, that "[i]t appears highly unlikely . . . that Congress in 1872 believed that the Federal Government should prosecute traditional state matters that did not involve directly the federal post office."[89] That is so because of then prevailing constitutional problems that might arise from Congress interfering with matters entrusted to the states, like regulation of fraud and the criminal law generally. Hence, Congress probably intended that the direct exploitation of the post office was a necessary element of the offense.[90]

While doubts exist about Congress' original intent, the courts have not been constrained in their construction of the statute. Instead, the mail and wire statutes have been the "first line of defense" against fraud.[91] The government has used those statutes in cases of "consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, [and] have [been] extended even to such areas as blackmail, counterfeiting, election fraud, and bribery."[92] The government has used § 1341 in cases where legislatures have been slow to

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83. 18 U.S.C. § 1341 (1988).

84. *Id.* (providing for a possible fine of $1,000,000 or imprisonment of not more than 30 years or both if the violation affects a financial institution).

85. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796. The change to the mail fraud statute was not given widespread publicity undoubtedly because the main provisions of the bill were far more politically volatile. For example, the same law provides for the death penalty for a number of federal crimes and financed a number of crime prevention programs. *See* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 436 (1995).

86. 18 U.S.C. § 1343 (1988).

87. Henning, *supra* note 85, at 441.

88. Henning, *supra* note 85, at 441-42.

89. Henning, *supra* note 85, at 441-42.

90. Henning, *supra* note 85, at 442-43.

91. Rakoff, *supra* note 81, at 772.

92. Rakoff, *supra* note 81, at 772.

act to fill a gap. As observed by one court, in explaining why Congress has not attempted to define the term "defraud," "to try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention."[93]

Common law offenses, for example, like fraudulent pretenses were far narrower than mail fraud. Unlike fraudulent pretenses, the scheme to defraud may relate to statements about future events.[94] Indeed, in at least one instance, a federal court has upheld a prosecution based on what were apparently a series of technically true statements. As the court stated in *Lustiger v. United States*, statements in a brochure advertising a land deal in Arizona may have been true, but "could reasonably have led a person of average intelligence and experience to believe that all parcels offered for sale had reasonable access to a water supply."[95] Taken as a whole, statements that are misleading are actionable.

Even prior to the 1994 expansion of § 1341 to include private carriers, the mailing element was liberally construed. By contrast to what Congress probably intended, some direct abuse of the mail service,[96] the act has been interpreted so that the mailing element is satisfied even if it is not an essential part of the scheme to defraud.[97] Instead, it is enough that the mailing be an incident to an essential part of the scheme or a "step in [the] plot."[98]

A few examples demonstrate the loose connection between the scheme and the use of the mails. For example, in *Schmuck v. United States*, the defendant, a wholesale used car dealer, routinely rolled back odometers of cars before he sold the cars to retail dealers.[99] The mailing took place after the sale was complete as part of the process whereby the retail dealer made an application to the state's department of transportation for title to the vehicle. The Supreme Court found that the mailing element was satisfied. It found that Schmuck's "scheme . . . did not reach fruition until the retail dealers resold the cars and effected transfers of title."[100] By contrast, had he not been a dealer engaged in multiple transactions, the scheme would have ended prior to the mailing. Only then would the mailing not be an incident to the scheme.[101]

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93. Forshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934).

94. KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS 118-19 (2d ed. 1995).

95. Lustiger v. United States, 386 F.2d 132, 136 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

96. *See* Henning, *supra* note 85, at 442.

97. Periera v. United States, 347 U.S. 1, 8 (1954).

98. Badders v. United States, 240 U.S. 391, 394 (1916); *see also* Schmuck v. United States, 489 U.S. 705 (1989).

99. *Schmuck*, 489 U.S. at 707, 711.

100. *Id.* at 712.

101. *Id.* at 711. There are also examples in which the mailing took place after the scheme to defraud and in no way was an incident to the scheme. *See, e.g.*, Kann v. United States, 323 U.S. 88 (1944); Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974). Even after the scheme has come to an end without the use of the mails, a "lulling" letter to help avoid detection of the scheme may satisfy the mail requirement. *See* United States v. Sampson, 371 U.S. 75 (1962).

The use of the mails extends Congress' power into matters otherwise beyond its jurisdiction. For example, Congress lacks jurisdiction to regulate state tax matters and typically exercises restraint when matters involving such issues are otherwise within its jurisdiction.[102] Notwithstanding that fact, mail fraud reaches schemes involving state tax matters when the mailing element has been met.[103] As observed by the Supreme Court, Congress' power extends to the use of the mails to execute the scheme even if it cannot forbid the underlying scheme itself.[104]

In light of the flexible or malleable nature of § 1341, the government has had no difficulty in charging lawyers with mail fraud based on padded bills.[105] The scheme to defraud is to charge the client more than the fee would be if billing were based on actual time spent on the client's work.[106] The client has received legal services, presumably something of value. But critical to a scheme to defraud is whether the client received the bargained for value. As observed by Judge Learned Hand, a person is defrauded when "he has lost his chance to bargain with the facts before him."[107] Deceptive billing practices prevent the client from making an informed decision about the true cost of legal services.

The use of the mail is obviously met as long as the law firm uses the mail to send the bill. Courts have routinely found the mailing element met in similar situations where either a bill was sent through the mails[108] or where the victim of the scheme to defraud used the mail to send money or other property to the defendant.[109]

Finally, like the cases involving state taxation,[110] the argument that regulation of the bar is a matter of state power would be unavailing as well. Local matters become federal matters upon the use of the mails. And as Mitch McDeere observed, every mailing is a separate count of mail fraud.[111] The prospects of criminal liability are truly frightening.

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102. *See* Brickey, *supra* note 94, at 112; *see also* Rakoff, *supra* note 81, at 778 (stating that when faced with the question of whether the mail fraud statute violates constitutional limitations on Congress's power to regulate local fraud, courts have avoided the question by reasoning that mail fraud regulates the use of the mails and that the gist or gravamen of the offense is not the regulation of fraud per se).

103. *See, e.g.*, United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

104. Badders v. United States, 240 U.S. 391, 393 (1916).

105. *See, e.g.*, cases cited *supra* note 6.

106. The government must prove that the attorney did not explain the billing practices to the client. *see* Government's Trial Memo, *supra* note 79.

107. United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932).

108. *See e.g.*, United States v. Perkal, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976).

109. *See, e.g.*, United States v. Roylance, 690 F.2d 164 (10th Cir. 1982); United States v. Britton, 500 F.2d 1257 (8th Cir. 1974).

110. *See* Brickey, *supra*, note 94, at 112; *see also* Illinois Dept. of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985).

111. Badders v. United States, 240 U.S. 391, 394 (1916); *see also* Rakoff, *supra* note 81, at 777-78.

B. OTHER WAYS TO COMMIT MAIL FRAUD

One of the more creative uses of the mail fraud statute has been the cases in which the government has relied on the deprivation of loyal service to one's employer.[112] A similar theory has allowed the government to expand its jurisdiction to cover acts of local bribery.[113] For example, in *United States v. Mandel*, the government successfully prosecuted the governor of Maryland based on his failure to disclose material information concerning state-regulated enterprises.[114] According to the Fourth Circuit, this denied the citizens of their right to honest and faithful execution of duties by the governor.[115] In some cases, the intangible rights theory merely allowed the government to prevail without making a detailed showing of the financial loss suffered by the employer.[116] But in some cases, it was able to prevail where economic loss may not have been proven.[117]

In 1987, the Supreme Court rejected the intangible rights theory in *McNally v. United States*.[118] There, the public officials and high ranking members of the Democratic party devised a scheme whereby an insurance brokerage agency purchased insurance for the state in return for its agreement to kickback a percentage of its commissions to parties designated by the defendants. The government failed to demonstrate a financial loss to the state.[119]

Contrary to all of the lower courts' interpretation of § 1341, *McNally* held that a scheme to defraud had to be one to obtain money or property.[120] As one commentator has argued, *McNally* "vindicate[d] implicitly . . . the view that several commentators and some dissenting judges had begun to articulate in the

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112. *See, e.g.*, United States v. George, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); United States v. Seigel, 717 F.2d 9 (2d Cir. 1983).

113. United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982) (political leader failed to disclose information about scheme to kickback political contributions); United States v. Busch, 522 F.2d 641 (7th Cir. 1975) (city employee failed to disclose interest in company awarded municipal contracts), *cert. denied*, 424 U.S. 977 (1976).

114. 591 F.2d 1347 (4th Cir.), *aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980).

115. *Mandel*, 591 F.2d at 1364.

116. *See, e.g.*, Abbott v. United States, 239 F.2d 310 (5th Cir. 1956) (Fifth Circuit stated that employer had suffered direct economic loss).

117. *See, e.g.*, United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987). As observed by Professor Coffee: "[I]t seems unlikely that there was any economic loss caused by the agent's misconduct. A union official took kickbacks from law firms to whom he referred workmen's compensation cases . . . [b]ecause the fees that the law firms would receive were set by a state agency, it is doubtful that the agent's gain came at the union members' expense." John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 128 (1988).

118. McNally v. United States, 483 U.S. 350 (1987).

119. *Id.* at 360 (the government did not allege a financial loss).

120. Section 1341 provides that "any scheme or artifice to defraud, or for obtaining money or property" 18 U.S.C. § 1341. The Supreme Court, unlike lower courts, found that the legislative history and the words "to defraud" require showing of harm to one's property rights. *McNally*, 483 U.S. at 356-60.

early 1980's: that the 'intangible rights' doctrine had resulted in serious overextension of the criminal law."[121] Permissive use of § 1341 had blurred the line between the criminal law and the civil law of fiduciary duties.[122]

In 1988, Congress substantially reversed *McNally* when it enacted § 1346.[123] Section 1346 provides that a § 1341 or § 1343 scheme to defraud may be one "to deprive another of the intangible right of honest services."[124] Even before enactment of § 1346, the Court had found that while intangible rights are not protected by mail and wire fraud, intangible property does support a conviction under those provisions.[125]

The use of mail fraud based only on deprivation of intangible rights raises concern that only the prosecutor's restraint prevents "a serious overextension of the criminal law, one that [leaves] no meaningful line between the civil law of fiduciary duties and the criminal law of fraud."[126] As argued by Professor Coffee, "[b]ecause the term 'fiduciary' essentially implies only a relationship based on trust and confidence . . . an interpretation that criminalizes all undisclosed fiduciary breaches seemingly [gives] the mail and wire fraud statutes nearly universal scope."[127]

The broad application of mail and wire fraud is of special concern to lawyers. Lawyers often possess confidential information belonging to their clients and to third parties. Unauthorized use of such information (perhaps not even for personal gain)[128] violates federal fraud statutes whenever the lawyer uses the mail, telephone or other electronic transmission as part of the dissemination of the information or any other part of the scheme.[129]

These are not merely theoretical musings. For example, in *United States v. Grossman*,[130] the defendant was a lawyer in a firm that was preparing a recapitalization for one of its clients. During that time, one of the lawyers, not directly involved in the recapitalization plan, learned about the plan from a fellow associate. He began calling friends and relatives, getting them to trade in the stock. Not only did the government successfully prosecute under federal securities laws, but also got a conviction under the mail fraud statute. The Second Circuit upheld the conviction and found, even apart from § 1346, that the infor-

121. Coffee, *supra* note 117, at 127.
122. Coffee, *supra* note 117, at 127.
123. 18 U.S.C. § 1346 (1988).
124. *Id.*
125. Carpenter v. United States, 484 U.S. 19 (1987).
126. Coffee, *supra* note 117, at 127.
127. Coffee, *supra* note 117, at 127.
128. *See, e.g.*, Coffee, *supra* note 117, at 140 (arguing that under the Supreme Court's approach, a whistleblower with noble social goals would be guilty of mail fraud).
129. *See, e.g.*, United States v. Grossman, 843 F.2d 78 (2d Cir. 1988); United States v. Bronston, 658 F.2d 920 (2d Cir. 1981).
130. 843 F.2d 78 (2d Cir. 1988).

mation was within the meaning of intangible property consistent with the Supreme Court's interpretation in *McNally* and *Carpenter*.[131]

Grossman is hardly a sympathetic case insofar as the lawyer's conduct obviously violated federal securities laws. But the same conduct gave rise to separate charges; punishment on both charges is constitutionally permissible.[132] *Grossman* is hardly the only case in which the government has targeted lawyers for misusing clients' confidential information.[133] In the litigated cases, while the lawyer has been motivated by personal gain, under the Court's analysis in *Carpenter*, misuse of the confidential information alone constitutes the gravamen of the offense.[134]

D. MAIL FRAUD AND THE PRACTICE OF LAW

In the cases discussed above,[135] instances of overbilling and misuse of client confidences, arguably, the lawyers engaged in questionable conduct not directly related to the practice of law. That is not always the case in fraud claims. In fact, many lawyers may be surprised that in any number of instances, the actus reus of a federal crime is the performing of legal services or the giving of legal advice.[136]

Civil plaintiffs have used acts of mail fraud as the underlying predicate offenses to state a private right of action under the RICO statute, and frequently named lawyers and other professionals as defendants.[137] In a number of cases, plaintiffs have alleged that attorneys have helped develop fraudulent schemes involving promised tax shelters that have later been declared improper by the IRS.[138] While some courts have rejected those allegations as sufficient to state a claim under RICO, properly analyzed, a lawyer furthering a fraudulent scheme by preparing a legal document should not be immune from criminal liability.[139]

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131. *Grossman*, 843 F.2d at 85-86.

132. United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984), *rev'd in part*, 473 U.S. 207 (1985).

133. *See, e.g.*, United States v. Bronston, 658 F. 2d 920 (2d Cir. 1981).

134. Coffee, *supra* note 117, at 138-42.

135. *See* discussion *supra* notes 79-134.

136. *See, e.g.*, United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964); United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987).

137. Ralph Pitts, Michael R. Smith & Reginald R. Smith, *Civil RICO and Professional Liability after Reves: Plaintiffs Will Have to Look Elsewhere to Reach the 'Deep Pockets' of Outside Professionals*, 9 CIV. RICO REP. 1, 1 (1993).

138. *See, e.g.*, Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993); Sasson v. Altgeist, 777, Inc., 822 F. Supp. 1303 (N.D. Ill. 1993); Adler v. Berg Harmon Associates, 816 F. Supp. 919 (S.D.N.Y. 1993).

139. *See* Michael Vitiello, *More Noise from the Tower of Babel: Making 'Sense' Out of Reves v. Ernest & Young*, 56 OHIO ST. L.J. 1363 (1995) (arguing that lower courts have misconstrued the Supreme Court's decision in *Reves*); *see also* G. Robert Bakey and Marc Haefner, *Did Reves Give Professionals a Safe-Harbour Under RICO?*, 9 CIV. RICO REP. 1, 3-4 (1993) (arguing that professionals are fully liable in cases like that described above under § 1962(d) or aiding and abetting). Outside the RICO-mail fraud context, lawyers are criminally liable for fraudulently prepared legal documents.

In such a case, the actus reus of the crime of mail fraud may be the giving of professional advice. The lawyer's contribution to the scheme is the rendering of a legal opinion that the proposed scheme satisfies federal tax law. Any thought that a lawyer has an immunity from the criminal law when his conduct consists merely of performing legal services is simply wrong.[140]

What turns the ordinary practice of law criminal is the lawyer's mental state.[141] For example, in the case of the tax shelter cases, the lawyer must have been aware that the scheme was fraudulent. If charged with aiding and abetting, a defendant must have an intent to advance the criminal scheme of the primary defendant.[142] In various contexts, the mens rea is satisfied by a showing of knowledge.[143]

In the tax shelter case, the lawyer may have acted without the requisite knowledge. For example, the attorney may have been negligent in her understanding of current tax regulations. Negligence or malpractice is not mail fraud because there would be no intent to defraud.[144] But the mens rea of mail fraud may not be sufficient protection for those accused of fraudulent conduct, because of the way in which a prosecuting party proves fraudulent intent. As I have argued elsewhere, "[i]n a fraud case, the plaintiff will seldom have a 'smoking gun' on the intent to defraud. Few defendants will admit that they acted consciously to deceive the victim of the fraud."[145] Because a lawyer has special knowledge, the prosecutor will invite the jury to infer the mens rea from the defendant's conduct in preparing the memo in support of the tax shelter.[146] If a competent attorney would have known that the shelter was improper, the jury may be allowed to infer guilty knowledge.[147]

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see, e.g., United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964). At least one federal district court has upheld as sufficient allegations that lawyers committed mail fraud by their preparation of workers' compensation claims. The pleadings alleged additional conduct by the lawyers, but a key element of the mail fraud-RICO claim was what might otherwise be characterized as the practice of law. *see* Tribune Co. v. Purcigliotti, 869 F. Supp. 1076 (S.D.N.Y. 1994).

140. *See* HAZARD ET AL., *supra* note 7, at 67.

141. United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964); *see also* HAZARD ET AL. *supra* note 7, at 66-67; Vitiello, *supra* note 139.

142. The mens rea for accomplice liability is satisfied only upon a showing of intent. *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 441 (2d ed. 1995).

143. Indeed, in some cases, the mens rea element is proven by willful blindness. *see Benjamin*, 328 F.2d at 862 (the mens rea element may be satisfied in a case in which a lawyer "shut[s] [his] eyes to what was plainly to be seen.").

144. 18 U.S.C. § 1341 is explicit that a defendant must have an intent to defraud. *see also* Durland v. United States, 161 U.S. 306, 313 (1896) (identifying the significant fact as intent and purpose); *see generally* 2 KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY, § 8.31 (2d ed. 1991). Some courts have found recklessness to be sufficient. *see, e.g.*, United States v. Schaflander, 719 F.2d 1024 (9th Cir. 1983).

145. Vitiello, *supra* note 139, at 1385.

146. *See, e.g.*, United States v. Fuel, 583 F.2d 978 (8th Cir. 1978); United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970); United States v. Andrade, 788 F.2d 521 (11th Cir. 1986).

147. Vitiello, *supra* note 139, at 1384-86.

V. COMPOUNDING THE RISK: MAIL FRAUD AND RICO

Above, I have suggested a number of ways in which a lawyer may violate § 1341 by committing acts in connection with the practice of law. In this section, I explore how multiple acts of mail fraud may compound the attorney's criminal and civil exposure.

The lawyer's exposure is multiplied because mail fraud is what is colloquially known as a predicate offense for a RICO violation.[148] RICO is not just one of the most potent federal criminal statutes because it authorizes long prison terms and forfeiture.[149] It also creates a private right of action and includes treble damages and allows the prevailing plaintiff to recover attorneys fees.[150]

Enacted in 1970 to fight organized crime,[151] RICO has been used in contexts having nothing to do with the Mafia.[152] A number of business groups and numerous commentators and judges have lamented its use in cases involving what amounts to local fraud, converted into a federal right of action because mail fraud is among the predicate offenses.[153]

RICO consists of four offenses. One involves the use of racketeering proceeds to invest in an enterprise;[154] a second makes it unlawful for a defendant to take over an enterprise through a pattern of racketeering.[155] Those provisions have been used rarely.[156] The most frequently used provision is § 1962(c), providing that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[157] The fourth RICO is offense is a conspiracy provision.[158]

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148. 18 U.S.C. § 1961(1) (" 'racketeering activity' " means any of the specifically identified offenses).

149. 18 U.S.C. § 1963 (providing criminal penalties including forfeiture of assets).

150. 18 U.S.C. § 1964.

151. *See* Michael Vitiello, *Has the Supreme Court Really Turned RICO Upside Down?: An Examination of NOW v. Scheidler*, 85 J. CRIM. L. & CRIMINOLOGY 1223, 1233-37 (1995).

152. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); H.J. Inc. v. Northwestern Bell Telephone, 492 U.S. 229 (1989).

153. *See, e.g.*, Susan Getzendanner, *Judicial 'Pruning' of 'Garden Variety Fraud' Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 674-75 (1990); William J. Hughes, *RICO Reform: How Much is Needed?*, 43 VAND. L. REV. 639, 642 (1990).

154. 18 U.S.C. § 1962(a).

155. 18 U.S.C. § 1962(b).

156. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 726-27 (1987).

157. 18 U.S.C. § 1962(c).

158. 18 U.S.C. § 1962(d).

In the Grisham example of the overbilling law firm, a prosecutor or plaintiff whose injury is proximately caused[159] by the defendant's conduct could allege all of the elements of a RICO offense under § 1962(c). The law firm itself readily satisfies the enterprise element.[160] The lawyer is obviously employed by or associated with the enterprise.[161]

The defendant must conduct the affairs of the enterprise through the pattern of racketeering. The pattern element is not defined, but the statute provides that it consists of at least two acts of racketeering.[162] Congress specified the meaning of "acts of racketeering." Section 1961(1) provides a list of specific offenses that constitute "racketeering activity."[163] One of the enumerated offenses is mail fraud.[164]

While § 1961 does not define "pattern," the Supreme Court has held that "pattern" is more than the mere commission of two acts of racketeering.[165] As the Court held in *H.J. Inc. v. Northwestern Bell Telephone*, the offenses must demonstrate continuity and relatedness.[166] But in the case that I have described, the case of routine overbilling, both would be satisfied. Relatedness is easily met in light of the similarity of the offenses. Continuity is satisfied in one of two situations described by *H.J. Inc.* If the scheme has been completed, the scheme must have taken place over a substantial period of time.[167] That involves obvious line drawing but certainly if the challenged conduct has taken place over a period of a year or more, the continuity standard is met. If the period is short, for example, because it is interrupted by the lawsuit or indictment, pattern may be established as long as the government can demonstrate that the scheme would continue into the future.[168] Certainly, repeated acts of overbilling would satisfy the pattern requirement unless the scheme was interrupted early.

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159. The Supreme Court has found that a plaintiff must prove that its damages were proximately caused by a defendant's racketeering activity. Holmes v. Securities Inv. Protection Corp., 503 U.S. 258 (1992).

160. 18 U.S.C. § 1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Supreme Court has given liberal interpretation to the "enterprise" concept. *See* NOW v. Scheidler, 114 S. Ct. 798 (1994); United States v. Turkette, 452 U.S. 576 (1981).

161. At times, courts have extended the "associated with" language well beyond a partner or member of the organization. *see, e.g.*, United States v. Yonan, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

162. 18 U.S.C. § 1961(5) provides, in relevant part, that " 'pattern of racketeering' requires at least two acts of racketeering activity."

163. 18 U.S.C. § 1961(1).

164. *Id.*

165. H.J., Inc. v. Northwestern Bell Tel., 492 U.S. 229, 237-39 (1989).

166. *Id.*

167. *Id.* at 242 (party may "demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time).

168. *Id.* (liability may depend on threat of continuity).

The interstate commerce element has not proven to be a significant limitation on the use of RICO. Courts in RICO cases, as in most federal crimes, have given very liberal interpretation to that requirement.[169] Courts have not required any proof that any of the activity occurred in or affected interstate commerce. The prosecutor or plaintiff needs to show only that the enterprise itself has some involvement with interstate commerce.[170] For example, in one case, the court found the interstate commerce element satisfied because a local district attorney's office bought supplies in interstate commerce.[171] Even more obvious in the hypothetical law firm case, the element would be satisfied through the use of the mails and an interstate telephone system.[172]

IV. CONCLUSION

I started with the premise that the government unquestionably considers lawyers as suitable targets for white collar criminal investigations.[173] Obviously, it is appropriate to criminalize criminals, even if they are lawyers. But targeting lawyers raises a number of important concerns.

Prosecutorial discretion is virtually unreviewable.[174] Misuse of that power can be used in subtle and invisible ways to intimidate criminal defense lawyers. This is especially true in cases involving any number of federal crimes, like mail fraud, where the statute, even as admitted by its proponents, is amorphous.[175] In the case of overbilling, a related problem arises: defendants are virtually foreclosed from raising claims of selective enforcement of the law.[176] This may leave hidden from public scrutiny an improper motive by the government in targeting one lawyer as opposed to another. As argued above, the Hallinan case looks like one in which the government may have timed his arrest to make it difficult for him to secure a timely release from custody, a scenario suggestive of governmental agents intent on punishing Hallinan.[177] But the

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169. *See, e.g.*, R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) (stating that nexus with interstate commerce required by RICO is minimal); *see also* United States v. Conn, 769 F.2d 420 (7th Cir. 1985) (purchase of office supplies and equipment from companies outside the state was sufficient to meet the interstate commence element).

170. *See, e.g.*, United States v. Conn, 769 F.2d 420 (7th Cir. 1985).

171. United States v. Altomare, 625 F.2d 5 (4th Cir. 1980).

172. *See, e.g.*, United States v. Muskovsky, 863 F.2d 1319 (7th Cir.), *cert. denied*, 489 U.S. 1067 (1988) (use of telephone sufficient); Cadle Co. v. Schultz, 779 F. Supp. 392 (N.D. Tex. 1991) (use of mails sufficient). The Supreme Court has recently underscored that the interstate commerce element is satisfied by making purchases out of state. *See* United States v. Robertson, 115 S. Ct. 1732 (1995).

173. *See* discussion *supra* at notes 4-5.

174. *See* Jones v. White, 992 F.2d 1548, 1571 (11th Cir. 1993) (holding that defendant must show selective prosecution and selection motivated by "constitutionally invidious" criterial like race or religion); *see also* Vitiello, *supra* note 151, at 1254 (raising concern about overbroad use of RICO).

175. *See, e.g.*, Rakoff, *supra* note 81, at 771-72.

176. *See* sources cited *supra* note 174.

177. *See* discussion *supra* at notes 19-22.

public never learns whether the government may have had an improper motive in selecting him as a target of investigation.

Aggressive prosecution of attorneys raises other concerns. For example, the Supreme Court has held that a lawyer's office is entitled to no special Fourth Amendment protection.[178] This raises serious concerns about the confidentiality between the attorney and client. For example, in a case in which government agents are executing a search warrant for evidence of overbilling, the scope of the search would take them into client legal files.[179] Presumably, the searching officers would have to stop reading documents that did not pertain to overbilling, but a cursory examination of a document to ascertain its content allows the officer to learn something about the document's confidential information.[180] We have been assured in a related context that the government cannot take advantage of that kind of information,[181] but it may be difficult indeed to show that the government took advantage of information that it may have discovered during the course of a search.

Insofar as mail fraud may become a vehicle for the government to regulate, selectively, the practice of law, this essay has canvassed a few specific concerns. I want to highlight one final concern. As indicated above, proponents of the mail fraud statute applaud its amorphous nature because it prevents the calculating perpetrator of fraudulent schemes from evading its provisions.[182] But that kind of creative prosecutorial use of mail fraud also means that in many instances, defendants are swept into its provisions without any indication that the legislature has intended to criminalize the conduct at issue.

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178. Andresen v. Maryland, 427 U.S. 463 (1976).

179. Presumably, the official executing the warrant is authorized to look anywhere that evidence may be found. Billing information almost certainly would be found in a client's file.

180. *Cf.* United States v. Hillyard, 677 F.2d 1336, 1342 (9th Cir. 1982) (allowing perusal of documents if the police have reasonable suspicion).

181. Weatherford v. Bursey, 429 U.S. 545 (1977) (refusing to find per se violation of the Sixth Amendment when undercover agent attended pretrial meetings between a defendant and his lawyer).

182. *See* discussion *supra* at notes 91-93.

Liability of the HMO for the Medical Negligence of Its Providers*

DOMENICK C. DICICCO, JR., ESQUIRE†

I. INTRODUCTION

There has been a dramatic rise in the number of health maintenance organizations (HMOs)[1] during the past twenty years, with particularly large increases taking place during the last decade. The impetus for this growth has been the rapid increase in the cost of health care. This increase has forced the public and their representatives to seek alternatives to the traditional method of health care delivery. Tight fiscal controls exercised by health maintenance organizations, the attractiveness of a pre-paid fee to the customer, and federal legislation have made the health maintenance organization the dominant organization in the health care delivery system.[2] As a result of the dramatic increase of HMOs, plaintiffs have attempted to hold HMOs liable for malpractice committed by the health care providers of the HMO.

This article will briefly review the history of HMOs and explore the current state of the law regarding the liability of HMOs.

II. HISTORY OF HMOS

The generally accepted definition of an HMO is:

> An organized system which accepts responsibility and risk for both the financing and delivery of comprehensive health care services to a defined, voluntarily enrolled population for a fixed monthly pre-paid amount. Thus,

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† Senior trial attorney with CNA insurance company in Philadelphia, PA staff counsel office. Widener Law School, 1989. Currently an M.B.A. student at Pennsylvania State University.

1. A "Health Maintenance Organization" is an organized system of health care which provide or arranges for comprehensive basic and supplemental health care services. These services are provided on a prepaid basis to voluntarily enrolled members living within the prescribed geographic area. The responsibility for the delivery, quality and payment of healthcare falls to the managing organization - the HMO. PHYSICIANS OFFICE COORDINATOR MANUAL (citing HMOs AS AN ALTERNATIVE TO TODAY'S HEALTH CARE SYSTEM, A. TOWERS, PERRINE, FORSTER, & CROSBY BACKGROUND STUDY (Dec. 1975)); Boyd v. Albert Einstein Medical Ctr., 547 A.2d 1229 (Pa. Super. Ct. 1988).

It is estimated that 56 million members of the public are now enrolled in some form of HMO, up from 25.7 million in 1986. Andy Miller, *Personal Business Enrollments in Organizations Offering Managed Health Care Figure to Grow Sharply in the Next Few Years, Leaving More People with a Stake in the Debate over HMOs*, ATLANTA CONST., May 1, 1995, at E1.

2. The Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e-300e-17(1988); DAVID B. NASH, FUTURE PRACTICE ALTERNATIVES IN MEDICINE (1st ed. 1987).

> HMOs not only insure against the cost of healthcare, but also insure the actual provision of needed health services.[3]

Although HMOs have only recently become popular, they have been around since 1927. The first pre-paid health plan began as a cooperative in Elk City, Oklahoma in 1927. During the 1930's, further pre-paid plans developed around major construction projects. The pioneer of the HMO is industry giant, Kaiser Health Systems. During World War II, Kaiser Industries felt the need to provide quality health care for its employees. Pre-paid health care at construction sites of Kaiser Industries formed the genesis of the Kaiser-Permanent System.[4] This system is considered the "grand-daddy" of pre-paid health plans in the United States.[5] The Kaiser-Permanent System, along with such plans as Group Health Cooperative of Puget Sound (Seattle), the Health Insurance Plan of Greater New York and the Group Health Association of Washington, D.C., were once considered anomalies in the health care delivery system.[6]

In the early 1970's, the Democrats, lead by Senator Edward Kennedy, attempted to shift public sentiment toward the development of a national health insurance. The Republican response was to encourage private enterprise to develop pre-paid plans. This response lead to the adoption of the Health Maintenance Organization Act of 1973.[7] This Act not only provided grants for development but also federal loans to subsidize the initial operating deficits of new HMOs. The impact of the law was dramatic. In 1972, there had been fewer than forty HMOs, with approximately three million members. By 1985, there were two hundred sixty-three HMOs, with more than eighteen million members.[8]

This federal law, combined with the need to find an alternative to traditional health care delivery, lead to the explosive growth of HMOs during the late 1970's through the present. This increased growth has also lead to the significant and recent consolidation of the industry, which should continue for the next several years.

III. TYPES OF HMOs

Since many courts have considered the form of the HMO in their analysis of liability, it is necessary to understand the three basic forms of HMOs presently in operation.

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3. NASH, *supra* note 2, at 204 (definition of Richard M. Cooper, President of Focus Healthcare Management Corporation).

4. The nation's largest HMO. *see* Jane Gross, *The Faithful Hear the Sermon*, N.Y. TIMES, Sept. 24, 1993, at A3.

5. NASH, *supra* note 2, at 207.

6. NASH, *supra* note 2, at 207.

7. 42 U.S.C. § 300e-300e-17 (1988).

8. NASH, *supra* note 2, at 208.

A. THE STAFF MODEL

The Staff Model is the traditional form of the HMO. In this system, the participating physicians are employees of the HMO. The facility in which the physician practices is owned by the HMO, and the personnel who help run the practice are also employees of the HMO.

The theory behind this model is that it frees the physicians from the responsibilities of the day-to-day management of a practice and, therefore, they are free to concentrate on providing the best possible care to the patient.[9] Since the health care providers are employees of the HMO, the HMO will, in most cases, be susceptible to liability under the traditional theory of *respondeat superior*.[10]

B. THE GROUP MODEL (IPA)

In the Group Model, a group of physicians incorporate themselves and then contract as a group with the HMO to provide care for the members of the HMO. Depending upon the terms of the contract, the physician group may be forced to limit its practice exclusively to members of the HMO, or may be permitted to treat fee-for-service patients as well.[11]

The theory behind the Group Model is that the negotiating power of a group of physicians, as opposed to the physician employees in the Staff Model, gives the physicians more power. Additionally, the Group Model allows the physician to generate additional income by treating fee-for-service patients.

Critics of the Group model charge that there is an inherent conflict in this structure. The physician would favor fee-for-service patients and, therefore, may not devote the proper time and treatment to pre-paid patients. Additionally, pre-paid patients provide more income to the group if the physicians provide fewer services. Conversely, the fee-for-service patients bring in more income to the group and results in internal referrals and increased use of laboratory hospital services.[12]

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9. NASH, *supra* note 2, at 211; *see also* William A. Chittenden III, *Malpractice Liability in Managed Healthcare: History and Prognosis*, 26 TORT & INS. L.J. 451 (1991); Sharon M. Glenn, *Tort Liability of Integrated Healthcare Delivery Systems: Beyond Enterprise Liability*, 29 WAKE FOREST L. REV. 305, 311 (1994); Michael Kanute, *Evolving Theories of Malpractice Liability of HMOs*, 20 LOY. U. CHI. L.J. 841, 842 (1989).

10. Literally, "Let the Master Answer." Under this doctrine, the master is responsible "for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

11. *See* sources cited *supra* note 9.

12. *See* sources cited *supra* note 9.

C. THE GROUP MODEL (NON-IPA)

The Group Model provides pre-paid health care for members through contracts with individual physician groups or entities having provider employees.[13] Thus, instead of one group of physicians serving the members of the HMO, several groups provide service. This form of HMO is also known as the "Network Model."

Although these broad categories cover most of the HMOs currently operating in the United States, there are other models which, for the sake of economy, will not be discussed here.

IV. THEORIES OF LIABILITY

As the HMOs exercise more control over the physicians, their liability for the torts of their participating physicians will continue to increase. By far, the most popular and persuasive theory of liability is that based upon vicarious liability.

A. VICARIOUS LIABILITY

Depending upon the model employed, the theory of vicarious liability can be pursued via ostensible or actual agency. Naturally, the theory of actual agency is most persuasive when employed against the Staff Model HMO. Actual agency is generally synonymous with the doctrine of *respondeat superior*. This well-known principle of law provides that an employee may be held vicariously liable for the negligent acts of an employee conducted in the course and scope of employment.[14]

The case of *Sloane v. Metropolitan Health Council of Indianapolis*[15] provides a good illustration of this theory. In *Sloane*, the plaintiff brought an action against a staff model HMO for the negligence of its physician. The appellate court overturned the trial court's dismissal of the case and held that Metropolitan's medical director controlled its staff physicians and that an employer-employee relationship existed between the physician and Metropolitan. Accordingly, the court found that Metropolitan could be held vicariously liability via the doctrine of *respondeat superior*.[16]

In *Schleier v. Kaiser Foundation Health Plan*,[17] the United States Court of Appeals for the District of Columbia circuit held that an HMO could be vicariously liable for the actions of an *independent* consulting physician based upon

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13. Chittenden, *supra* note 9, at 452.

14. Boyd v. Albert Einstein Medical Ctr., 547 A.2d 1229 (Pa. Super. Ct. 1988); RESTATEMENT (SECOND) OF AGENCY § 219 (1984); Yunker v. Kaiser Found. Health Plan, 611 P.2d 314 (Or. Ct. App. 1980).

15. 516 N.E.2d 1104 (Ind. Ct. App. 1987).

16. *Sloane*, 516 N.E.2d at 1109.

17. 876 F.2d 174 (D.C. Cir. 1989).

the theory of *respondeat superior.* The court, perhaps stretching the theory of vicarious liability, found that when an HMO employee/physician requested a cardiac consultation by an independent physician, the HMO could be liable for the actions of the independent consulting cardiologist because a "master-servant" relationship may have existed between the HMO employee/physician and the consulting cardiologist.[18]

In *Gugino v. Harvard Community Health Plan,*[19] the Massachusetts Supreme Court held that a community health plan could be held vicariously liable for the injuries sustained by a patient/subscriber as a result of the malpractice of a plan physician and nurse where the defendant had the power of control and/or direction over the negligent conduct in question.[20] The plaintiff, a member of the defendant health plan, had a Dalkon shield inserted in 1972. In 1974, after reading several articles questioning the safety of the device, plaintiff sought the advice of her physician. The physician, an employee of the health care plan, assured plaintiff that the device was safe. The plaintiff eventually suffered severe injuries which resulted in her undergoing a total hysterectomy.[21]

B. OSTENSIBLE AGENCY

Ostensible agency is the relationship that arises when a principal represents or creates the appearance that a person is his agent and a third party reasonable relies on that representation.[22]In order to sustain a cause of action based on the theory of ostensible agency, plaintiff will have to prove that:

1) the patient looked to the HMO rather than the individual physician for care; *and*
2) the HMO *held out* the physician as its employee, thereby creating a reasonable presumption in the eyes of the patient that the physician was the apparent agent of the HMO.[23]

Boyd v. Albert Einstein Medical Center,[24] is particularly instructive. In *Boyd,* the plaintiff participated in a health plan offered by the defendant. The health plan was an IPA model and, thus, the plaintiff was restricted to select a primary-care physician from those offered by the HMO. The primary care physician

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18. *Schleier,* 876 F.2d at 177.
19. 403 N.E.2d 1166 (Mass. 1980).
20. *Gugino,* 403 N.E.2d at 1168.
21. *Id.* at 1167.
22. RESTATEMENT (SECOND) OF TORTS § 429 (1984); *see also* Kapan v. Divine Providence Hosp., 430 A.2d 647 (Pa. Super. Ct. 1980); Boyd v. Albert Einstein Medical Ctr., 547 A.2d 1229, 1222 (Pa. Super. Ct. 1988).
23. *Boyd,* 547 A.2d at 1234; *see also* McClellan v. Health Maintenance Org. of Pa., 604 A.2d 1053 (Pa. Super. Ct. 1992), *appeal denied,* 616 A.2d 95 (1992); Degnova v. Ansel, 555 A.2d 147 (Pa. Super. Ct. 1988); Elsesser v. Hospital of Philadelphia College of Osteopathic Medicine, 848 F. Supp. 39 (E.D. Pa. 1994).
24. 547 A.2d 1229 (Pa. Super. Ct. 1988).

detected a lump in the plaintiff's breast and referred her to a specialist, who was also a participating HMO health care provider. During the surgery, the specialist perforated the plaintiff's chest with a biopsy needle, causing her to sustain a left hemothorax.[25]

The court held that the HMO could be held vicariously liable for the specialist's actions based on the theory of ostensible agency. The court listed several factors which indicated that the HMO "held out" its providers as employees. Particularly, the court reviewed the HMO's advertising and marketing campaign which offered the organization as a "total care program." Additionally, the HMO advertised its care and selection in accreditation for its member physicians.[26]

In the unreported case of *Decker v. Saimi*,[27] the minor plaintiff sought treatment by his primary care physician for soreness in his arm. The primary care physician referred the plaintiff to a non-member physician for x-rays, which were negative. Several months later, the plaintiff was diagnosed with cancer and his arm was amputated.[28] The court concluded that the HMO could be liable for the medical malpractice of the independent physician under the theory of vicarious liability. The court held that:

> To allow HMOs, as a matter of law, to escape liability for their members' treatment by simply referring [them] outside the HMO plan . . . would be an unscrupulous practice in cases where the HMO collects a membership fee based on the representation that it will provide the member with the complete health care services.[29]

In *Raglin v. HMO Illinois*,[30] the plaintiff alleged that an HMO was vicariously liable for the negligence of the physicians with whom it had contracted. The HMO was a Group IPA Model. The court rejected the plaintiff's argument that the HMO's quality assessment an utilization guidelines amounted to sufficient control to impute an agency relationship. In reaching this decision, the

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25. Blood in the pleural cavity.

26. *Boyd*, 547 A.2d at 1233-35; *see also* Williams v. Goodhealth Plus-Healthcare America, 743 S.W.2d 373 (Tex. Ct. App. 1987) (first case which applied the theory of ostensible agency against an HMO. The plaintiff was examined by her treating physician for an infection of her right thumb nail. The thumb nail eventually became so infected that it had to be surgically removed. The defendant was a Group IPA Model HMO and, therefore, it contracted with the group to provide medical services to the HMO members. The court recognized that the physicians who formed the IPA were not employees of the HMO. The court granted the defendant HMO's motion for summary judgment finding that all of the notes, memoranda, stationary, and consent forms contained only the name of the IPA and not the HMO. The plaintiff presented no counter-evidence to establish that the HMO held itself out as the employer of the physicians.).

27. No. 88-361768 NH, 1991 WL 277590 (Mich. Cir. Ct. Sept. 17, 1991).

28. *Decker*, 1991 WL 277590 at *2.

29. *Id.* at *5.

30. 595 N.E.2d 153 (Ill. App. Ct. 1992).

court also noted that the HMO specifically informed the plaintiff that it did not directly furnish medical care.[31]

Since the theory of ostensible agency does not require an actual employer-employee relationship, this theory offers the most flexibility for a plaintiff to assert negligence against an HMO. Thus, this theory will continue to be the most viable alternative.

C. DIRECT LIABILITY - CORPORATE NEGLIGENCE

The established doctrine of corporate negligence provides that the subject hospital owes an independent, non-delegable duty to its patients to: 1) exercise reasonable care in ensuring the physicians selected as members of the hospital staff are competent to maintain safe and adequate facilities and equipment; 2) supervise all persons who practice medicine within its walls; and 3) formulate, adopt and enforce adequate rules and policies to ensure quality care for their patients.[32]

This doctrine was first introduced in the landmark case of *Darling v. Charleston Community Memorial Hospital*.[33] In *Darling*, the plaintiff suffered a broken leg during an amateur football game. Soon afterward, the plaintiff experienced great pain and his toes became swollen and discolored. Three days later, the defendant's physician removed the cast from the plaintiff's leg. Unfortunately, the plaintiff had to be transferred to another hospital where the leg had to be amputated.[34] The Illinois Supreme Court found the defendant hospital liable for breaching its duty to review the treatment and procedures of its independent contractor physicians.[35]

The courts have applied the theory of corporate negligence to HMOs in several cases. In *Harrell v. Total Health Care*,[36] the Missouri Court of Appeals upheld a direct cause of action against a Group IPA Model HMO for negligent selection of a physician. In *Harrell*, the plaintiff consulted with a primary care physician for a urological problem. After an initial examination, the primary care physician referred the plaintiff to an HMO approved specialist. Subsequently, the specialist negligently performed surgery on the plaintiff. The court eventually granted summary judgment in favor of the HMO based upon statutory immunity for a non-profit organization. However, the appellate court con-

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31. *Raglin*, 595 N.E.2d at 158.

32. Darling v. Charleston Comm. Mem. Hosp., 211 N.E.2d 253 (Ill. 1965); Thompson v. Mason Hosp., 591 A.2d 703 (Pa. 1991); Purcell v. Zembleman, 500 P.2d at 335 (Ariz. Ct. App. 1972); Johnson v. Miseracordia Comm. Hosp., 301 N.W.2d 156, 163-64 (Wis. Ct. App. 1981).

33. 211 N.E.2d 253 (Ill. App. Ct. 1965).

34. *Darling*, 311 N.E.2d at 255.

35. *Id.* at 258.

36. No. WD 39809, 1989 WL 153066 (Mo. Ct. App. Apr. 25, 1989), *aff'd on other grounds*, 781 S.W.2d 58 (Mo. 1989) (en banc).

cluded that, absent the statutory immunity, the plaintiff had otherwise established a cause of action against the HMO for negligent selection.[37]

In *McClellan v. Health Maintenance Organization of Pennsylvania*, the plaintiff went to her primary care physician regarding a mole on her back which had recently undergone a drastic change in size and color. Although the doctor removed the mole, he failed to obtain a biopsy or perform other proper follow-up procedures. As a result, the plaintiff died almost three years later of cancer.[38]

The Superior Court of Pennsylvania found that the plaintiff had asserted a valid cause of action based upon the Restatement (Second) of Torts § 323 which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if his failure to exercise such care increases the risk of harm, or the harm is suffered because of the other's reliance upon the undertaking.

Thus, the court found that it was necessary to determine whether the theory of corporate negligence should be expanded to include HMOs.[39]

In *Wickline v. State*,[40] the plaintiff underwent surgery and experienced some complications. The HMO only provided for a ten-day hospital stay and, therefore, denied the request of the surgeon to extend the plaintiff's post-operative recovery. Plaintiff alleged that as a result of not being able to stay in the hospital for the extended period of time, the leg became infected and eventually had to be amputated.[41]

While the court did not impose liability on the defendant, it did opine:

> The patient who requires treatment and who is harmed when care which should have been provided is not provided should recover for the injuries suffered from all those responsible for the deprivation of such care, including, when appropriate, health care payors. Third party payors of health care services can be held legally accountable when medically inappropriate decisions result from defects in the design or implementation of cost-containment mechanisms.[42]

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37. *Harrell*, 1989 WL 153066 at *8.

38. McClellan v. Health Maintenance Org. of Pa., 604 A.2d 1053, 1055 (Pa. Super. Ct. 1992), *appeal denied*, 616 A.2d 95 (1992).

39. *McClellan*, 604 A.2d at 1059.

40. 239 Cal. Rptr. 810 (Cal. App. Dep't Super. Ct. 1986).

41. *Wickline*, 239 Cal. Rptr. at 812.

42. *Id.* at 819.

Another California case also addresses this issue. In *Wilson v. Blue Cross,*[43] the plaintiff was released from a drug rehabilitation program after a brief stay. The physician recommended a stay which was several weeks longer than that permitted by the HMO. Several days later, the plaintiff committed suicide.[44]

The court found that the plaintiff could maintain a cause of action against the defendant HMO for negligence based upon principles of joint liability. Citing the Restatement (Second) of Torts, 2d § 431, the court held:

> The actors' negligent conduct is a legal cause of harm to another if (a) his [or her] conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability.[45]

The financial incentive of the HMO to reduce the amount of services provided was also attempted as a basis for corporate negligence against a HMO in *Pulvers v. Kaiser Foundation Health Plan.*[46] The plaintiff sued the HMO on the grounds of fraud claiming that the HMO lead it to believe that the plaintiff would receive the "best quality care."[47] The court granted the defendant's nonsuit finding that there was no suggestion that individual doctors acted negligently or refrained from recommending diagnostic procedures which were generally accepted for the appropriate circumstance.[48]

V. PREEMPTION AS A PRECLUSION TO SUITS AGAINST HMO

Many defendant HMOs have attempted to exit malpractice lawsuits by arguing that such claims are preempted by the Employee Retirement Income Security Act ("ERISA").[49] In enacting ERISA, Congress sought to establish a comprehensive system of regulating, *inter alia*, "employee welfare benefit plans" that "through the purchase of insurance or otherwise, [provide] medical, surgical or hospital care, or benefits in the event of sickness, accident, disability or death . . . ."[50] The act "provides a detailed system of civil enforcement which limits who may file suit, the grounds for such suits and the relief to which a litigant is entitled."[51] Congress created a preemption provision which provides that ERISA shall supersede all state laws insofar as they "relate the any employee benefit plan" of ERISA.[52]

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43. 271 Cal. Rptr. 876 (Cal. App. Dep't Super. Ct. 1990).
44. *Wilson*, 271 Cal. Rptr. at 878.
45. *Id.* at 883.
46. 160 Cal. Rptr. 392 (Cal. App. Dep't Super. Ct. 1979).
47. *Pulvers*, 160 Cal. Rptr. at 394.
48. *Id.* at 394.
49. 29 U.S.C. § 1001-1461 (1988).
50. *Id.* at § 1002(1); *see also* Stroker v. Rubin, No. 94-5563, 1994 U.S. Dist. LEXIS 18379 (E.D. Pa. Dec. 23, 1994).
51. Visconti v. U.S. Healthcare, 857 F. Supp. 1097, 1100 (E.D. Pa. 1994) (quoting Altieri v. Cigna Dental Health, Inc., 753 F. Supp. 61, 63 (D. Conn. 1990); *see also* 29 U.S.C. § 1132 (1988).
52. 29 U.S.C. § 1144(a) (1988); *see also Stroker*, 1994 U.S. Dist. LEXIS 18379 at *16.

Thus, the issue to be addressed by courts in deciding whether medical malpractice claims are preempted by ERISA is whether the state medical malpractice law "relate to" the plaintiff's employment benefit plan in such a way that necessitates a preemption.[53]

The case law which addresses this issue indicates that the trend is for the federal courts to find claims of direct negligence against the HMO preempted by ERISA. However, the courts are split as to whether claims for vicarious liability are preempted.

A. CLAIMS OF DIRECT NEGLIGENCE

In determining whether state law claims are preempted, "the purpose of Congress is the ultimate touchstone."[54] The state law will be said to "relate to" an ERISA plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan."[55] Any connection may trigger preemption, and preemption is not limited to laws relating to the specific subjects covered by ERISA.[56] The state law may be found to "relate to" a benefit plan even if it is not specifically designed to affect such a plan or its effect is only indirect.[57]

A rule of law relates to an ERISA plan if: 1) it is specifically designed to affect employee benefit plans; 2) it singled out such plans for special treatment; or 3) the right to restrictions it creates are predicated on the existence of such a plan.[58] A state rule of law may be preempted even though it has no such direct nexus with ERISA plans if its effect is to dictate the restricted choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states.[59]

The courts are in agreement that where a plaintiff seeks to hold an HMO liable for its own negligent administration of cost-containment provisions of an employee benefit plan or with regard to the type and extent of benefits promised, the courts have found that ERISA preempts such claims brought under state law.[60]

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53. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *16.

54. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985).

55. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983); Ingersoll-Rand Co. v. McClenden, 498 U.S. 133 (1990).

56. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 47, 47-48 (1987).

57. *Id.* at 47.

58. United Wire, Metal & Machine Health & Welfare Fund v. Morristown Mem. Hosp., 995 F.2d 1179 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 382 (1993).

59. *Id.*

60. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *20; Kearney v. U.S. Healthcare, Inc., 859 F. Supp. 182 (E.D. Pa. 1994); Visconti v. U.S. Healthcare, 857 F. Supp. 1097 (E.D. .Pa. 1994); Dukes v. U.S. Healthcare Sys. of Pa., 848 F. Supp. 39 (E.D. Pa. 1994), *rev'd*, 57 F.3d 350 (3rd. Cir. 1995); Elsesser v. Hospital of Philadelphia College of Osteopathic Medicine, 802 F. Supp. 1286, 1290-91 (E.D. Pa. 1992).

As noted by the court in *Stroker v. Rubin*:

> In these cases, courts have found preemption because of the obvious connection between state negligent claims including, *inter alia*, allegations that an HMO was negligent in failing to pay a benefit claim, pre-approve a medical procedure, create adequate rules to guide the conduct of participating physicians, select qualified personnel for participation in its program and in setting the terms of the applicable benefits plans.[61]

In *Ricci v. Gooberman* plaintiff sued U.S. Healthcare, *inter alia*, for failing to advise the plaintiff of certain abnormalities on a mammogram and for other careless treatment.[62] Judge Stanley S. Brotman of the Federal District Court for the District of New Jersey held that the state tort claims arising from vicarious liability were preempted by ERISA and dismissed with prejudice the plaintiff's claim against U.S. Healthcare.[63]

Thus, cases which allege that an HMO was negligent in employing or contracting with negligent doctors, knew that the doctors were not qualified or competent, failed to use due care in selecting and overseeing the doctors, and failed to formulate, adopt and enforce adequate rules and policies to insure quality care for patients will likely be preempted under ERISA.[64]

B. OSTENSIBLE AGENCY

The courts are divided on the issue of whether ERISA preempts medical malpractice claims against an HMO under a theory of ostensible agency.[65] The courts which have held that ERISA preemption was appropriate for an HMO under a theory of ostensible agency reason that the determination of the existence of the ostensible agency relationship "relates to" employee benefit plans since it requires an assessment which the benefit plans since it requires an assessment which the benefit plan itself provides and whether the treatment provided by the doctor reached the performance level advertised under the benefit

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61. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *22.

62. 840 F. Supp. 316, 316 (D. N.J. 1993).

63. *Ricci*, 840 F. Supp. at 318.

64. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *20.

65. *See, e.g.*, Stroker v. Rubin, No. 94-5563, 1994 U.S. Dist. LEXIS 18379 (E.D. Pa. Dec. 23, 1994) (holding that a vicarious liability claim against an HMO for malpractice of affiliated physicians alleged to be ostensible agent was preempted); Dukes v. U.S. Healthcare Sys. of Pa., 848 F. Supp. 39 (E.D. .Pa. 1994) (in accord), *rev'd*, 57 F.3d 350 (3rd. Cir. 1995); Ricci v. Gooberman, 840 F. Supp. 316, 317-18 (D. N.J. 1993) (in accord); Kearney v. U.S. Healthcare, Inc., 859 F. Supp. 182 (E.D. Pa. 1994) (finding a vicarious liability claim against an HMO plan under a theory of ostensible agency was not preempted by ERISA); Elsesser v. Hospital of Philadelphia College of Osteopathic Medicine, 802 F. Supp. 1286 (E.D. Pa. 1992); Stratton v. Bryant, No. 92-CV-3873, 1992 U.S. Dist. LEXIS 18050 at *7-8 (E.D. Pa. Nov. 18, 1992) (in accord); Independence HMO, Inc. v. Smith, 733 F. Supp. 983, 988 (E.D. Pa. 1990) (in accord).

plan.[66] Stated another way, "[t]he question is one of relating plan performance to plan promise."[67] As stated by the court in *Ricci*:

> [T]he outcome of a vicarious liability claim arising from a health care provider's alleged malpractice ultimately depends on the relationship between the provider and the administrative plan under which he or she functions. Whether a doctor is an employee or an independent contractor, for example, will depend on factors such as the degree of control maintained over one's work and the method of payment. Each of these factors is defined by the contract between provider and the HMO. Accordingly, it seems evident to this court that disputes involving such factors can fairly be characterized as "relating to" to governing employee benefit plan.[68]

The court in *Dukes v. U.S. Healthcare Systems of Pennsylvania,* supported its finding of ERISA preemption for vicarious liability claims for two primary reasons. First, the elements of a vicarious liability claim require a showing of how the physician was an agent of the HMO, thereby requiring an analysis of the exact terms of the applicable employee benefit plan. Secondly, a vicarious liability claim was found to "relate to" the employee benefit plan because the cause of action required an analysis of whether the HMO agents measured up to the quality promised by the plan.[69]

The Fifth Circuit distinguished decisions regarding what is covered by the plan and what is medically needed. As such, claims against the HMO were found to be preempted.[70]

In *Corcoran v. United Health Care, Inc.*, the plaintiff became pregnant and her obstetrician recommended that she have complete bed rest during the final months of her pregnancy.[71] The plaintiff applied to her employer for the benefits, but the benefits were denied. This prompted her obstetrician to write to the medical consultant for the plaintiff's employer and explain that the plaintiff had several medical problems that placed her in a category of high risk. Plaintiff's employer again denied the disability benefits.[72]

The plaintiff's employer had a self-funded welfare benefit plan which was administered by Blue Cross and Blue Shield of Alabama. The quality care program of the plan which provides that participants must obtain advance approval for overnight hospital admissions and certain medical procedures was administered by the defendant, United Healthcare.[73]

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66. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *23.
67. *Dukes*, 848 F. Supp. at 42.
68. *Ricci*, 840 F. Supp. at 31.
69. *Dukes*, 848 F .Supp. at 41; *see also* Visconti v. U.S. Healthcare, 857 F. Supp. 1097, 1101 (E.D. .Pa. 1994).
70. Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).
71. *Corcoran*, 965 F.2d at 1322.
72. *Id.* at 1324.
73. *Id.*

The plaintiff's child was eventually stillborn and, as a result, the plaintiff sued United Healthcare as well as other parties. In sustaining United Healthcare's motion for summary judgment based upon preemption, the court held:

> We cannot fully agree with either United or the Corcorans. Ultimately, we conclude that United makes medical decisions -indeed, United gives medical advice - but it does so in the context of making a determination about the availability of benefits under the plan. Accordingly, we hold that the Louisiana tort action asserted by the Corcorans for the wrongful death of their child allegedly resulting from United's erroneous medical decision is preempted by ERISA . . . United decides "what the medical plan will pay for." [As opposed to making direct medical decisions.][74]

Several other decisions are in accord with this line of reasoning. In *Dukes v. United States Healthcare Systems of Pennsylvania*, the court, per Justice Ditter, dismissed plaintiff's claim of ostensible agency on the basis of preemption since: 1) any ostensible agency claim must be made on the basis of what the benefit plan provides and is, therefore, "related to" it; and 2) the treatment received must be measured against the benefit.[75]

In *Pomeroy v. Johns Hopkins Medical Services*,[76] plaintiff was diagnosed with diplopia,[77] a medical condition requiring surgery. Plaintiff's HMO refused to pay for the surgery. On September of 1990, the plaintiff was diagnosed with chronic back pain, severe depression, and a facial tick. Once again, the plaintiff's HMO refused to pay for proper and necessary medical treatment. The plaintiff alleged that as a result of the HMO's refusal to provide the proper treatment, he became addicted to the prescription drug, Percodan, and that the HMO refused to pay for drug dependency treatment.[78]

In holding that plaintiff's claims were preempted, the court, quoting *Dukes*, found that:

> [The] medical malpractice claim against an HMO, when couched in direct or vicarious liability terms relates to the benefit plan. One who enrolls in an HMO is assured of medical services of a given extent and quality. A malpractice claim asserts the services provided did not measure up to the benefit plan's promised quality. The question is one of relating plan-performance to plan-promise, and is therefore preempted by ERISA.[79]

Another reason espoused by the courts which found preemption, was one of public policy. The courts noted that a refusal to find preemption will cause both

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74. *Id.* at 1331.

75. Dukes v. U.S. Healthcare Sys. of Pa., 848 F. Supp. 39 (E.D. Pa. 1994), *rev'd*, 57 F.3d 350 (3rd. Cir. 1995).

76. Pomeroy v. Johns Hopkins Medical Servs., 868 F. Supp. 110, 111 (D. Md. 1994).

77. Double vision.

78. *Pomeroy*, 868 F. Supp. at 111.

79. *Id.* at 113-14; *see also Dukes*, 848 F. Supp. at 42; Nealy v. U.S. Healthcare, 844 F. Supp. 966, 972 (S.D.N.Y. 1994).

the HMOs and the providers to carry liability insurance, ultimately resulting in higher costs to the end user. This strikes at the very purpose of the legislation enacted by Congress regarding the HMOs, namely to provide low cost health care to the population.[80]

C. CLAIMS BASED UPON OSTENSIBLE AGENCY NOT PREEMPTED

The courts that have decided that claims based upon ostensible agency are not preempted by ERISA have offered several reasons for their holdings. First, it has been stated that there is:

> no question that state law vicarious liability claims are not designed to specifically impact employee benefit plans. Further, . . . while direct negligence claims may be said to predicate on the existence of an employee benefit plan to the extent the claims concern the administration of plan benefits, a vicarious liability claim does not restrict the benefits, structure, administration or reporting requirements of employee benefit plans.[81]

The court in *Kearney* stated:

> The determination that a treating physician committed malpractice does not require an examination of the plan to decide whether the service provided was that which was promised. What is required is evidence of what transpired between the patient and physician and an assessment of whether in providing admittedly covered treatment or giving professional advice the physician possessed and utilized the knowledge, skill and care usually had and exercised by physicians in his community or medical specialty. . . . That one may refer to the contents of a plan to adduce evidence that it held out a particular person as its employee or agent to help sustain a cause of action does not implicate the concerns underlying the ERISA preemption provision.[82]

In *Independence HMO v. Smith*, it was found that a plaintiff's state medical malpractice claims brought against an HMO under a theory of ostensible agency had "nothing to do with any denial of our rights under the plan. Instead, she seeks redress for physical injuries in which the plaintiff's HMO selection of an operating surgeon allegedly played a part."[83]

In *Haas v. Group Health Plan, Inc.*, the plaintiff suffered a punctured eardrum during a routine cleansing of the ear.[84] Plaintiff sought to hold the HMO vicariously liable for the negligent acts of its employee or agent. The court found that the ERISA preemption did not apply to state court medical malpractice claims based upon vicarious liability. The court held:

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80. *Visconti*, 857 F. Supp. at 1103-04; *Dukes*, 848 F. Supp. at 43; *Ricci*, 840 F. Supp. at 317-18.
81. *Stroker*, 1994 U.S. Dist. LEXIS 18379 at *29.
82. *Kearney*, 859 F. Supp. at 186.
83. Independence HMO v. Smith, 733 F. Supp. 983, 988 (E.D. Pa. 1990).
84. Haas v. Group Health Plan, Inc., 875 F. Supp. 544, 546 (S.D. Ill. 1994).

> when an HMO plan elects to directly provide medical services or leads a participant to reasonably believe that it has, rather than simply arranging and paying for treatment, a vicarious liability medical practice claim based on substandard treatment by an agent of the HMO is not preempted . . . Medical malpractice claims based on treatment do not require a court to determine if a promised benefit was actually provided, as such claims would be preempted; rather, the court must decide if the services provided deviated from the applicable standard of care.[85]

In *Smith v. HMO Great Lakes*, the plaintiff's claims against the defendant HMO, based upon garden variety professional malpractice and the contractual relationships between the HMO and the doctor who treated the plaintiff, were held *not* to be preempted by ERISA.[86] The court reasoned that plaintiff's claims were not the functional equivalent of claims for benefits and did not rely on obligations on the plaintiff's employee health care plan.[87]

Courts have addressed the public policy concerns by noting that although a particular state law may increase the cost of operating the benefit plan, Congress never intended preemption with regard to vicarious liability claims. If costs were determinative, employee benefit plans would be exempt from liability from virtually all state law torts and they are not.[88]

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85. *Haas*, 875 F. Supp. at 544.

86. Smith v. HMO Great Lakes, 852 F. Supp. 669 (N.D. Ill. 1994).

87. *Smith*, 852 F. Supp. at 671-72.

88. *Kearney*, 859 F. Supp. at 196; *see also* Dearmas v. Av-Med, Inc., 865 F. Supp. 816, 817 (S.D. Fla. 1994) (medical malpractice claims against HMO based on vicarious liability are not preempted); Kearney v. U.S. Healthcare, 859 F. Supp. 182, 185 (E.D. Pa. 1994) (plaintiff's claims based on misrepresentation, direct negligence and breach of contract dismissed as being preempted. Plaintiff's claims based upon vicarious liability were found not to be preempted); Visconti v. U.S. Healthcare, 857 F. Supp. 1097, 1101 (E.D. Pa. 1994) (all claims of medical malpractice against an HMO are preempted under ERISA); Pickett v. Cigna Health Plan of Texas, Inc., No. 01-92-00803-CV, 1993 Tex. App. LEXIS 1747 (June 17, 1993) (Texas appellate court affirmed the granting of a motion for summary judgment in favor of Cigna Health Plan based upon the fact that the plaintiff alleged that Cigna was negligent in failing to properly diagnose and treat the plaintiff. The trial court granted Cigna's motion for summary judgment on the basis that, as a matter of law, Cigna cannot be held liable for the failure to diagnose or other acts or medical negligence committed by a licensed physician with whom it did not employ or contract. The defendant physician contracted with a central Texas independent practice association which, in turn, contracted with Cigna. However, the court did state that there was no evidence that Cigna held itself out as a practitioner of medicine or maintained an agency relationship with the treating physicians. Thus, the door was left open for Texas plaintiff to establish medical malpractice claim against an HMO on an agency theory.); Elsesser v. Hospital of the Philadelphia College of Osteopathic Medicine, 802 F. Supp. 1286 (E.D. Pa. 1992) (court held that plaintiff's claims for misrepresentation, breach of contract and negligence based upon defendant's failure to pay for a halter monitor were preempted. Moreover, the court let stand plaintiff's claims against U.S. Healthcare for negligent selection, maintaining and evaluation of plaintiff's primary care physician and claim for ostensible agency.); Kohn v. Delaware Valley HMO, Inc., No. 91-2745, 1991 U.S. Dist. LEXIS 18694 (E.D. Pa. Dec. 19, 1991) (plaintiff's claims of ostensible agency against defendant HMO were upheld while plaintiff's claims of direct negligence were held to be preempted under ERISA); Independence HMO v. Smith, 733 F. Supp. 983 (E.D. Pa. 1990) (court, per Judge Antwerpin, denied the defendant's HMO preliminary injunction preventing the plaintiff from filing a state court medical malpractice ac-

VI. CONCLUSION

The developing caselaw provides an opportunity for plaintiff attorneys to assert a wide array of negligence theories. Hence, counsel for the HMOs will continue to face the difficulty of defending broad attacks. Defense counsel will continue to have the benefit of the preemption defense although recent decisions indicate that this may be a temporary refuge.

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tion. HMO sought the injunction on the basis that the plaintiff did not exhaust the administrative remedies available under the HMO contract prior to filing with the state court. The court felt that the defendant's likelihood on the merits that the administrative procedure was a requirement of the contract and therefore, preempted under ERISA found to be unpersuasive by the court.); Dalton v. Peninsula Hosp. Ctr., 626 N.Y.S.2d 362 (N.Y. Sup. Ct. 1995) (New York court found that the plaintiff's claims of negligent evaluation of a member physician and a breach of contract to include only competent doctors in its list of primary care physicians were preempted); Dunn v. Healthcare Plan of N.J., 606 A.2d 862 (N.J. Super. Ct. Law Div. 1990) (plaintiff's primary care physician contracted directly with the defendant HMO. Accordingly, the court found that the HMO could be held liable under a theory of agency. Thus, the jury verdict in favor of the plaintiff was affirmed by the New Jersey Appellate Court); Dukes v. U.S. Healthcare Sys. of Pa., 57 F.3d 350 (3rd. Cir. 1995) (*Dukes* was recently overturned by the Third Circuit Court of Appeals. The court found that nothing in the complaint indicated that the plaintiff was complaining about their ERISA welfare plan's failure to provide benefits due. Rather, the plaintiff was complaining about the low quality of treatment received. Thus, the court found that plaintiff's claim was not preempted).

Camille Paglia, *Sex, Art, and American Culture: Essays*. New York: Vintage Books, 1992

BOOK REVIEW BY: GINA L. BLASDELL†

In *Sex, Art, and American Culture,* Camille Paglia[1] advocates her own feminism which she calls "Italian Pagan Catholicism" or "pragmatic liberalism."[2] The child of Italian immigrants, Paglia's Italian American upbringing has shaped her self-image and feminist views through the use of the dramatic, the mystical and emotional.[3] She was also influenced by strong men and women and was exposed to a respect for law and order, tradition, and family while at the same time being wild and sensual.[4]

At the core of Paglia's feminism is the issue of self-responsibility. She calls for the radical reform of feminism to focus on common sense and reality. To Paglia, women must take responsibility for their actions in order to claim equality. To illustrate this she discusses a classic example of a young college woman who drinks heavily, goes to a fraternity brother's room and behaves a certain way that leads to sex.[5] To Paglia, this is more than a legal problem. It is a problem of personal responsibility. She advocates responsible behavior in this situation such as remaining alert and arriving and leaving with friends.[6] Both females and males who do not act responsibly, must learn to accept the consequences of their actions. Paglia compares this situation to one of leaving the keys on the hood of your car in New York City and expecting the car to be there when you return.[7] Although the thief should be punished, we should not rely solely on laws and rules to protect us.[8]

Paglia's feminism also advocates no special treatment for women. She wants women to accept the road they have chosen, whether it be a career or childbearing, and not later complain about lost opportunity. She abhors the idea that women are frail, delicate individuals who require special treatment. She wants

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† Class of 1996. Syracuse University College of Law.

1. Camille Paglia is the author of *Sexual Personae, Art and Decadence from Nefertiti to Emily Dickinson* and *Vamps and Tramps*, her most recent book published in 1994. Originally from Central New York, Paglia attended Harpur College, (the State University of New York at Binghamton) and received her Ph.D. from Yale. She has been a Professor of Humanities at the University of the Arts in Philadelphia since 1984. Her father taught at a Jesuit institution in Syracuse.

2. CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE: ESSAYS (Vintage Books 1992).

3. *Id.*

4. *A Scholar and a Not-So-Gentle Woman; Camille Paglia; Interview*, COSMOPOLITAN, Nov. 1991, at 106.

5. PAGLIA, *supra* note 2, at 55-69.

6. PAGLIA, *supra* note 2, at 50-51.

7. PAGLIA, *supra* note 2, at 57.

8. PAGLIA, *supra* note 2, at 57.

women to be courageous, independent and have the freedom to make choices that may or may not be dangerous.

Self-responsibility and no special treatment are two main ways that Paglia's feminism differs from other mainstream feminists such as Catherine McKinnon and Andrea Dworkin. Paglia's answer to problems such as rape and sexual harassment does not lie in regulating these behaviors. Unlike these feminists, Paglia's view is that when a woman takes responsibility for herself and her actions, she is free to take risks. Sometimes poor decisions may result in unfortunate results. When this happens, women need to be strong, pick themselves up, admit their responsibility for poor judgment and move on.[9]

Also of interest to the Italian American legal community is Paglia's essay, "*The Strange Case of Clarence Thomas and Anita Hill.*"[10] This essay contains Paglia's unique perspective on a conflict of law over sexual harassment and gender issues. Paglia considers Anita Hill an antifeminist although she is seen as a "feminist heroine" to many. Unlike Hill, Paglia does not want to combat sexual harassment through special treatment or regulation. Paglia wants each woman to accept individual responsibility for what they will and will not tolerate from men at work, and to confront the unacceptable when it happens. She criticizes Hill's public show as an inappropriate way to show "displeasure and disinterest."[11] In her view, Hill waited too long to come forward and stifled feminist principles in furtherance of her legal career. "It is hypocritical of her, ten years later to invoke feminist principle when she didn't have the courage to stand on it before," writes Paglia.[12]

In addition to legal issues, *Sex, Art and American Culture* also provides interesting reading on a variety of topics from Paglia's unique perspective. Her essays discuss issues ranging from education reform to Madonna and MTV.

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9. PAGLIA, *supra* note 2, at 63.
10. PAGLIA, *supra* note 2, at 46.
11. PAGLIA, *supra* note 2, at 48.
12. PAGLIA, *supra* note 2, at 48.

Senator Alfonse D'Amato, *Power, Pasta & Politics.* New York: Hyperion, 1995. Pp. xix + 357.

BOOK REVIEW BY: ANDREW C. AMBRUOSO†

I. INTRODUCTION:

From the office of Town Supervisor of the little known town of Island Park, Long Island to the floor of the United States Senate, Senator Al D'Amato has endured a productive yet rigorous career in both local and national politics. During his sixteen year tenure as a United States Senator, Senator D'Amato has achieved national prominence and acclaim for being one of this country's hardest working Republican Senators. Coming at a time when those who are elected to govern and lead this country are under much scrutiny, this work perhaps evidences the characteristics and requirements of a successful politician and national voice, that success not being measured by how many times one has been re-elected, but rather by satisfactorily representing voters' interests and the needs of this nation. Moreover, in this book Senator D'Amato "sets the record straight" with respect to the storied chronicles of his life.

In keeping with the Jeffersonian ideal that "[t]he whole of government consists in the art of being honest," Senator D'Amato's thoughtful autobiography appears to be a convincing display of honesty. Moreover, if it does not completely dispel any doubts concerning the Senator's prolific career, it should at least provide adequate information to form a more objective opinion as well as demonstrate the real workings of both New York State and national politics.

II. THE MAKINGS OF NEW YORK'S FIRST ITALIAN-AMERICAN U.S. SENATOR:

Senator Alfonse D'Amato, the grandson of Italian immigrants who came to New York from the small town of Avalino, just north of Naples, Italy, was born the day before the traditional Catholic feast of St. Alfonso.[1] Yet despite bearing the name of his grandfather, uncle and a Catholic Saint, the Senator spent much of his childhood anguishing over the thought of why his parents could not have given him a more seemingly American name. However, given his energetic, and admittedly hyperactive disposition, his parents gave him the nickname of "Tippy" early on as a baby.[2] (The name "Tippy" was actually taken from a

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† Class of 1996. Syracuse University College of Law.

1. ALFONSE D'AMATO, POWER, PASTA & POLITICS: THE WORLD ACCORDING TO SENATOR AL D'AMATO 3, 7 (1995).

2. D'AMATO, *supra* note 1, at 3-4.

neighbor's hyperactive poodle.) To this day, he is still known by many of his childhood friends as "Tippy."

When he was eight years old the family's move from Newark, New Jersey to the small town of Island Park, Long Island would set the stage for the cultivation of New York's future U.S. Senator.[3] In Island Park, a small town composed of mostly working and middle-class families of all ethnicities, the D'Amato family planted its roots and flourished. In this large, yet cohesive family the strong values of hard work and generosity prevailed. Coming from a modest family, the young Senator's parents struggled to provide him with the best academic and social education possible. Hence, the Senator attended Chaminade, a Catholic high school run by the Marianist brothers known for academic excellence and tough discipline.[4] Despite the strong family values instilled upon the Senator by his parents and grandparents, the Senator's most important lesson was learned at Chaminade; it was a lesson he would apply again and again through his career. Simply, it was: "Do the right thing because it's the right thing to do."

Senator D'Amato continued, and completed, his formal academic education at Syracuse University - both as an undergraduate as well as attending law school there and graduating in 1961.[5] Modesty once again seemed to be a recurring theme. As a student struggling to survive both academically and financially, the Senator proudly held a janitorial position which enabled him to keep his head above water.[6] Such a position gave the Senator the appreciation and compassion to relate to people from all walks of life.

III. FIGHTING FOR THE FORGOTTEN MIDDLE CLASS:

Senator D'Amato's 1980 bid for the U.S. Senate was the beginning of his now deeply rooted commitment of representing the needs and interests of all classes of New Yorkers comprising almost every ethnicity. Holding the rather obscure office of Presiding Supervisor of the Town of Hempstead, the Senator realized early on that his first and perhaps most difficult hurdle would be convincing his own local Republican party leaders of his sincere desire to run and win.[7] After defeating the legendary Jacob Javits, the firmly planted incumbent, in the primaries, the Senator now had the power to enlist his party's support and

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3. D'AMATO, *supra* note 1, at 35-36.
4. D'AMATO, *supra* note 1, at 40-42.
5. D'AMATO, *supra* note 1, at 43-50.
6. D'AMATO, *supra* note 1, at 43-50.
7. In 1979 with the death of Nelson Rockefeller and failing health of incumbent Republican Senator Jacob Javits, D'Amato realized his time had come to enter a political arena of a grander scale. However, convincing Joe Margiotta, the Nassau County Republican Party Chairman, was his first hurdle. In order to even enter the primaries, the Senator first had to reveal that he, and not Joe Caputo, the former Congressman from Long Island, was the only serious challenger to Javits and then attempt to secure the New York Conservative Party support. By June the Senator entered the Republican State Committee

disprove all those who told him: "Knock it off and concentrate on being re-elected Presiding Supervisor."[8]

By 1980 D'Amato had amassed broad support from across the state for his senatorial race. But even with broad support perhaps Senator D'Amato's victory came, in part, from a ride on the coat tails of Ronald Reagan's sweeping campaign and in another part from the effectiveness of Mamma D'Amato's campaign efforts.[9] Nevertheless, he quickly proved to be true to his promises to satisfy the broad middle-class needs. Even before taking the oath of office the Senator made his renowned trip to Northern Ireland to learn more of the suffering and oppression there and reassure Irish-Americans that he would represent their concerns.[10]

Once in office he wasted no time in tackling the issues that were imperative to both the livelihood of his beloved New Yorkers as well as to the nation. Quickly earning the title of "Senator Pothole," of which he remains proud, the Senator fought for federal aid and funds for New Yorkers. In keeping with the Reagan Administration he fought for the health of the defense industry by promoting the cost-effective relocation of the battleship *Iowa* to New York and fighting for more funds to maintain New York's sprawling mass transit system.[11] In the national spectrum, the Senator demonstrated his will to "do the right thing" first by forcing the CIA to subordinate its agenda and uncover the truth of the plot to assassinate the Pope in 1981, an issue of prime importance to both Catholic Americans and national security.[12] Moreover, his tackling of the drug-running Panamanian dictator Manuel Noriega proved to be a great service to both New Yorkers and the entire country as he fought the drug war head-on.[13]

IV. CRISIS AND REDEMPTION:

In 1986 Senator D'Amato won re-election by a landslide. Such a victory provided the Senator with a feeling of vindication after only a "razor-thin" margin of victory in 1980.[14] However, Mark Green, the defeated Democratic oppo-

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Meeting with the earned support of Joe Margiotta and the entire Long Island delegation. D'AMATO, *supra* note 1, at 71-86.

8. This was Joe Margiotta's initial reaction to Senator D'Amato's interest in running against Javits. Moreover, in November 1979, D'Amato won the race for Presiding Supervisor by 57 per cent of the vote. *See* note 7 *supra.*

9. During his 1980 campaign, Senator D'Amato ran television ads of his mother, "Mamma" D'Amato, making passionate pleas and extolling her son in order to appeal to as many voters as possible. This tactic has been hailed by many as one of the most effective campaign tools known to any politician. D'AMATO, *supra* note 1, at 95-100.

10. D'AMATO, *supra* note 1, at 101-108.

11. D'AMATO, *supra* note 1, at 128-131.

12. D'AMATO, *supra* note 1, at 121-127.

13. D'AMATO, *supra* note 1, at 155-162.

14. D'AMATO, *supra* note 1, at 165.

nent in the 1986 election, would not take his defeat quietly. Senator D'Amato opines that Mark Green was a "sore loser."[15] In fact, Green took his complaints that the Senator raised money simply to line the pockets of his supporters all the way to the Senate Ethics Committee. Whether Green actually felt his complaints were justified, he nevertheless instigated a barrage of attacks and insinuations by the media upon Senator D'Amato that would all but end his career.[16] In 1989 the Senate Ethics Committee officially launched its investigation into the conduct of Senator D'Amato.[17]

During the entire course of the investigation the Senator was harangued by the press with unsubstantiated accusations. Foremost was the accusation that Senator D'Amato was "tied to the mob."[18] The fact that the Senator himself was of Italian descent and associated himself with the Italian-American image as well as with friends of the same heritage, seemed to be all the proof the press needed to "tie" someone to the mob. So much for ending stereotypes in American society in the 1990's. Tabloids, television shows and newspaper publications seemed to contort all of the Senator's official and personal actions as political favoritism leading to the financial gain of his friends and family. Rather than being known as "Senator Pothole," Senator D'Amato was now known as "Senator Sleaze."[19]

Vindication finally came for the Senator in August 1991 when the Senate Ethics Committee exonerated him of any wrongdoing.[20] Yet, with only a year before his reelection bid for a third term, there was much negative publicity to overcome.[21]

V. POLITICS, NEW YORK STYLE:

From the elementary level of Long Island machine politics to the highest offices of the State of New York, Senator D'Amato's book exposes the real workings of New York politics with necessary frankness. During the course of his career as a U.S. Senator, Senator D'Amato has had to interact with all levels of New York State officials in order to promote the interests and needs of New York State.

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15. D'AMATO, *supra* note 1, at 165.

16. D'AMATO, *supra* note 1, at 166-181.

17. D'AMATO, *supra* note 1, at 166.

18. During Mark Green's campaign against the Senator, journalists and columnists wrote about Senator D'Amato with such disdain and left such an assumption of guilt that mobster-like inferences were readily drawn. Finally, the Senator's sixteen year old daughter asked him if he was "connected" because that is what she heard from other kids at school. D'AMATO, *supra* note 1, at 170.

19. D'AMATO, *supra* note 1, at 166-180.

20. D'AMATO, *supra* note 1, at 180.

21. Senator D'Amato won re-election in 1992 with much of his supporters crossing party lines to vote for him. (i.e. over one million New York voters who voted for President Clinton in the presidential election also voted for Senator D'Amato.) The Senator thus was dubbed "the real come-back kid" by Senate colleagues on both sides of the aisle. D'AMATO, *supra* note 1, at 217-236.

Senator D'Amato's relationship with Mario Cuomo can best be described as two-fold. On the one hand, the Senator respects and admires Cuomo on a personal level for his intelligence, eloquence and thoughtfulness. Yet, on the other hand, Senator D'Amato is tremendously blunt in stating his belief that New York suffered under Cuomo's leadership.[22] Under Cuomo's "tax and spend liberal ideology," the crime rate increased too much, too many jobs were lost, and the quality of life in New York declined. However, despite their ideological differences, they did enjoy a twelve year political relationship where they often acted in concert to serve New Yorkers. Their nonaggressive political relationship unfortunately ended in 1991 as Cuomo lashed out at Senator D'Amato for his support of fellow Republican George Pataki, during his successful campaign for Cuomo's seat.[23]

Senator D'Amato bluntly describes his relationship with New York City's Republican Mayor Rudy Giuliani as "stormy."[24] Initially impressed with Giuliani's performance as U.S. Attorney for the Southern District of New York and his commitment to the war on drugs, Senator D'Amato admits that New York City and the state have been well served by Giuliani's work.[25] The relationship became tenuous, however, as Giuliani first insisted on personally selecting his successor as U.S. Attorney and then when he broke from the Republican ranks to support Mario Cuomo, a liberal Democrat, in his reelection bid.[26] Perhaps it is not the fact that Giuliani chose to disagree and state an independent position, as much as it was the fact that his decision was viewed by both parties as somewhat of a "political temper tantrum."[27]

VI. LIFE IN BILL CLINTON'S WASHINGTON:

Akin to his working relationship with Mario Cuomo, Senator D'Amato, while quick to blockade the Democratic agenda and promote the ideals of the Republican party, nevertheless admits his respect and admiration for President Bill Clinton.[28] As the Senator reveals, they share the mutual characteristics of being tough, hardworking and savvy. President Clinton, D'Amato admits, is clearly a "master politician."[29]

On the national front, as in New York, the Senator admits to stand ready to work with anyone, Democrat or Republican, to further the interests and needs of this country. However, while Senator D'Amato and the President may share

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22. D'AMATO, *supra* note 1, at 261-268.
23. D'AMATO, *supra* note 1, at 268.
24. D'AMATO, *supra* note 1, at 275.
25. D'AMATO, *supra* note 1, at 276.
26. D'AMATO, *supra* note 1, at 279-280.
27. D'AMATO, *supra* note 1, at 280.
28. D'AMATO, *supra* note 1, at 287.
29. D'AMATO, *supra* note 1, at 287.

common social values, the Senator remains firm in his Republican ideology that in order to ensure the welfare of the citizens, the Government must cap spending, cut taxes and move towards methods of privatization.[30]

VII. CONCLUSION:

It is clear that, as the grandson of Italian immigrants to this country, Senator D'Amato's autobiography reflects the events that comprise the quintessential Italian-American experience which many of us share. Most significantly, it is these common events and values that have shaped one of this country's most noteworthy Senators and greatest contributors to the Italian-American community.

Both Senator D'Amato's parents and grandparents struggled to live a modest lifestyle through which they could support their families and raise their children. Despite the struggles that many Italian immigrants faced when they came to America, the backdrop of their Italian heritage infused a strong work ethic, family unity and respect for friends and family. With these basic Italian-American values, many families like The D'Amatos have enjoyed successful lives in America. Moreover, it is these values that cultivated the ambition and perseverance that brought Al D'Amato to the U.S. Senate. Finally, as the values and virtues of the Italian-American heritage are also shared by other ethnic sections of American society, the strength of this common thread allows Senator D'Amato to represent the needs of *all* his constituents - no matter what ethnicity, no matter what class of society.

30. D'AMATO, *supra* note 1, at 323-43.

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