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## THE INFLUENCE OF COMPARATIVE LAW IN TEACHING “STREET LAW” IN ITALY

**ABSTRACT.** *This paper analyzes various comparative-law features inherent to teaching “Street Law” in Italy, a legal clinic now offered at Roma Tre’s Law Department. The clinic examines basic legal notions such as the rule of law, democracy and justice, framed around active-citizenship initiatives enabled by the principle of horizontal subsidiarity. Street Law presents these concepts using learner-based, interactive methodology – typical of all legal clinics – in a “train-the-trainer” format. As part of the clinic, the law students in turn teach these concepts to high school students in several theoretical and hands-on lessons at a local high school, resulting in “peer-to-peer” teaching. Not surprisingly, Street Law, initiated by student-activists in Washington DC in the early 1970s, is deeply infused with common-law legal-education methodology and principles. Traditional lecture-based methods typical of civil-law legal education give way to the Socratic method, guided discussions, guest speakers, onsite visits to local government offices, role-play, games and other hands-on activities designed to engage students in a challenging, new experience aimed at both increasing their practical skills and mastering legal principles. This paper will analyze the methodological aspects of the course, and the policy guidelines embedded in soft-law provisions emanating from various sources that offer sound rationales for including Street Law in legal education. It will also review the comparative-law notions inherent to the clinic that extend also to substantive legal concepts such as subsidiarity, a largely European notion,<sup>1</sup> seeking parallels to it in the American legal system, as well as several of the fundamental rights and duties of democracy.*

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1 The US Constitution does not mention subsidiarity explicitly, and federal courts rarely review cases presenting challenges based on the principle it entails, i.e., that whenever possible, measures should be taken at the lowest level of government that can effectively achieve them. See G. BERMAN, *Subsidiarity as a Principle of US Constitutional Law*, 42 *Am. J. Comp. L. Supp.* 555, 1994, at 560.

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### **1. What is Street Law? History and Methodology**

In the spring semester of academic year 2018-2019, the Law Department of Roma Tre University introduced a new “didactic activity”<sup>2</sup> called “Street Law.” Now a staple in the increasing range of clinical-legal-education offerings taught in law schools worldwide,<sup>3</sup> this clinic marks Street Law’s debut in Italy. First introduced at Georgetown Law School in 1972, and taught today across the USA and in some 40 nations around the world, Street Law uses innovative, interactive teaching techniques<sup>4</sup> as it pushes law students beyond their comfort zones, stimulating them to become promoters of social action.

Every Street Law program shares certain elements or characteristics:

1. teaching practical content (law, democracy, and government);
2. using interactive teaching strategies to develop important civic skills (civic engagement, problem solving, critical analysis, and communication); and
3. involving the community in the educational process (resource experts from law and law enforcement visiting classrooms and students working beyond classroom

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2 *I.e.*, “a set of classes or a plan of study on a particular subject, usually leading to an exam or qualification” (Definition of “course,” at <https://dictionary.cambridge.org/it/dizionario/inglese/course>) in law that carries less than five *CFUs* (*Crediti formativi universitari*, or University Education Credits) rather than a full “course,” which carries five or more such credits, according to the terminology used at Roma Tre University. For the purposes of succinctness, this “didactic activity” will be referred to as a “course,” or as a “clinic,” hereinafter.

3 L. ARBETMAN, *Street Law Inc.: Context history and future*, 1 *Int J Pub Legal Educ*, 2018, 3.

4 *Id.* Lee P. Arbetman, Executive Director at Street Law, Inc., characterizes Street Law as a way to “teach the public about law and public policy using learner-centered, interactive teaching methods. Today, Street Law programs can be found in every state in the US and in more than 40 countries around the world [... in] more than 120 law schools.”

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walls in the community).<sup>5</sup>

This Roma Tre edition of Street Law inserts students in the context of teaching civic education and legality in high schools. It calls upon their knowledge of substantive law and their powers of persuasive communication, while instilling them with didactic skills. The unique quality of the course is that it gives Italian law students the opportunity to hone all these skills by actually teaching Italian high school students – *liceali* – about the basic principles they have already been studying for years. Their lesson plans include discussions and activities based on the rule of law, the foundations of democracy, the reasons we strive for justice, and the tools the Italian Constitution provides to pursue these ideals. They analyze fundamental legal concepts ranging from basic tenets of criminal norms that guarantee security in a democratic society to concepts regarding common goods, subsidiarity and other constitutional principles. In addition to the theoretical knowledge they will impart in the *liceo* classroom on these topics, the law students will also lead hands-on lessons with the *liceali* on a street near their school, taking concrete action together to care for common goods in need of refurbishing. Their efforts constitute a collective effort to restore dignity and functionality to this common space, while putting into practice the concepts they’ve discussed inside the traditional classroom, first as learners, then as instructors.

In particular, during the five-week course, the law students acquire “specific knowledge and competences regarding themes relative to the rule of law, subsidiarity and the protection of common goods,” deeply analyzing the legal aspects that constitute them in a comparative and international perspective. The clinic’s learning objectives provide that “at the end of the course, the students will be able to:

- describe the main theoretical and normative frameworks that constitute the principles of the rule of law and of subsidiarity, in a comparative and international perspective, with particular reference to the Italian and US contexts;
- plan and organize training initiatives aimed at transmitting this knowledge to high school students;

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5 R. GRIMES, *Part one: Introduction, Ed O’Brien Conference*, in *Ed O’Brien Book, Street Law and public legal education: A collection of best practices from around the world in honour of Ed O’Brien* in press by Juta & Co. Ltd.

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- promote, through the application of the acquired knowledge and skills, the implementation of events aimed at taking care of common goods;
- interact with the public administration in order to manage and improve the territory (or common goods);
- diffuse the principles of actions of horizontal subsidiarity.”<sup>6</sup>

## ***2. National, European and International Legal Foundations Supporting Street Law in the Law School Curriculum***

Policy guidelines embedded in soft-law provisions emanating from various sources offer sound rationales for including Street Law in legal education. Here we will focus on several such examples: one from the Italian legal system – and by extension the EU –, one from the US and a third from an international body, the UN.

### ***2.1. In Italy***

The importance of the Street Law objectives can be inferred from the content of the Decree of the Italian *Ministero dell’Istruzione, dell’Università e della Ricerca (MIUR)*<sup>7</sup> of 25 October 1993, n. 302, whose subject was “Educating towards Legality.” In defining this key phrase, the Ministry specified that “educating towards legality” means elaborating and spreading an authentic culture of civic values. It defined this culture as one that:

- considers law as an expression of a social pact, indispensable for building informed relationships between citizens themselves, and between citizens and institutions;
- allows for the acquisition of a deeper and more extensive notion of the rights of citizenship, starting from the awareness of the reciprocity among subjects possessing the same dignity;
- facilitates the understanding of how the organization of personal and social life finds itself on a system of legal relationships;

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6 Course objectives, Roma Tre Law Department website: <http://uniroma3-public.gomp.it/Insegnamenti/Render.aspx?CUIN=xx1822445> (Accessed 30 May 2019).

7 Italian Ministry of Education, University and Research.

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– develops the awareness that conditions such as dignity, liberty, solidarity and security cannot be considered as having been permanently acquired, but must be pursued, coveted and – once secured – protected.

This decree identifies and defines the same objectives as those pursued in Street Law. It encourages, later in the document, the “realization of a series of initiatives” as “possible means of promoting the delineated process.” However, the *MIUR* decree does not indicate any specific methodology that converts the theories inherent in “legality” into concrete practices. In the decree, “educating towards legality” remains a theoretical, academic pursuit. Thus, it does not prescribe techniques or methodologies, or envision the idea of linking law students to high school students, in a synergetic, peer-to-peer, learning relationship, as identified and implemented in Street Law.

## ***2.2. In Europe***

Examining the general development of clinical legal education in Europe, it is noteworthy that a wave of experiential learning intensified when the Bologna process began in 1999.<sup>8</sup> “It was only following the adoption of the Bologna Declaration (aimed at the creation of a common European area for higher education), the European integration process and the growing competition between public and private universities that clinical legal education began to take hold in Western Europe.”<sup>9</sup> To gather force, clinical legal education has had to overcome several obstacles, many tied to fitting into the prevalent civil-law educational practices mentioned above. It was difficult to diverge from “the formalism of legal studies and their separateness from objectives of social justice and commitment to public goods.”<sup>10</sup> This formalism and the separateness from the achievement of social ends, which

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8 See M. ROMANO, *The history of legal clinics in the US, Europe and around the world* in C. BARTOLI, *Legal Clinics in Europe: For a commitment of higher education in social justice* in *Diritto & Questioni Pubbliche, Special Issue*, Palermo: Diritto & Questioni pubbliche, 2016. “With the Bologna Declaration, a system of credits and easily comparable titles was introduced, allowing greater mobility of students and teachers, and aiming at facilitating the process of European integration and a greater exchange between the positive experiences of the different universities.” *Id.* at 33.

9 *Ibid.*

10 M. BARBERA, *The Emergence of an Italian Clinical Legal Education Movement* in A. ALEMANNINO-L. KHADAR (eds) *Reinventing Legal Education: How Clinical Education Is Reforming the Teaching and Practice of Law in Europe*, Cambridge: Cambridge University Press, 2018, 62.

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have been embedded in the civil-law legal-education system for some 1000 years, do not readily embrace “law in action, where the goals include rethink[ing] and reconceptualiz[ing] norms, institutions, law-making processes, and the role of the different actors involved in these mechanisms. [... It means] reintroduc[ing] in legal education the idea of law as an instrument of social change [...] as a social weapon.”<sup>11</sup>

The arsenal that Street Law brings to bear is well defined among the learning objectives written and adopted by the Roma Tre law students themselves in the modules they taught at the local high school. These included: “to foster the development of the high school students’ public spirit; to understand concepts of democracy, law and justice; to comprehend the differences between common goods, public goods and private goods; to understand the principle of subsidiarity, shared administration, care and respect for common goods.”<sup>12</sup> These learning objectives recall the Ministerial decree that called upon educators to “elaborate and spread an authentic culture of civic values.”<sup>13</sup> They correspond to the other specific points of the decree in the consideration of “law as an expression of a social pact, indispensable for building informed relationships between citizens themselves, and between citizens and institutions; [...] understand[ing] how the organization of personal and social life finds itself on a system of legal relationships; develop[ing] the awareness that conditions such as dignity, liberty, solidarity and security cannot be considered as having been permanently acquired, but must be pursued, coveted and – once secured – protected.”<sup>14</sup>

By not only learning these principles but also teaching them to their (slightly

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11 *Ibid.*

12 Taken from a lesson plan designed by Street Law students, edition 1, Roma Tre University Law Department 2019. In it, they delineated specific methodology and detailed timetable to follow: “The discussions will take place based on the Socratic Method. The students will be stimulated to express their opinions in a guided discussion, as follows: Initial plenary discussion – 15 min. - What is a common good? – 10 min. - What is the difference between a private good and a public good? – 10 min. - Reflection. Who takes care of the common goods? Why? – 10 min. - Introduction to the concepts of subsidiarity and shared management of public spaces. Collaborative Pacts – 10 min. - Conclusions: comprehend the benefits, not only to the environment but also to society and to personal development that derive from the activity of Retake (compare with sports) – 10 min. - Final plenary discussion. – 20 min.”

13 Decree of the Italian *Ministero dell’Istruzione, dell’Università e della Ricerca (MIUR)* of 25 October 1993, n. 302.

14 *Id.*

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younger) peers, the law students are imparting notions and using methodology intended to effect change, using skills they obtained through a sense of empowerment that the course aimed to heighten. These skills are transferrable to situations students will encounter in future endeavors – as lawyers, public officials, corporate strategists, engaged citizens – or any role where leadership is required and exercised through informed, persuasive communication skills. By introducing Street Law into its curriculum, Roma Tre University maintains its prominent role in clinical legal education in Italy; it now offers four other legal clinics: the Clinic on the Law of Immigration and Citizenship, the Legal Clinic on Minors’ Rights, the Banking and Financial Law Legal Clinic and the Prison Law Clinic.<sup>15</sup>

### ***2.3. In the United States***

In 1992, the American Bar Association (ABA), an institution closely linked to US law schools due to, *inter alia*, its accreditation of them,<sup>16</sup> published the *McCrate Report*. It stated, “clinical [legal] courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all ABA-approved law schools.”<sup>17</sup> The *McCrate Report* also encouraged law “schools to recognize the value of live-client clinical experiences and to explore ways to expand the availability of courses that offer such experiences.”<sup>18</sup> This Report therefore endorsed and encouraged the continued and in-

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15 *Cliniche legali, Presentazione*, Roma Tre University’s Law Department. [http://www.giur.uniroma3.it/?q=clini-che\\_legali](http://www.giur.uniroma3.it/?q=clini-che_legali) (Accessed 1 June 2019).

16 “The Role of the ABA Section of Legal Education and Admissions to the Bar. Under Title 34, Chapter VI, § 602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations.

The Council of the Section promulgates the Standards and Rules of Procedure for Approval of Law Schools with which law schools must comply in order to be ABA-approved. The Standards establish requirements for providing a sound program of legal education. The law school approval process established by the Council is designed to provide a careful and comprehensive evaluation of a law school and its compliance with the Standards.” See [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2016\\_accreditation\\_brochure\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf), (Accessed 21 May 2019).

17 American Bar Association, *Legal Education and Professional Development – An Educational Continuum Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (known as the *McCrate Report*) 1992, p. 6.

18 *Id.* (at 254).

creased use of courses such as Street Law, which were already being taught in law schools across the United States.

In fact, clinical legal education began in early 1900s in the United States due to the influence of the legal realist movement. Jurists who extolled legal realism argued “that legal education should expose students to the dynamic relationship between theory and practice – that good theory is practical, and that good practice is informed by theory.”<sup>19</sup> A prominent legal realist, Jerome N. Frank, advocated that legal clinics should play a broad role in legal education in 1933: “law school clinics would not confine their activities to [those] now undertaken by the Legal Aid Society. They could take on important work for governmental agencies or other quasi-public bodies.”<sup>20</sup> He defended an expanded scope and purpose of legal education to a concrete understanding of how the law could work to pursue social ends. “The law student should be taught to see the inter-actions of the conduct of society and the work of the courts and lawyers<sup>21</sup> [... and] be encouraged to consider that an important part of their future task is to press for improvements of the judicial process and for social and economic changes through legislation, and wise administration, but, at the same time, that proposals for adequate improvements should be formulated on the basis of moderately accurate information as to how the judicial, legislative and administrative processes actually function.”<sup>22</sup> This mixture of practical knowledge and theoretical expertise is precisely what characterizes all legal clinics today, including Street Law.

#### ***2.4. In the International Sphere***

Regarding relevant guidelines handed down in the sphere of international law, we can refer to the United Nations Sustainable Development Goals, which identifies 17 such Goals, each with a number of Targets to reach by the year 2030. Two of the

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19 S. WIZNER, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *Fordham L. Rev.* 1929, 2002, at 1932. Available at: <http://ir.lawnet.fordham.edu/flr/vol70/iss5/29> (Accessed 30 May 2019).

20 J. FRANK, *Why Not a Clinical Lawyer-School? Faculty Scholarship Series* 4109, 1933 at 918. [https://digitalcommons.law.yale.edu/fss\\_papers/4109](https://digitalcommons.law.yale.edu/fss_papers/4109) (Accessed 30 May 2019).

21 *Id.* at 921.

22 *Id.* at 922-923.

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Goals are particularly relevant to the Street Law clinic, numbers 4 on Quality Education and 11 on Sustainable Cities and Communities.

Goal 4 provides: “Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.” In establishing this goal, the international community has reiterated the importance of quality education as a means to improve the conditions of lifestyle of persons, the community and society as a whole. It has emphasized that education is thus a factor that contributes to making the world safer and more sustainable.<sup>23</sup> In particular, Goal 4 includes the following Target:

By 2030, ensure that all learners acquire *the knowledge and skills* needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development.<sup>24</sup>

The dual focus on knowledge and skills through quality education reflect those that Street Law – and all clinical legal education – pursues.

When coupled with the objectives set forth in Goal 11, which provides, “Make cities and human settlements inclusive, safe, resilient and sustainable,” Street Law’s overarching themes come full circle. This Goal seeks a comprehensive, sustainable and participatory approach to make our cities safer and more inclusive, especially for women, children, the elderly and disabled.<sup>25</sup> The Street Law curriculum provides precisely this prescription to deliver its results. By engaging two different categories of young people – university and high school students – in interactive learn-by-doing activities and encouraging the younger group to echo the message among their families and friends,

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23 See *Agenzia Italiana per la Cooperazione allo sviluppo*, at <https://www.aics.gov.it/home-ita/settori/obiettivi-di-sviluppo-sostenibile-sdgs/> (Accessed 30 May 2019).

24 Emphasis added. See, e.g., United Nations Department of Economic and Social Affairs: <https://www.un.org/development/desa/disabilities/envision2030-goal4.html> (Accessed 30 May 2019).

25 See *Agenzia Italiana per la Cooperazione allo Sviluppo*, at <https://www.aics.gov.it/home-ita/settori/obiettivi-di-sviluppo-sostenibile-sdgs/> (Accessed 30 May 2019).

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Street Law seeks to spread throughout the entire society its purpose of instilling respect for the common goods that comprise our cities. Looking closer at Goal 11, the following two Targets stand out as particularly relevant to Street Law's aims: "Enhance inclusive and sustainable urbanization and capacity for participatory, integrated and sustainable human settlement planning and management in all countries" and "Reduce the adverse per capita environmental impact of cities, including by paying special attention to air quality and municipal and other waste management."<sup>26</sup>

### ***2.5. Conclusions regarding Legal Foundations for Street Law in the Law School Curriculum***

Similar concerns emerge from the Italian, European, US and international recommendations sustaining themes relating to learning-by-doing or experiential learning regarding civic education, social cohesion and respect for the environment. In these directives, therefore, we can detect common threads that seem to be fairly non-controversial, lending support to offering Street Law in the law school curriculum. Nonetheless, Roma Tre's Street Law clinic is in effect a pilot course; its content and purpose still lie fairly far afield from mainstream offerings in Italy's law departments. Given the many pressing issues facing Italy, Europe and indeed the entire world today that require innovative thinking and quality lawyering to cobble viable solutions, a comparative-international-law approach would seem an obvious choice. A passage from a case decided by Learned Hand in 1911 is relevant: "How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."<sup>27</sup> Along

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26 See, e.g., United Nations Department of Economic and Social Affairs: <https://www.un.org/development/desa/disabilities/envision2030-goal11.html> (Accessed 30 May 2019).

27 *Parke-Davis & Co. v. H. K. Mulford Co.*, Circuit Court, S.D. New York 189 F. 95; 1911 US App. LEXIS 5245 28 April 1911, Learned Hand. The quote comes from a patent case dealing with technical issues regarding the chemical composition of "crude product" Adrenalin. His analysis of the case concludes with a strong endorsement of using solutions presented through the study of comparative law:

"I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as

these same lines but some sixty years later, Saul D. Alinsky cited Justice Hand as stating: “the mark of a free man is that ever-gnawing inner uncertainty as to whether or not he is right.”<sup>28</sup> Alinsky claims that social organizers who aim at effecting positive change would agree with Hand’s statement, and that he also believes that “if people have the power to act, in the long run they will, most of the time, reach the right decisions.”<sup>29</sup> This sense of optimism and trust informs legal clinics such as Street Law. These values should push us towards creating opportunities that allow law students to experiment, to think on their own, to engage with others based on their own powers of reasoning, to take on responsibility, to become empowered through the study of law. Indeed, empowerment starts through civic awareness and develops into civic engagement and accomplishment. Active citizens and groups or associations of them act through “empowerment” to engage not only other citizens but public administrators as well.

### ***3. Comparative-Law Notions Inherent to Street Law***

Several areas of substantive law studied in Roma Tre’s first edition of Street Law invite analysis through a comparative lens. These areas range from that known as “subsidiarity” in Italian and EU law, and its counterpart – if we can call it that – in the US, to that of basic concepts of legality itself, ranging from criminal norms and administrative sanctions in various settings. “Comparative law facilitates a better comprehension of the different social and cultural institutions of our world.”<sup>30</sup> The comparative-law framework, with its broader, interdisciplinary and international approach contributes to a greater understanding of these issues. In fact, for purposes of Street Law, the comparative-law approach worked in precisely the ways Zweigert and Kötz describe:

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these. [...] In Germany, where the national spirit eagerly seeks for all the assistance it can get from the whole range of human knowledge, they do quite differently. The court summons technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken.”

28 S. ALINSKY, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals*, New York: Random House, 1971, Vintage Books Edition, 1989, at 11.

29 *Ibid.*

30 K. ZWEIFERT-H. KÖTZ, *Introduzione al Diritto Comparato*, Milano: Giuffrè Editore, 1998, at 18 (translated from the Italian).

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The primary function of comparative law is, like that of all scientific methods, knowledge. If by the science of law we intend not only interpretive science regarding law, principles of law and national ‘rules’ and ‘standards,’ – but also the search for models to avoid and resolve social conflicts – then it is clear that comparative law provides a wider range of models and solutions than that [of] a national legal system.<sup>31</sup>

Using a comparative approach coupled with an interactive, learn-by-doing method, allowed students to reflect on a range of principles comprising legality, democracy and justice in ways they hadn’t previously encountered thus far in their study of law. Zagrebelsky notes in his *Imparare democrazia* that one of democracy’s foundations is the “Spirit of dialogue [...] Democracy is *discussion, reasoning together*.”<sup>32</sup> The next section will focus on one of the main areas of substantive law encountered and analyzed in Street Law: subsidiarity. Following Zagrebelsky’s suggestion, we *discussed* this principle in almost every lesson, recognizing that “[o]ne of the most characteristic implications of subsidiarity is political participation.”<sup>33</sup> In a clinic aimed at engaging students by directly involving them in the interplay between the public administration and individual empowerment, *reasoning together* about its potential “in facilitating citizens’ participation in social and political relationships, enhancing democracy, and protecting individual liberty”<sup>34</sup> is key. This interactive method draws students into the law and engages them to participate in the democratic process at the most basic level,<sup>35</sup> in a true manifestation of the principle of subsidiarity. It is not surprising that this principle constitutes a central theme of the clinic.

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31 *Id.* at 17.

32 G. ZAGREBELSKY, *Imparare democrazia*, Torino: Einaudi, 2007 (emphasis added).

33 M. EVANS-A. ZIMMERMANN, *Global Perspectives on Subsidiarity* (Eds.) New York: Springer 2014, Introductory chapter, at 2.

34 M. KANETAKE, review of M. EVANS-A. ZIMMERMANN, *Global Perspectives on Subsidiarity* (Eds.) New York: Springer 2014, *Global Perspectives on Subsidiarity* 13 *Int’l J. Const. L.* 1085, 2015, at 1086.

35 Tocqueville wrote: “I maintain that the most powerful, and perhaps the only, means of interesting men in the welfare of their country which we still possess is to make them partakers in the Government.” A. DE TOCQUEVILLE *Democracy in America* (translated by H. REEVE) 2002, V 1 at 270.

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## 4. Subsidiarity

### 4.1. A Brief Historic Overview

The roots of subsidiarity are traceable to the thoughts of Aristotle and Aquinas.<sup>36</sup> It also has ties to the Catholic Church, and featured in Pius XI’s 1931 encyclical, where he wrote that subsidiarity:

remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>37</sup>

Here, the encyclical expresses the complexity of the concept of subsidiarity: hierarchical powers of the Church that should recognize and support the members of its body.

Pursuing a political-philosophy point of view – including considerations relevant to virtue ethics – Dominic Burbridge examines subsidiarity in his article entitled

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36 In *The Federal Constitution: Towards a Normative Theory*, 61 *Am. J. Juris.* 13, 2016, Nicholas Aroney writes: “Aristotle begins his *Politics* with an account of human beings born into households, inhabiting villages and finding their fulfilment within the *polis*. [...] He] later describes the *polis* as a composition of individual citizens (*politai*) formed into a self-sufficing unity.” p. 13, footnote 1 [...] and ] “concludes that the *polis* is the essential unit of human self-governance and the location of ‘supreme authority.’” p. 14. St. Thomas explained that “order is unity arising from the harmonious arrangement of many objects, a true, genuine social order demands that the various members of a society be united together by some strong bond.” *Contra Gentiles*, III, 71. In these excerpts, we can perceive the seeds of what will become the basis of horizontal subsidiarity, as discussed *infra*.

37 Pius XI, *Quadragesimo anno*, § 79, 1931. The encyclical continues, at § 80 “The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of ‘subsidiary function,’ the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.” <https://bit.ly/1A5GcL9> (Accessed 30 May, 2019). Here the encyclical articulates a more clearly defined version of what would be considered vertical subsidiarity.

“The Inherently Political Nature of Subsidiarity.”<sup>38</sup> In it, he states, “A democratic order hosts participatory decision-making insofar as the people are sovereign in the fullness of their political nature. This requires concurrent navigation of the criteria of legitimate authority alongside deciding what should be done.”<sup>39</sup> This consideration, placing popular sovereignty at the forefront, approaches the horizontal version of subsidiarity. In that regard, Burbridge cites Jonathan Chaplin who sustains that subsidiarity is a call for social functions to be fulfilled, not at *the lowest possible level but rather at the right level*<sup>40</sup> and that “*all communities have a potential responsibility towards all other communities (and to persons) to offer them various kinds of ‘help’ or service. The principle [of subsidiarity] turns out to have not only a vertical but also a horizontal application.*”<sup>41</sup> Burbridge believes that “What matters is not how society is ordered as a whole, but the recognition of various inter-dependencies between otherwise autonomous groups, inter-dependencies that are best facilitated through a principle of a-political non-absorption.”<sup>42</sup> These ideas emphasize participation in its broadest, macro perspective, including that of horizontal subsidiarity.

Recently the term “new governance” has been used to analyze these basic principles about decision-making and participation in the democratic process. It comprises the idea that the state alone is unable to meet all the demands expected of it, and thus “needs to engage other actors to leverage its capacities.”<sup>43</sup> Emanuel Savas described new forms of public administration nearly two decades ago, meant to meet the challenges posed by changing dynamics in society. “Governments, now more than ever, must persuade and motivate citizens to secure their support. Because many societies, even in ad-

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38 D. BURBRIDGE, *The Inherently Political Nature of Subsidiarity*, 62 *Am. J. Juris.* 143, 2017.

39 *Id.* at 144.

40 J. CHAPLIN, *Subsidiarity and Social Pluralism*, (emphasis in original) New York: Springer, 2014, at 72.

41 *Id.* at 75.

42 D. BURBRIDGE, *The Inherently Political Nature of Subsidiarity*, at 144.

43 F. STEWART, *Behind the Cloak of Corporate Social Responsibility: Safeguards for Private Participation within Institutional Design*, 25 *Ind. J. Global Legal Stud.* 233, 2018, at 246. “Under this definition, new governance encompasses a broad diversity of thought with one common thread: an agreement that today’s governance demonstrates a correlation between the state’s engagement with ‘other actors’ and the blurring of the public-private distinction, evidenced in practice by many examples of governance partnerships.” *Id.*

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vanced market economies, are becoming less coherent, less unified, more fragmented, and have less respect for political authority, public officials must bring together the various stakeholders and gain consensus on common action.”<sup>44</sup>

#### ***4.2. The European and Italian Perspectives***

In European law, subsidiarity is a key principle, as established in 1992 in the Treaty of Maastricht, and currently formulated under the Treaty on European Union, which entered into force in 2009.<sup>45</sup> In both the EU and within Italy, this principle helps distribute and allocate administrative resources and functions throughout the governmental frameworks.<sup>46</sup> In the EU context, it regulates and limits EU authorities from acting when national or even local governments could do so more effectively, requiring that decisions be taken as closely as possible to the citizens.<sup>47</sup> Subsidiarity in this context therefore regulates concurrent powers, providing a flexible mechanism that weighs the national interest against local ones. This regulation of concurrent powers provides rules in a hierarchical structure, pushing the exercise of governmental power downward to the lowest administrative level that can effectively achieve the objectives of any given proposed action, in what is generally known, as noted above, as “vertical subsidiarity.”

In Italy, innovators and volunteer organizations that are engaged in active citizenship have begun to invoke “horizontal subsidiarity” under Article 118 of the Italian Constitution.<sup>48</sup> It provides: “The State, regions, metropolitan cities, provinces and mu-

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44 E. SAVAS, *Privatization and the New Public Management*, 28 *Fordham Urb. L.J.* 1731 (2001) at 1736.

45 The present formulation, in the consolidated version following the Treaty of Lisbon, is contained in Article 5(3) and protocol (No. 2) on the application of the principles of subsidiarity and proportionality of the Treaty on European Union, which entered into force on 1 December 2009: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

46 It is interesting to note that during the same timeframe in which “subsidiarity” was forming across Europe, critical developments were helping spread the practices of clinical legal education worldwide.

47 See *The Principle of Subsidiarity, European Parliament*, available at: <http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> (Accessed 30 May 2019).

48 In 2001, the Italian Parliament approved, and a referendum confirmed revisions to Title V of the Italian Constitution, inserting the principle of subsidiarity in paragraph 4 of Article 118.

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nicipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity”<sup>49</sup> Based on this provision, citizen initiatives aimed at improving the collective good are increasingly expecting and demanding governmental support. In the Italian legal context, “horizontal subsidiarity” thus garners support for citizens’ actions *from the bottom up, to the “State, regions, metropolitan cities, provinces and municipalities.”* It thus provides “individuals” or “associations” with institutional support for “activities of general interest” from every level of the Italian government, thus encouraging citizens to undertake them. In both the EU and Italy, the term subsidiarity is relevant to the distribution of governmental power. Comparing and contrasting their content and functions sheds light on the complex relationship between the two interacting legal systems and their effects on citizens and local administrations.<sup>50</sup>

In Italy, this recently established legal framework that institutes horizontal subsidiarity has allowed for and encouraged growth in activities undertaken by active citizens based on their newly found sense of empowerment – especially those aimed at taking care of common goods. Enrica Rocca describes the revolutionary principle of horizontal subsidiarity as follows:

In 1997, in a well-known essay on the need for a shared system of administrative governance, Professor Gregorio Arena wrote that the Italian system of public administration seemed to be evolving towards a new model based on the principle of cooperation rather than on the conflict between citizens and the public power. Synergy, not antagonism, between the public and private spheres should be the new lens through which to look at the power relationships of society. What was a mere theoretical idea in 1997, which had the backing of some case law, has today become a day-to-day phenomenon.<sup>51</sup>

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49 Constitution of the Italian Republic, published by the Parliamentary Information, Archives and Publications Office of the Italian Senate. Available at: [https://www.senato.it/documenti/repository/is\\_tituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/is_tituzione/costituzione_inglese.pdf) (Accessed on 30 May 2019). “*Stato, Regioni, Città metropolitane, Province e Comuni favoriscono l'autonomia iniziativa dei cittadini, singoli e associati, per lo svolgimento di attività di interesse generale, sulla base del principio di sussidiarietà*”. The current text of Article 118 was introduced with the constitutional law 18.10.2001, n. 3.

50 See e.g., T. GROPPi AND N. SCATTONE, *Italy: The Subsidiarity Principle*, 2006, 4(1) *Int J Const L* 131-137 <https://doi.org/10.1093/icon/moi056> (Accessed on 30 May 2019).

51 E. ROCCA, *The City, between Innen and Aussen: The Revolution of the Horizontal Subsidiarity Principle in*

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### 4.3. *The US Perspective*

The United States Constitution contains no explicit reference to subsidiarity, but the federal structure it creates, including the Supremacy Clause,<sup>52</sup> arguably work toward its general goals. “From executive orders requiring that a proposed federal action be weighed against the efficacy of state action, to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of [the USA’s] political and legal landscape comports fully with subsidiarity’s ideal.”<sup>53</sup> However, some commentators believe that “the US system offers few political or legal guarantees that the federal government will act only when persuaded that the states cannot or will not do so on their own.”<sup>54</sup> George A. Bermann asserts that even if “the notion of political self-governance underl[ies] the American federal system,” he recognizes that “federal preemption of state law is permitted in all areas where the two levels share powers.”<sup>55</sup> Bermann and others tend to characterize the function of subsidiarity in the United States as more of a “guide to the legislator.”<sup>56</sup>

Regarding in particular the existence of the principle of *horizontal* subsidiarity in the US Constitution, we might argue that the Ninth and Tenth Amendments of the Bill of Rights, both ratified in 1791, could provide valuable insights. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” It thus cautions against

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Italy, 5 *Birkbeck L. Rev.* 135, 2017, at 144.

52 Article VI Clause 2 of the United States Constitution establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the “supreme law of the land.” Subsidiarity is said to be similar to the principle of *Konkurrenziende Gesetzgebung* in Germany. See T. GROPPi AND N. SCATTONE, *Italy: The Subsidiarity Principle*.

53 See P. WIDULSKI, *Bakke, Grutter, and the Principle of Subsidiarity*, 32 *Hastings Const. L.Q.* 847, 2005, at 852.

54 G. BERMAN, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States* in *Columbia Law Review*, Vol. 94, Issue 2 (March 1994), pp. 331-456, at 403.

55 See G. BERMAN, *Subsidiarity as a Principle of US Constitutional Law*, at 560.

56 M. JACHTENFUCHS-N. KRISCH, *Subsidiarity in Global Governance*, 79 *Law & Contemp. Probs.* 1, 2016, pp. 1-26, at 11. These authors, comparing what they consider the negligible influence of the courts in upholding the principle of subsidiarity in the EU and the US, write: “Even in the EU, which, contrary to the United States, has a legally enforceable subsidiarity principle, scrutiny by the European Court of Justice has not led to many practical results.” *Id.* at 12.

making any assumptions regarding the scope of people's rights based on the mere inclusion of them elsewhere in the Constitution. As such, the Amendment has been said to have been intended to vitiate the maxim: *expressio ungue est exclusio alterius*.<sup>57</sup> The Tenth Amendment is said to create Reserved Powers. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Ninth and Tenth Amendments therefore both call to mind ideas regarding popular sovereignty, enshrining the fundamental role of the people in the founding of the United States. These amendments thus reflect a sense of empowerment residing in the people – a *grassroots* culture – and firmly embed it into the US *legal* culture already at the time of its founding. This infusion of empowerment into its legal culture strengthened and grew over time; later, in literature, Ralph Waldo Emerson called it self-reliance.<sup>58</sup>

Many procedural – and substantive – law mechanisms comprise the fabric of the American legal system. "The availability of class action suits and broad, liberal discovery rules have strengthened the potential of private actions in the US."<sup>59</sup> The private enforcement regime that characterizes, *e.g.*, US antitrust law – by providing for the remedy of treble damages and empowering individual citizens as private attorneys general to enforce the Sherman Act<sup>60</sup> – demonstrates the effectiveness achieved by this culture.

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57 See *Gibson v. Matthews*, 926 F.2d 532, 537 (6<sup>th</sup> Cir. 1991).

58 R. EMERSON, *Self-Reliance* (1841).

59 R. SPITZMILLER *A Primer on Competition and IP Law: A US-EU Perspective on Private Enforcement in Competition Law and Intellectual Property A European Perspective* in G. CAGGIANO, G. MUSCOLO AND M. TAVASSI, *Competition Law and Intellectual Property: A European Perspective*, Wolters Alphen aan den Rijn: 2012, pp. 293-312 at 296. "The ancestor of today's US federal class action suit, first passed in 1938 and governed by Federal Rules of Procedure Rule 23 (2010) and 28 U.S.C § 1332(d) (2010), dates back to group litigation in medieval England. It was imported through case law and rules of equity in the US (*e.g.*, Equity Rule 48, promulgated in 1833), which allowed for representative suits in cases with numerous plaintiffs. The 1938 Federal Rules of Civil Procedure also ushered in the liberal discovery rules characterizing modern litigation. *Ibid.* See S. SUBRIN, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *Boston College Law Review* 691, 1998, at 691. Available at: <<http://lawdigitalcommons.bc.edu/bclr/vol39/iss3/6>>.

60 *The Antitrust Modernization Commission, Report and Recommendation*, (2007), 243 stated: "From the outset Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as 'private attorneys general,' and that the antitrust laws should encourage such enforcement."

“This effectiveness is predicated upon an entire legal system that has supported such an approach throughout its history, [...] as well as a legal tradition that has long viewed private citizens as empowered to enforce antitrust laws.”<sup>61</sup>

The United States thus originated and expanded through a horizontal plane of development that pushed outward and upward, from the American Revolution onward. American society, including its legal institutions, derived *ab initio* from self-organization, propelled by individuals, families and groups of people who created structures on their own that served civic needs. Volunteers built infrastructures such as roads and schools and established fire departments and law enforcement; they did so out of necessity due to a void of structured power. In fact, in 1835, in *Democracy in America*, Alexis de Tocqueville described the existence of several phenomena that he found to play striking roles in the fledgling nation: subsidiarity, decentralization, active citizenship and empowerment.<sup>62</sup> He analyzed and delineated the deeply rooted differences between European and American legal and civic cultures that somehow still persist today.

### **5. Concluding Observations**

We can observe that those who want to advance justice in the US may do so because they are inspired by the principle of equality and in defense of cer-

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61 R. SPITZMILLER *A Primer on Competition and IP Law*, at 308.

62 On decentralization: “The partisans of centralization in Europe are wont to maintain that the Government directs the affairs of each locality better than the citizens could do it for themselves; [...] But I deny that such is the case when the people is as enlightened, as awake to its interests, and as accustomed to reflect on them, as the Americans are. [...] On the contrary, in this case the collective strength of the citizens will always conduce more efficaciously to the public welfare than the authority of the Government. It is difficult to point out with certainty the means of arousing a sleeping population, and of giving it passions and knowledge which it does not possess; it is [...] an arduous task to persuade men to busy themselves about their own affairs; [...] to interest them in [...] the repairs of their common dwelling. But whenever a central administration affects to supersede the persons most interested [...] it is either misled or desirous to mislead. However enlightened and however skilful a central power may be, it cannot of itself embrace all the details of the existence of a great nation”: A. DE TOCQUEVILLE, *Democracy in America* 2002, V 1 at 108.

On active citizenship and empowerment: ‘I maintain that the most powerful, and perhaps the only, means of interesting men in the welfare of their country which we still possess is to make them partakers in the Government, ... everyone takes as zealous an interest in the affairs of his township, his county, and of the whole State, as if they were his own, because everyone, in his sphere, takes an active part in the government of society’ (at 270); <https://goo.gl/MmPVwx> (accessed on 30 May 2019).

tain “inalienable rights: ... Life, Liberty and the Pursuit of Happiness.”<sup>63</sup> Such concepts are rooted in the American Declaration of Independence and were later consolidated to guarantee them in the Bill of Rights and in the XIV Amendment of the oldest constitution of the world. Corresponding principles exist in the Italian founding charter. Article 2 provides: “The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.”<sup>64</sup> This Article “affirms – albeit as an implicit recognition – the centrality [...] of the individual and of the social groups in which the individual’s personality is expressed.”<sup>65</sup> Article 3, instead, states: “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature that constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”<sup>66</sup>

However, these two articles, even taken together, were not sufficient to render explicit “a responsibility of the State which, however, associates to itself all the non-profit social formations that act for the purpose of the general interest in a logic of active citizenship ... [and to] implement Articles 2 and 3 of the Constitution.”<sup>67</sup> For this reason,

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63 THOMAS JEFFERSON, Declaration of Independence, 1776.

64 Article 2, Italian Constitution: “*La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità*”, e richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.”

65 F. LOGIUDICE, *Sull’art. 118 della Costituzione: la vexata quaestio della sussidiarietà*, Altalex, 29/06/2006 <http://www.altalex.com/documents/news/2006/07/11/sull-art-118-della-costituzione-la-vexata-quaestio-della-sussidiarieta> (Accessed on 30 May 2019).

66 Article 3, Italian Constitution: “*Tutti i cittadini hanno pari dignità sociale [XIV] e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali. E’ compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l’eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l’effettiva partecipazione di tutti i lavoratori all’organizzazione politica, economica e sociale del Paese.*”

67 G. ARENA, *Il principio di sussidiarietà orizzontale nell’art. 118 u.c. della Costituzione*, in *Studi in onore di*

subsidiarity was introduced in 2001.<sup>68</sup> It establishes horizontal subsidiarity, *i.e.*, asserting that “in the relationships between public powers and organizations of society, it is manifested as a promotional initiative aimed at rendering effective the possibility, for individuals or associations and in general ‘groups’ of citizens, to carry out actions of general interest that, spontaneously, they decide to implement in parallel to the public structures, also creating, through autonomous activities, structures and interactions with the public organs.”<sup>69</sup>

That a constitutional reform was needed in the year 2001 to effect this end demonstrates one of the differences between this aspect of the legal culture of the United States and that of Italy. In the USA, despite the absence of an explicit provision, the concept of active citizenship – and therefore of horizontal subsidiarity – is somehow inherent to the very principle of democracy, as reflected also in the very premise “We the People,” immortalized in the Preamble of the US Constitution.<sup>70</sup> Historically, as noted above, we might say that certain aspects of American citizenship have embodied the concepts of empowerment, horizontal subsidiarity and active citizenship ever since the Declaration of Independence, which is itself a manifestation of self-determination and autonomy of the people.

In a process that parallels the founding of the United States, the origins of the Street Law clinic exemplify those differences. As noted above, in the early 1970s, a handful of law students at Georgetown University started giving practical lessons in law to high-school students, teaching them how to take on civic responsibilities. Their initiative epitomized subsidiarity, decentralization, active citizenship and empowerment. The first “Street Law” clinic was thus founded, launching a global movement “to teach the public

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*Giorgio Berti, Napoli*, 2005, vol. I, pp. 179-221; ID, citing Honorable Rosa Jervolino Russo, in the Proceedings of Parliament, Camera dei Deputati, Discussioni, Seduta del 20 settembre 2000, 23.

68 *Id.*

69 F. LOGIUDICE, *Sull'art. 118 della Costituzione*, *Altalex*, 29/06/2006.

70 “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

about law and public policy using learner-centered, interactive teaching methods.”<sup>71</sup> As noted above, over the last decade, clinical legal education (CLE) has been expanding in Europe, including in Italy. With the new Italian Street Law course, the *bel paese* will join the “global movement to advance justice through practical education about law and democracy.”<sup>72</sup>

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71 L. ARBETMAN, *Street Law, Inc.: Context history and future*, 1 *Int J Pub Legal Educ* 3, 2018.

72 *Id.* at 4.

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