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OVERCOMING CULTURAL BLINDNESS IN INTERNATIONAL CLINICAL COLLABORATION: THE DIVIDE BETWEEN CIVIL AND COMMON LAW CULTURES AND ITS IMPLICATIONS FOR CLINICAL EDUCATION

PHILIP M. GENTY*

This essay reflects upon the work that U.S. clinical teachers have done in helping to bring clinical methodology to law schools in European civil law jurisdictions. The essay examines some of the differences between the U.S. common law and European civil law systems with respect to the conception, teaching, and practice of law. The essay suggests that U.S. clinical teachers have not been sufficiently sensitive to these differences in legal culture. The essay describes five core differences between the two systems and their implications for effective clinical education in civil law systems. The essay concludes with recommendations for future cross-cultural pedagogical collaboration between U.S. clinical teachers and their European colleagues.

INTRODUCTION

It was my first trip to the region. My colleague and I were in a meeting with our international partner, who was the director of a law clinic in an Eastern European law school and a prominent member of the faculty. We had collaborated with this clinic director on several occasions and viewed her as an important supporter of our work.

The subject of the meeting was a fact pattern for an interviewing simulation that we were planning to use as a training tool for upcoming clinical conferences throughout the region. A U.S. graduate student from this clinic director's country had worked with us to develop the fact pattern, and we were very happy with the end product. Today the clinic director was reviewing our work. She had invited a friend of

* Clinical Professor, Columbia Law School. I am grateful to Peggy Levitt, Katharina Pistor, and Judith Waksberg, for their help in conceptualizing and completing this essay, and to Audrey Boctor, James Moliterno, and Barbara Schatz for reading and commenting upon an earlier draft. This essay is dedicated to the many international colleagues with whom I have worked and who have given generously of their time and ideas. I am particularly indebted to Professors Gordana Siljanovska-Davkova, Arsen Janevski, and Renata Treneska of the Ss. Cyril and Methodius University, Faculty of Law Justinianus Primus, Skopje, Republic of Macedonia, for their kindness and hospitality during my visits. They have become treasured friends, as well as valued colleagues.

hers, a judge, to the meeting.

The judge read the fact pattern slowly and thoughtfully, a stern look on her face. Finally she looked up and said something to the clinic director in their common language. The clinic director turned to us and spoke: "The judge says the law is incorrect." We immediately explained that the purpose of the fact pattern and simulation was not to teach substantive law but to develop interviewing and counseling skills. Therefore, we said, the law itself was not really that important, and anyway, it was probably accurate enough for the purposes of this simulation. The clinic director nodded and resumed speaking to the judge, again in their language. The two engaged in a discussion for five more minutes. At the end of this exchange, the clinic director turned to us and spoke: "The judge says the law is incorrect."

Fast forward now some six years after that first experience with the Eastern European judge. I am preparing for a clinical teaching workshop with colleagues in another country. The law schools of this country have a well-developed system of law school clinics. My feeling is that the teachers have many ideas and that my role, as in many of our clinical classes at home, will be simply to get a discussion started and let them talk to and learn from each other. I plan carefully for facilitating this discussion. The day before this workshop I meet with two of the teachers who will be participating.

"We are very happy to have you," they say. "We are excited about your session."

"I'm so pleased. Is there anything in particular you would like to discuss tomorrow?" I ask.

"No, that is up to you," they reply. "Only, please don't walk in and tell us that you are only interested in hearing what we have to say. One of your colleagues from another university in the U.S., who is wonderful by the way, always does that. We are so tired of talking to each other. We want to take advantage of your presence and *hear what you have to tell us.*" We want to learn from you!" (A frantic revision of my plan occurs over the next 24 hours.)

These two stories, six years apart, frame the period of my most active involvement in international work related to law teaching. Primarily through Columbia's Public Interest Law Institute ("PILI")¹ under the direction of Ed Rekosh, I have traveled extensively in Central and Eastern Europe – primarily in the Balkans – as well as Israel and the Palestinian Territories.² Like many of my clinical colleagues, I

¹ The Public Interest Law Institute (PILI) was initially called the Public Interest Law Initiative. PILI is now independent, with no formal Columbia affiliation. For more information about PILI, see <http://www.pili.org/en/>.

² Albania (2001); Bulgaria (2000); Croatia (2003); Czech Republic (2003, 2008); Hun-

have been involved in teacher trainings, conferences, workshops, and program evaluations. I have met many inspirational, dedicated teachers and intelligent, creative, engaging students. I believe that I can count many of these international colleagues as friends. This has been some of the most rewarding work of my professional life, a feeling that I know I share with many U.S. clinical colleagues.

In doing this international work, what has always impressed me about the approach developed by Ed Rekosh and others is that it emphasizes the importance of developing the kind of “client-centered” orientation that we teach in clinics. Those of us who have worked with PILI have been taught the importance of attaining a level of cultural competence. First and foremost we *listen* to our international partners and try to see the issues through their eyes. We do not *tell* them how to do things; we help them figure out the approach that will be best suited to meeting their needs. In clinical teacher “lingo,” we use a non-directive style in our work.

Over these years, as I had looked back and reflected upon that early experience with the Eastern European judge, I had become convinced that my U.S. colleague and I were “right” and that the judge was “wrong.” The judge was the product of a traditional lecture-based legal education and simply did not understand the purpose and methodology of clinical legal education. Yes, we could have handled this in a more sensitive, skillful manner, but in the end, the judge was simply locked in a traditional, static method of legal education.

The international work that I have done over these years has all been wonderful, heady stuff. And I believe that my U.S. clinical colleagues and I have accomplished a good deal by providing support and mentoring to our newer international clinical colleagues. And yet –

As I think about these two stories, I feel that we may be missing something essential. I fear that in relying upon our non-hierarchical, non-directive, listening style we may, in fact, be failing to *hear* part of what our “clients” are trying to tell us. It may be that we have overlooked some important differences between our common law based system and the primarily civil law based systems in which we have been working. Put simply, these civil law systems place great importance on the teaching of legal doctrine. In addition, they value the imparting of information from “experts” in the field. It may be that we have overlooked these differences and have been too quick to dismiss the “top-down” substantive law-based teaching style in favor of our

gary (2006-08); Israel (2005, 2006); Macedonia (2000, 2002, 2004, 2007); Palestinian Territories (2006); Poland (2004, 2007); and Serbia (2003, 2004, 2006). I have also taught in a summer program in the Netherlands (1997-2000, 2007).

own American common-law, non-directive, legally indeterminate, fact-based approach to law teaching.³

This is not to say that we have it wrong. Our international partners certainly agree that interactive teaching is generally preferable to a straight lecture method. But I feel that we U.S. teachers have neither thought carefully enough about the kind of interactive teaching that is most appropriate for the perspectives, orientation and needs of our civil law colleagues nor engaged these colleagues in a conversation about how best to do this. We have enough collective experience to begin to do that, and a goal of this essay is to suggest a framework for undertaking this collaborative task.

Section I of the essay describes the history of international collaborative efforts. This story has been told very well and in detail by others,⁴ and I provide only a brief overview. Section II discusses the differences in the way law is defined, taught, and practiced in the civil and common law systems. Section III examines the ways in which the efforts of U.S. funders and clinical teachers to develop clinics in civil law societies may have involved a measure of blindness to cultural differences. Section IV outlines five core differences between the civil and common law cultures and their implication for clinical education, and Section V offers a provisional description of a distinct civil law model of clinical education that takes these cultural differences into account. The essay concludes with some proposals for the next stage of collaborative international work.

I. LESSONS FROM THE HISTORY OF INTERNATIONAL COLLABORATIVE EFFORTS

The history of U.S. lawyers and law teachers working extensively abroad begins with the Law and Development movement of the 1960's. This movement was described and critiqued in often cited works by David M. Trubek and Marc Galanter, and John Henry Merryman.⁵ More recently, Leah Wortham and Peggy Maisel have pro-

³ Throughout this essay the comparisons I draw are primarily between the continental European and United States systems. I do not have direct experience with the civil law systems of Mexico or Central and South America. As I note elsewhere in this essay, my understanding is that these systems are somewhat different from their European counterparts in the way they approach the teaching and practice of law.

⁴ Recently, Peggy Maisel and Leah Wortham have provided detailed accounts of international collaborative efforts. Peggy Maisel, *The Role of U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465 (2008); Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL L. REV. 615 (2006).

⁵ See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflec-*

vided thoughtful, detailed histories of this movement.⁶ Both have described the ethnocentric qualities of the movement, which was premised on the idea that American models could be exported to “developing” countries and that the results would be improved legal systems. The critics of the movement came to believe that these ideas were naïve and even misguided. As Maisel describes it,

The specific projects [of the Law and Development movement] included aiding in research and upgrading legal education which largely meant teaching U.S. law courses in foreign law schools, using U.S. style teaching methodologies. . . .

. . . [M]any of the efforts themselves, according to the critics, grew out of a form of legal ethnocentrism, *i.e.* a belief that desired social change would result from making the legal institutions in developing countries resemble those in the United States. This ethnocentrism was based on assumptions made without learning about the local context and without meaningful consultation with legal scholars in the host country. As a result, few of the desired ‘reforms’ were ultimately accepted or institutionalized.⁷

After recounting this history, as well as the history of the more recent “New Law and Development,” “Democracy Promotion,” and “Rule of Law” movements,⁸ Maisel and Wortham provide useful prescriptions for successful international collaborations. They describe the importance of cultural sensitivity and humility and of obtaining knowledge of the country’s history and legal system before beginning work in that country.⁹ Other U.S. clinical teachers have added similar reflections, based upon their own experiences working in various countries.¹⁰

The problems associated with the Law and Development Movement reflect the more general challenges associated with “transplanting” legal systems onto each other. Comparative law scholars have focused on the process by which such transplants occur,¹¹ and more

tions on the Crisis in Law and Development Studies in the United States, 1974 WISC. L. REV. 1062. See also Brian Z. Tamanaha, *Book Review: Law and Development (Vol. 2, Legal Cultures)*, Edited by Anthony Carty, 89 AM. J. INT’L L. 470 (1995).

⁶ Maisel, *supra* note 4; Wortham, *supra* note 4.

⁷ Maisel, *supra* note 4, at 473-74 (internal citations omitted).

⁸ *Id.* at 472-90; Wortham, *supra* note 4, at 632-54.

⁹ Maisel, *supra* note 4, at 492-95; Wortham, *supra* note 4, at 675-76.

¹⁰ See, e.g. Lawrence M. Grosberg, *Clinical Education in Russia: “Da and Nyet”*, 7 CLINICAL L. REV. 469 (2001); C. Nicholas Revelos, *Teaching Law in Transylvania: Notes from a Different Planet*, 45 J. LEGAL EDUC. 597 (1995); Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT’L L. 375 (1989).

¹¹ See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993); Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995); John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT’L L. 357 (1981). See

importantly, on the factors that determine whether such transplants will be effective. Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard have suggested that the success of a legal transplant will depend upon the transplanted system's adaptation to the receiving society's needs and the receiving society's familiarity with the transplanted system: "[F]or the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law."¹²

Thus, the history of the Law and Development and subsequent movements, and the analysis of the ways in which legal systems are transplanted, indicate that successful international collaboration in legal education involves at least two elements: a subjective attention to issues of cultural sensitivity in transmitting ideas, and a practical attention to the utility of these ideas to the receiving "host" country.

Attention to both of these factors is further complicated by the fact that most of the countries in which U.S. teachers do collaborative work have a civil law tradition. The difficulties of transmitting ideas from the peculiar U.S. common law system to these civil law systems are significant and reflect fundamental differences between the two legal "cultures."¹³ These cultural differences in the conception, teaching, and practice of law, which are typically under-appreciated by U.S. law teachers who undertake international work, are explored in the next section.

also Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) (suggesting that "translation" is a more accurate metaphor than "transplant" and analyzing the differences between the American adversarial system and the Continental inquisitorial system in criminal proceedings).

¹² Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003). See also Merryman, *supra* note 11, at 386 (noting that a successful transplant requires that the legal principle be "'received' in context, accompanied by the material that gives it meaning within the system of origin").

¹³ See, e.g., Langer, *supra* note 11, at 64 ("The debate about Americanization of law is, to a great extent, a debate about legal cultures. In other words, it is a debate about how law is understood, thought of, and practiced in different jurisdictions . . ."); Merryman, *supra* note 11, at 383 (arguing that an understanding of the differences between the Common Law and Civil Law systems must go beyond a comparison of the respective rules to an examination of the legal cultures). See also Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053 (1998) (arguing that legal education in the U.S., Canada, and Mexico fails to prepare students for practice under NAFTA, because students are not taught about the differences among the three legal cultures); Saúl Litvinoff, *Global Law in the Perspective of the Bijural Curriculum*, 52 J. LEGAL EDUC. 49, 53 (2002) (suggesting that to understand the two systems one must study the "legal science" of each: "sources (that is, how is law created or at least how does it originate); . . . what are the methods used by persons of the law to find it, study it, and improve it; . . . [and] how is it applied by those empowered for that purpose").

II. ACROSS THE GREAT DIVIDE: LAW, LEGAL EDUCATION, AND LEGAL PRACTICE IN THE COMMON LAW AND CIVIL LAW SYSTEMS

A. *Sources and Conceptions of Law*

Gary Bell has provided an extremely useful summary of the historical origins and development of the common and civil law systems.¹⁴ He describes the common law system as having originated in England after the Norman conquest of 1066. The decisions of the newly established royal courts became the common law of the kingdom, and this system was spread to countries that became part of the British Empire.¹⁵

Bell traces the origins of the civil law system to Rome in the Fifth Century B.C. The Roman law was codified for the Eastern Roman Empire by Justinian in the Sixth Century A.D., and the Justinian Code remained in effect in the Eastern Empire for many centuries. In Western Europe, Roman law was revived in the Eleventh Century A.D., when the University of Bologna started teaching Roman law, and Roman private law eventually spread throughout continental Europe. In Western Europe the law codification occurred in France in 1804, and in Germany in 1896. The countries of the world with civil law systems have variations of the French or German model.¹⁶

Bell also discusses the differences in the roles of judges and law professors in common law and civil law systems and the implications these differences have for legal education. In common law jurisdictions, cases are the primary source of law, reflecting the way in which law developed through the decisions of the royal courts and, later, of courts in countries under the British Empire. In contrast, the primary source of doctrine in civil law jurisdictions is the code or statute, again reflecting the historical codification of law in these jurisdictions.¹⁷

Law in common law jurisdictions is therefore “bottom-up” and inductive, moving from the particular to the general; the synthesis of individual cases interpreting specific factual situations creates the body of legal doctrine.¹⁸ Judges are therefore the most important legal authorities.¹⁹ In civil law jurisdictions, all of this is reversed. Law is “top down” and deductive, starting from the general theory and prin-

¹⁴ Gary F. Bell, *The U.S. Legal Tradition Among the Legal Traditions of the World*, in JANE C. GINSBURG, *LEGAL METHODS CASES AND MATERIALS*, at 66 (rev. 2d ed. 2004).

¹⁵ *Id.* at 66-67.

¹⁶ *Id.* at 67-68.

¹⁷ *Id.* at 69-71.

¹⁸ Julie Bedard, *Transsystemic Teaching of Law at McGill: “Radical Changes, Old and New Hats,”* 27 *QUEEN’S L.J.* 237, 268-69 (2001).

¹⁹ Bell, *supra* note 14, at 72.

ciples set out in the law codes and the treatises, and applying these to the particular case.²⁰ Law professors, the authors of these treatises, have a leading role in defining the law in civil law jurisdictions.²¹ The implications for legal education are obvious – in common law jurisdictions, students will study cases, while in civil law jurisdictions, they will focus on codes and treatises.

Several authors have described further theoretical differences between the two systems. Nicholas Kasirer distinguishes between the rule-oriented differences (“Law’s empire”) and a more philosophical approach, focusing on the mind sets inherent in the two systems (“Law’s cosmos”).²² In describing the differences between the two systems, Kasirer focuses on the contrasting sources and uses of law. He first summarizes the grand design of the civil law: “[I]t very often takes shape in a rationalist enactment that civilians call ‘code’; it is a gold mine of transcendent values and principles, of vocabulary, of categories of thought, and of basic classifications that provide the cement for all private law. . . .”²³ Kasirer contrasts this with the common law, which he describes as “the unseen treasure . . . , buried deep in the case reports, to be dredged up in the courtroom tomorrow and the next day, without the benefit of much of a map.”²⁴

John Henry Merryman’s analysis is consistent with Kasirer’s. According to Merryman, the civil law curriculum classifies law as a social science, and law is, accordingly, treated in a more “scientific” manner than in a common law system.²⁵ The lawyer and judge in the civil law

²⁰ Bedard, *supra* note 18, at 269-70.

²¹ Bell, *supra* note 14, at 72.

²² Nicolas Kasirer, *Bijuralism in Law’s Empire and in Law’s Cosmos*, 52 J. LEGAL EDUC. 29 (2002).

²³ *Id.* at 37.

²⁴ *Id.*

²⁵ John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 870 (1974). It must be acknowledged, however, that Christopher Columbus Langdell, the person most responsible for the case method that has dominated U.S. legal education since the late 19th Century, also conceived of law as a science and saw his common law case study approach as utilizing scientific educational methods:

My associates and myself . . . have constantly acted upon the view that law is a science, and that it must be learned from books. . . . We have also constantly inculcated the idea that the [law] library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.

C.C. Langdell, *Professor Langdell’s Address, in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* 84, at 86-87 (Justin Winsor ed., 1887).

As Arthur Sutherland puts it, “Langdell’s specimens were opinions of judges, collected in a library. The student of law, he thought, like the student of chemistry or biology, must learn the arts of close scrutiny and discriminating classification. The student of law, that is to say, must continually study, compare, and classify judicial opinions.” ARTHUR E.

system are technicians or operators of a machine built by others, while the lawyer and judge in a common law system are social engineers. These differences are mirrored in the approach to legal scholarship in the two systems: The civilian professor wants to build a theory or science of law, while the common law professor is more interested in examining the system at work and solving concrete problems.²⁶

Pierre Legrand focuses on another aspect of the common law/civil law dichotomy – the common law’s greater emphasis on facts and narrative.²⁷ Legrand sees this as part of the cultural differences between the two systems. He describes the culture of the civil law system as “conceptual-rational,” and that of the common law system as “factual-relational.”²⁸ He suggests that these differences are deeply ingrained in the respective legal societies and that “a lawyer brought up within a system of judge-made law [common law] has a legal outlook utterly different from one who has grown up within a codified [civil law] system.”²⁹ Legrand expands on this idea:

[T]here is both a civil-law and a common-law way of thinking about the law and . . . those two frameworks differ profoundly from each other. Moreover, such difference is irreducible so that it is not possible for a civilian to think like a common-law lawyer (or for a common-law lawyer to think like a civilian). It does not matter how long a civilian spends studying the common law or living in a common-law jurisdiction; she can never transform herself into a common-law lawyer who would have been born, raised, and educated in the jurisdiction. . . . No matter how much common law the civilian eventually imbibes, she will always remain, to some extent, a civilian.³⁰

Perhaps most interesting, he describes the common law method as a feminist approach because of its emphasis on narrative expressions of the particular experiences of the parties to a dispute.³¹

B. Differences in Legal Education

These differences between the two legal “cultures” affect the way law is taught and practiced in the two systems. With respect to legal

SUTHERLAND, *THE LAW AT HARVARD, A HISTORY OF IDEAS AND MEN, 1817-1967*, at 176 (1967).

²⁶ Merryman, *supra* note 25, at 866-67. As discussed previously, Christopher Columbus Langdell also conceived of law as a science and his case method as utilizing scientific educational methods. See *supra* note 25.

²⁷ PIERRE LEGRAND, *FRAGMENTS ON LAW-AS-CULTURE* 75-76 (1999).

²⁸ *Id.* at 78.

²⁹ *Id.* at 77 (quoting Roderick Munday, *The Common Lawyer’s Philosophy of Legislation*, *RECHTSTHEORIE* 14, at 191 (1983)).

³⁰ *Id.* at 64.

³¹ *Id.* at 58-59.

education, in common law jurisdictions the teaching style tends to be at least somewhat interactive, with the professor pushing the students to interpret the cases and make arguments about what the legal doctrine should be. The U.S. Socratic method is the best-known example of this. In civil law countries, lecturing is typically the dominant teaching style. Bell terms this style “magisterial” as “the professor exposes the law to his or her students, who take notes and do not intervene in class.”³²

While this dichotomy between an interactive approach and lecturing is commonly thought to be an essential distinction between the two systems, it is not clear that such a distinction is inherent. Julie Bedard acknowledges that the structure and style of the civil code, with its emphasis on broad abstract principles, has an obvious influence on the lecturing teaching style of the professor in a civil law classroom.³³ However, she argues: “There is . . . nothing inherent in civil law that mandates the expository and didactic method or precludes the use of a Socratic method. Similarly, nothing inherently prevents a common law teacher from using a lecture format.”³⁴

My own conversations with teachers in European civil law jurisdictions suggest that the dominant lecturing style in these systems may be more a function of practical, economic necessity than pedagogical choice.³⁵ Public universities in these countries are inexpensive, and, as a result, enrollment and class size in the law schools of these universities tend to be much larger than in U.S. law schools.³⁶ Teachers in these schools could not use interactive methods, even if they wanted to, because the classes are simply too large for these methods to work. It is noteworthy that in the newer private universities in these coun-

³² Bell, *supra* note 14, at 72.

³³ Bedard, *supra* note 18, at 263.

³⁴ *Id.* at 263-264. Bedard goes on to suggest: “A mix of methods is appropriate to combine the best in the civil and common law traditions and reach as many students as possible, because some will be more receptive to one method than the other.” *Id.* at 264.

³⁵ Michael McAuley makes this argument: “There is nothing so peculiar about the civil law that reserves learning of its principles and rules solely to the lecture style of instruction. The civil law need not be taught in the Continental mode, in huge amphitheaters, or magisterially. The fact that this is how it is still taught in France or Italy has nothing to do with the civil law but much to do with the fact that legal education in those countries is free.” Michael McAuley, *On a Theme by René David: Comparative Law as Technique Indispensable*, 52 J. Legal Educ. 42, 47 (2002). See also Merryman, *supra* note 25, at 868 (noting that the large class size makes interaction between professors and students impractical). Merryman also notes that inadequate classroom facilities mean that students are not expected to attend class regularly. *Id.* at 876. As discussed *infra*, some of these differences are changing as a result of the Bologna Process. Law classes in civil law jurisdictions are becoming more interactive.

³⁶ See e.g. Merryman, *supra* note 25, at 861 (comparing size of student body at the Faculty of Law, University of Rome (12,000-15,000) with that of Stanford (450)).

tries, which have smaller class sizes, interactive teaching methods tend to be more widely used.³⁷ In short, the perception that interactive teaching methods are inherent to the common law approach and that “magisterial” teaching is necessary to the civil law approach may be oversimplified.

Although the differences in teaching style may be due primarily to these practical economic factors, there *are* significant differences in the pedagogy of the two systems. The conception of law as a “science” within the civil law system and the emphasis on overarching theory and principles have important pedagogical implications. Because of this theoretical orientation, legal education in a civil law system is “closed” and “conceptual,” while the greater emphasis on cases in the common law leads to a pedagogy that is more “pragmatic and open.”³⁸ The role of the law professor in the “scientific” civil law system is to impart this body of knowledge to the students.³⁹ It is therefore natural that within a civil law system a professor would be seen as an authority figure and the source of doctrinal information, while in a common law system more emphasis would be placed on the professor’s ability to engage the students in an examination of the development and evolution of the law through decisions in individual cases. Thus, although interactive teaching methods can be used in either context, the role of professor as central authority figure is a critical aspect of civilian legal education in a way that it is not in the common law system.

C. *Differences in the Practice of Law*

In addition to these educational differences, there are significant practice differences. The most obvious are the respective roles of judges and lawyers. As noted above, judges are the primary “law makers” in the common law system. However, paradoxically, they play a mostly reactive role in litigation. It is the lawyers who make the important choices and control the litigation process. Judges respond to what is brought to them – motions, discovery disputes, etc. – but because most civil litigation is resolved through settlement, a judge may actually have relatively little to do with the conduct or outcome of a typical case.⁴⁰ Even in a trial the judge plays a largely passive

³⁷ See Lusine Hovhannisian, *Clinical Legal Education and the Bologna Process*, PILI Papers, Number 2, Dec. 2006, at 14-15.

³⁸ Bedard, *supra* note 18, at 287-88.

³⁹ Merryman, *supra* note 25, at 870.

⁴⁰ The differences between the roles of judges in the two systems may be breaking down somewhat in the U.S. federal system, where judges are exercising an increasing degree of control over the conduct of civil pre-trial and trial proceedings. See Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules – And the Extent of Conver-*

role, acting as a kind of referee by ruling on evidentiary questions and objections, charging the jury, and reading their verdict.

In contrast, judges in the civil law system are in control from the beginning. Under the inquisitorial method that is used in civil law jurisdictions, judges, not lawyers, decide what evidence is necessary and from whom. They dictate the timing and flow of a case, including which witnesses should be examined. A typical trial, civil or criminal, will consist of a series of examinations conducted by the judge, with the role of the lawyers limited to suggesting additional questions for the judge to ask of each witness.⁴¹

These differences in the way litigation is conducted have important implications for the attorney-client relationship. Because it is the judge, rather than the lawyer, who will be examining the lawyer's client, the lawyer may see it as relatively unimportant to spend time preparing the client to testify. In fact, it is possible that the client will not be testifying at all. For example, I was told by Dutch lawyers that in a typical civil suit in the Netherlands, it is thought to be too expensive to have the client testify in person. Instead, absent significant disagreements about the relevant facts, attorneys prepare and submit written summaries of client and witness statements and simply argue the case orally in court, focusing on the applicable law.⁴²

These practical differences reflect a more fundamental difference in the way the attorney-client relationship is perceived in the two systems. While the attorney's primary duty is to the client in the U.S. common law system,⁴³ this is not necessarily true in civil law jurisdictions. In European civil law jurisdictions, a lawyer is seen to have a role that is more independent from the client.

gence With Civil-Law Judging, Duke Law School Legal Studies Research Paper Series, Research Paper No. 173 (October 2007).

⁴¹ See e.g. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-30 (1985) (describing the conduct of a German civil hearing).

⁴² Conversation with participants in the Columbia-Amsterdam Summer Course in American Law, Amsterdam, Netherlands (July 2007). This information is corroborated by Judge Antoine Garapon and Daniel Schimmel in their fascinating audiovisual presentation, *Filming Legal Cultures: French and American Civil Procedures Compared*, West Legal Ed Center October 29, 2007, available at https://westlegaledcenter.com/program/program_frame.jsp. Judge Garapon and Mr. Schimmel go into great detail in describing and analyzing the many ways in which the differences in legal culture play out at every stage of civil litigation, from the filing of the initial "*assignation*" (civil law) and complaint (common law), through the conclusion of the "*audience*" (civil law) and trial (common law).

⁴³ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A) (1980) ("A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . .").

In their text *Global Issues in Legal Ethics*,⁴⁴ James Moliterno and George Harris have compiled source material describing this role difference. After noting that the civil law systems tend to be less client-oriented than common law systems, Moliterno and Harris quote one commentator's observations about some of the differences between the U.S. and European codes governing the practice of law:

[I]n the United States society thinks about the lawyer primarily as an agent of the client, one who acts because of, and at the direction of, the client. In other words, the lawyer is a derivative person, whose duties flow from the client. In contrast the CCBE [Council of the Bars and Law Societies of Europe] Code suggests a perspective in which lawyers sometimes can be viewed as acting for themselves, as opposed to acting as the agents of, and at the direction of, clients. According to this perspective, the lawyer is sometimes perceived as an independent being who has rights and duties which do not necessarily derive from the client.⁴⁵

My conversations with a group of international participants in a summer ethics course I taught in Budapest in 2007 corroborated the analysis offered by Moliterno and Harris. The European participants told me that in European civil law systems, lawyers are viewed as independent from their clients.⁴⁶

This difference in role conception has at least two important ethical implications. First, in presenting their clients' cases, civil law attorneys are not deemed to be vouching for the truth of their clients' statements. As a result, ascertaining the truthfulness of one's client may not be a significant ethical concern for the civilian lawyer. Second, rules about conflicts of interest are much looser in the European civil law systems than in the U.S., because civilian attorneys are not seen as being in an exclusive relationship of loyalty with their clients.⁴⁷

A further difference in legal practice between the two systems is the absence of "cause lawyering" in the civilian legal culture. I first became aware of this in 2006, when I was preparing for a clinical teacher training in Eastern Europe. I initially proposed using an ethics problem involving a potential conflict between two classes of clients represented by the same civil rights organization.⁴⁸ However, my

⁴⁴ JAMES MOLITERNO & GEORGE HARRIS, *GLOBAL ISSUES IN LEGAL ETHICS* (2007).

⁴⁵ *Id.* at 40 (quoting Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 *GEO. J. LEGAL ETHICS* 1, 51-52 (1993)).

⁴⁶ Conversations with participants in "Workshop on Innovative Law Teaching: Human Rights and Ethics," Central European University, Summer University, Budapest, Hungary (2007).

⁴⁷ *Id.* Interestingly, the participants also reported that ethics/professional responsibility is not typically included in the law school curriculum.

⁴⁸ The scenario is presented as Problem 6-4, "The Prisoners' Dilemma," in a profes-

European co-trainers told me that the participants would find the example to be incoherent, because class actions – and cause lawyering generally – do not exist in their legal culture.⁴⁹

Mark Drumbl has written about this difference in legal culture in the context of work in Mexico, another civil law jurisdiction. He recounts the efforts of environmental groups operating in the U.S. and Canada to enforce provisions in the North American Free Trade Agreement relating to environmental protections and their misunderstanding about the civil law.⁵⁰ Drumbl first describes the U.S. and Canadian “public interest litigation model” in which courts are seen as “a tool to effect policy change and to ensure that governments respect their commitments.”⁵¹ He then describes the cultural confusion this has caused in Mexico:

The “public interest litigation” model is not found in civilian jurisdictions such as Mexico. Courts have considerably narrower rules of standing, and judges have considerably reduced powers to interfere with legislative and administrative decision-making. Hence, when American environmental groups turn to courts, or to the CEC [Commission on Environmental Cooperation], to oblige Mexico to respect its environmental laws, these groups act in a way that creates confusion for the Mexican lawyer. Thus these groups may be following a course that will be ultimately ineffective. . . . No judicial or adjudicative body can interfere with an administrative failure to enforce, since such failures are perceived as policy decisions and are thus immunized from judicial review. Similarly, when statutory “gaps” occur in Mexico, these are filled by administrative regulations and interpretations.⁵²

sional responsibility text. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 381-83 (2d ed. 2008). Lerman and Schrag have based this problem on the case of *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987).

⁴⁹ In response I modified the scenario so that a lawyer working for an NGO was petitioning a government agency for a change in policies which affected the NGO’s client. The scenario was presented in Serbia and Montenegro at a session organized by the Columbia University Public Interest Law Initiative in April 2006, “Developing University-Based Legal Clinics in Serbia and Montenegro: Workshop for Clinical Teachers,” University of Belgrade Faculty of Law.

The situation may be somewhat different in Latin America. Clinical teachers from Colombia, Argentina, and Brazil, who have visited Columbia University, have described a more activist model of “public interest lawyering” within their own civil law systems.

⁵⁰ North American Free Trade Agreement, December 17, 1992, U.S.-Can.-Mex., Preamble, 32 I.L.M. 289, 297, cited in Drumbl, *supra* note 13, 1074 nn. 100 & 101 (1998).

⁵¹ Drumbl, *supra* note 13, at 1074.

⁵² *Id.* at 1074-75. Drumbl offers a second example involving a labor law issue. U.S. public interest organizations had brought a complaint about Mexican labor practices before the U.S. National Administrative Office (NAO). The U.S. NAO criticized the Mexican court for upholding the decision of a local labor board and deviating from a previous Mexican court decision. However, the criticism was based on a mistaken belief that the prior court decision amounted to binding precedent. This reflected a lack of understanding

Drumbl uses this example to make the larger point that lawyers need to be trained not only in the laws of other countries, but also in the legal *cultures* of these countries. He offers the environmental case as an example of the failure of U.S. law schools to offer comparative legal education that truly prepares students for transnational practice by teaching them about differences among legal cultures. Drumbl observes: “Many law schools offer comparative law courses. What is less clear, however, is the extent to which these courses prepare the graduate for transnational legal practice, or assist the graduate in understanding how legal practitioners within the relevant foreign jurisdiction generally cogitate issues, address problems, and draft documents.”⁵³

Thus, the deep cultural divide between civil and common law systems is reflected in their respective histories and theoretical underpinnings, as well as their approaches to legal education and the practice of law. Following upon Mark Drumbl’s observations that U.S. law schools fail to train lawyers in these cultural differences, I suggest in the next section that U.S. clinical teachers may be guilty of a similar shortcoming in our work with clinical programs in civil law systems.

III. THE NEW CLINICAL LAW AND DEVELOPMENT MOVEMENT: ANOTHER EXAMPLE OF LEGAL IMPERIALISM?

As discussed in the first part of this essay, the Law and Development Movement of the 1960’s was criticized for being naïve and culturally insensitive. Can the same be said of the more recent international work of U.S. clinical teachers?

Richard Wilson has raised this as a possible concern for those of us who are engaged in what he calls the “global movement for clinical legal education.”⁵⁴ Recalling the problems that arose at the time of the Law and Development movement in the 1960’s and ‘70’s, Wilson poses the question: “Is the export of clinical legal education to developing or transitional countries another form of what was then called ‘legal imperialism’?”⁵⁵

Having raised this as a possible concern, Wilson immediately dismisses it. He suggests that “clinical legal education sells itself on its merits, not as a distinctly American version of legal education that is

that the doctrine of precedent does not generally exist in civil law jurisdictions. *Id.* at 1076-78.

⁵³ *Id.* at 1095.

⁵⁴ Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN. ST. INT’L L. REV. 421, 428 (2004).

⁵⁵ *Id.* at 428-29 (citing JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980)).

forced on unwilling recipients,” and that although the “allure of international funding” is certainly a factor, the primary motivation for law school leadership and students is that they have “heard or seen for themselves the benefits of clinical legal education as an effective methodology for the preparation of new practicing attorneys.”⁵⁶ Wilson therefore concludes that efforts to bring clinical education to an international audience have been welcomed by and helpful to the recipients.⁵⁷

I am less confident. I fear that, despite our good intentions, U.S. clinical teachers have exhibited a degree of cultural blindness in the way we promote clinical programs in civil law countries. I say this because I do not believe that we have taken the time to appreciate fully the fundamental differences between the common law and civil law systems and that, as a result, we have “oversold” U.S. models of clinical education that are ill-suited to the civil law context.⁵⁸

In making this argument I want to distinguish between two related pedagogical concepts: clinical education and interactive teaching methods. While all clinical education is interactive, not all interactive teaching is clinical. For example, an instructor in a non-clinical, doctrinal course might use a variety of interactive teaching methods, including “Socratic” questioning, small group discussions, and role-play dialogues. I believe that the potentially problematic aspect of the work that we American clinical teachers are doing abroad relates to the development of clinical programs, as distinct from the introduction of interactive teaching methods.

With respect to interactive teaching, I completely agree with Richard Wilson about the benefits of our work abroad. As Wilson argues, the introduction, primarily by clinical law teachers, of these teaching methods has had a profound, and extremely positive, effect on legal pedagogy in civil law societies. In Europe, it is no exaggeration to suggest that a revolution in legal education is underway. As noted in the second part of this essay, legal education in civil law soci-

⁵⁶ *Id.* at 429.

⁵⁷ *Id.* In reaching this conclusion, Wilson is able to draw upon his own extensive international teaching experience. See e.g. *id.*; Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 *CLIN. L. REV.* 515 (2002); Wilson, *supra* note 10.

⁵⁸ Leah Wortham has written thoughtfully about these cultural concerns. She discusses the importance of avoiding the blind replication of a “home country model.” She offers the U.S. clinical teachers’ typical fixation on the absence of student practice rules in other countries as an example of this. She stresses the need to acquire knowledge about another country’s culture, politics, laws, and legal system in order to do effective international work. Wortham, *supra* note 4, at 674-76. See also Maisel, *supra* note 4, at 496-504 (discussing collaborative efforts to adapt U.S. models of clinical education to the educational programs of other countries).

eties has traditionally been delivered through lectures in large auditoriums. The professor essentially reads to a mass of anonymous students, with no interaction between teacher and student. However, this is all changing very quickly, as several examples will show.

In Skopje, Macedonia, a new system has been introduced at the law school in the past year. Student attendance is registered electronically – students swipe their identification cards as they enter the classroom. Professors award students grades for class participation, and the law school requires professors to enter these grades electronically after every class. Students have access to these grades throughout the semester.⁵⁹

In Bialystok, Poland, the Dean has asked the law faculty to attend a four-hour workshop at the beginning of the term about the use of interactive teaching methods in the classroom. Interactive teaching methods are used extensively by at least one law professor, who has incorporated techniques from a street law clinic that he teaches into his criminal law course. There are also Polish texts on interactive teaching techniques, street law clinics, clinical teaching generally, and moot court programs.⁶⁰

In Olomouc, Czech Republic, a compulsory, interactive lawyering skills course has been introduced in the first year. A cadre of interested faculty members has been recruited and trained to teach this course.⁶¹

In the Netherlands, the University of Leiden has a required moot court program for all students in their third year. The students work on simulated trials that are based on actual cases, and practicing lawyers are recruited to judge. Some limited faculty oversight is also provided.⁶²

These are a few examples of changes taking place in European legal education. They provide a sense of the many ways in which traditional civil law teaching methods are giving way to more active and engaging techniques.

In Central and Eastern Europe, this greater use of interactive

⁵⁹ Conversation with Dean and faculty at Ss. Cyril and Methodius University, Faculty of Law Justinianus Primus, Skopje, Republic of Macedonia (Oct. 2007).

⁶⁰ Conversation with law faculty members at University of Bialystok, Poland (Oct. 2007).

⁶¹ Presentations by JUDr. Veronika Tomoszková and JUDr. Maxim Tomoszek, International Conference, “Practical Forms of Law Teaching,” Law Faculty of Palacký University in Olomouc, Czech Republic, April 11-13, 2008, and conversation with Professors Tomoszková and Tomoszek during visit to University of Bialystok, Poland (Oct. 2007). This legal skills course is modeled in part on a program designed and directed by Professor James E. Moliterno at the College of William & Mary, Marshall-Wythe School of Law.

⁶² Conversation with participants in the Columbia-Amsterdam Summer Course in American Law, Amsterdam, Netherlands (July 2007).

teaching methods is no doubt due in significant part to the influence of American clinical teachers who have visited the region in the past ten years through programs funded by ABA-CEELI, the Soros Foundation's Open Society Institute, the Public Interest Law Institute,⁶³ university exchange programs, and other sources. In Western Europe, these changes are largely the result of the Bologna Process, which is transforming all of European higher education.⁶⁴ The Bologna Process requires law faculties to examine the relationship between the quality of legal education and the demands of the profession.⁶⁵ The Bologna Process is also affecting legal education in Central and Eastern Europe.⁶⁶

It is therefore clear that, as Wilson argues, the introduction of interactive teaching methods has benefited law faculties within civil law systems, and that these methods have won acceptance. Students have eagerly embraced the opportunity to engage more directly with their professors, and at least the more innovative among the professors share this enthusiasm. These results support the conclusions of Julie Bedard in her work examining the combined civil and common law degree program at the McGill University. As noted above, Bedard argues that interactive teaching techniques are as well suited to civilian teaching as to common law teaching.⁶⁷

Interactive teaching methods are therefore generally a good thing in any legal system.⁶⁸ That's the easy part. The harder part is distinguishing between interactive teaching generally and *clinical teaching*

⁶³ As discussed previously, PILI was formerly affiliated with Columbia University and was named the Public Interest Law Initiative. *See supra* note 1.

⁶⁴ Laurel Terry has written two articles in which she describes the Bologna Process, its standards for reform of European higher education, and initial studies measuring the degree of compliance with these standards. *See* Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L 107 (2008) [hereinafter Terry, *The Bologna Process and Its Impact in Europe*]; Laurel S. Terry, *The Bologna Process and Its Implications for U.S. Legal Education*, 57 J. LEGAL EDUC. 237, 237-240 (2007) [hereinafter Terry, *The Bologna Process and U.S. Legal Education*].

⁶⁵ *See* Hovhannisian, *supra* note 37, at 4-7.

⁶⁶ For example, in Macedonia, the traditional four year undergraduate law degree has been replaced by a two-tiered 3-2 structure (three years for the undergraduate degree, followed by two years for the Master's degree). This transition to a two-stage (bachelor-master) degree structure is one of the changes being implemented throughout Europe as part of the Bologna Process. *See* Terry, *The Bologna Process and Its Impact in Europe*, *supra* note 64, at 212 & app. 3 at 227; and Terry, *The Bologna Process and U.S. Legal Education*, *supra* note 64, at 239-40; *see also* Hovhannisian, *supra* note 37, at 4. Under the system being implemented in Macedonia, clinical courses will be part of the specialized two year Master's program. Conversation with Dean and faculty at Ss. Cyril and Methodius University, Faculty of Law Justinianus Primus, Skopje, Republic of Macedonia (Oct. 2007).

⁶⁷ Bedard, *supra* note 18, at 263-264.

⁶⁸ As discussed *infra*, interactive teaching methods should be seen as a supplement and complement to, rather than replacement for, lectures.

specifically. Clinical teaching programs reflect specific goals about educating students for practice.⁶⁹ As such, these programs are very much a product and reflection of their legal cultures. Thus, if U.S. clinical teachers, in our international collaborations, are not mindful of crucial differences between the legal cultures of civil and common law societies, we risk promoting clinical program models that will not work in civil law systems. The next section represents an attempt to define the core cultural differences that must be taken into account in order to engage successfully in international clinical collaboration.

IV. FIVE CORE DIFFERENCES BETWEEN THE CIVIL AND COMMON LAW CULTURES AND THEIR IMPLICATIONS FOR CLINICAL EDUCATION

As discussed in the second part of this essay, the list of potentially relevant differences between the civil and common law cultures is quite long. However, I want to focus on five aspects of the civilian legal culture, which distinguish it from the common law culture. I believe that these reflect the core differences between the two systems and that they are typically underappreciated by U.S. clinical teachers. The five aspects are: 1. the importance of substance, rather than process; 2. the importance of mastering, rather than creatively interpreting, legal doctrine; 3. the limited importance of the attorney-client relationship; 4. the importance of an informed authority figure; and 5. the lack of a concept of cause lawyering.

This list is reflected in the two anecdotes about my international work with which I began this essay. In the first, a clinic director in the host country had asked a judge to review a proposed scenario for an interviewing simulation. The judge was very critical, because she did not feel that the scenario adequately reflected the relevant substantive law. In the second, my clinical colleagues in the foreign school I was visiting caused me to change my plans for a workshop I would be conducting. They told me that the teachers who would be attending would not be interested in listening to each other's comments – which was precisely what I had intended – but would want instead to hear from me as the outside “expert.” While I did not really appreciate it when the events occurred, I think that these stories reflect some fun-

⁶⁹ Lusine Hovhannisian describes the goals of clinical education as follows: “Students learn to understand the interrelationship of various theories about lawyering within actual law practice situations. They learn how to apply a theory to actual legal problems, to analyze facts and law, and to develop strategies for resolving clients’ problems in the most effective and efficient way. To be able to do that, students learn to understand the ethical and professional dilemmas that lawyers face in their daily lives and the ways they are resolved and to build their own system of values and sense of responsibility.” Hovhannisian, *supra* note 37, at 12-13.

damental aspects of the civil law culture.

The lessons from the first story correspond roughly to the first and second differences between the civil and common law systems described above – the importance of substance, rather than process; and the importance of mastering, rather than creatively interpreting, legal doctrine. What the judge was trying to tell us was that for the students in her country, the most important lawyering skill was a mastery of the substantive law. This was what supervisors and judges would expect of these students when they graduated into the legal profession. It would not be the students' creative use of facts and their ability to "think on their feet," but their solid grounding in doctrine, that would count. For the judge, if the simulation did not teach and model that skill, then it could not be successful.

In addition, while the judge may not have had this explicitly in mind, her comment also reflected the third of the differences noted above – the limited importance of the attorney-client relationship in the civil law system. As described by my European colleagues and the Moliterno-Harris text on international ethics cited above,⁷⁰ the attorney-client relationship appears to be less important in the civil law system than in the common law system. The lawyer's duty to the court system trumps the duty to the client, and the lawyer is seen as presenting the client's case, without necessarily vouching for the client. Moreover, the client plays a limited role – if any – in the court proceedings, where written submissions predominate over live testimony. Thus, a sophisticated understanding of interviewing and counseling techniques may actually be much less important in such a system. In reacting negatively to the proposed interviewing simulation, the judge in my story may therefore have been conveying an important message – the interpersonal skills that we were trying to teach in the simulation were relatively unimportant compared to the substantive skills that she felt ought to be taught.

Similarly, my second story – about the clinical colleagues who requested that I not have them talk to each other – corresponds to the fourth civil/common law distinction noted above – the importance of an informed authority figure in the civilian culture. This idea, of course, is most vividly illustrated by the traditional use of the lecture method in civilian law teaching. However, even when more interactive teaching methods are used, the professor is still seen as the authority on the codified legal doctrine that is fundamental to the civilian system. Everything in such a system is "top-down," because law is embodied in a code, and the code must be learned.

⁷⁰ MOLITERNO & HARRIS, *supra* note 44, at 40-41.

Judges and law professors are the living embodiment of this core of knowledge. While interactive methods can be used to help students deepen their understanding of the doctrine, the students still expect to learn from the professor, rather than from one another. Similarly, practicing lawyers expect the judges to control the flow of information and to test the lawyers on their knowledge of the legal doctrine. My colleagues who caused me to change my planned presentation likewise saw me as the authority figure, because of my longer experience in clinical teaching; they expected and wanted to learn *from me*, rather than have me facilitate an opportunity for them to learn from one another. These observations call into question the efficacy of the non-directive teaching methods that are prized by U.S. clinical teachers. At the very least we need to re-examine the goals of such methods when we use them in civil law settings.

Finally, the lack of a concept of cause lawyering in civil law systems, at least in Europe, may make it difficult for these systems to implement a U.S. model of clinical education, which is often dependent on such a cause lawyering approach. Much of the history of clinical education in the U.S. has involved an effort to effect broad social change through large-scale legal advocacy.⁷¹ To the extent that clinics in the U.S. focus their teaching and their casework on “big” cases, especially class actions, or other forms of cause lawyering, they will simply not translate well into a civilian system.⁷² For these reasons we need to use clinical teaching models that are more appropriate to the civilian legal culture. A possible framework for developing such models is described in the following section.

⁷¹ See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 12-16 (2000) (describing “second wave” of history of clinical education, in which clinics began to develop a law reform/social justice mission and focus on such broad issues as civil rights, consumer rights, environmental rights, and poverty rights); Suzanne Valdez Carey, *Special Issue on the History of the Trial: An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 *KAN. L. REV.* 509, 521-22 (2003) (describing the law reform model of clinical programs adopted by some schools); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 *SMU L. REV.* 1461 (1998) (recounting the history of clinical education and the development of law reform models in the 1960’s and 1970’s, and describing the social justice mission of law school clinics); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 *YALE J. INT’L L.* 505, 523-31 (2003) (discussing the social justice mission of law school clinics and the ways in which clinics train students to engage in cause lawyering).

⁷² See *supra* note 49 and accompanying text, describing the changes that I needed to make in a class action scenario in response to comments from a European colleague about the scenario’s inapplicability to the Serbian audience with whom we would be working in a training session.

V. MOVING TOWARD A DISTINCT CIVIL LAW APPROACH TO CLINICAL EDUCATION

Where do we go from here? The first stage of the development of clinical education in Europe saw an influx of funding from U.S. sources, as well as the extensive involvement of U.S. clinical teachers. These efforts were essential in helping European clinical programs to get started. But it is now time to step back and think about the next stage in that development. What does European civil law clinical education look like? What *should* it look like? And what, if anything, can/should U.S. clinical teachers do to help?

This is an exciting and challenging time for legal education in Europe. The Bologna Process has called for a broad reform of higher education, and the European Law Faculty Association has discussed the ways in which the Bologna Process can lead to the incorporation of practice-oriented education into European law school curricula.⁷³ The law faculties of Central and Eastern Europe have pioneered the development of clinical education programs, but the Bologna Process will likely cause these programs to spread to Western Europe as well.

My colleague, Lusine Hovhannisian of PILI, has described the importance of clinical education in training European lawyers for the dynamic international practice world they are entering.⁷⁴ She describes clinical education as a system of problem-solving based education, in which students learn actively, rather than passively absorbing information.⁷⁵

How do these broad goals fit into the European civil law educational system? The answer must begin with recognition of the theoretical and practical underpinnings of the civil law system, which are described in the preceding sections. The theoretical, top-down, code-based, magisterial civil law culture is very different from the interpretive, fact-based, judge-made culture of the common law. It is critical to remember that for the civilian, law is a *science*.⁷⁶

This view of law as a science actually fits quite well with the goals of clinical education. The key is to view the classroom as a kind of scientific "laboratory" in which professors teach the scientific, substantive principles of law and then ask the students to engage in the central activities of the natural or social scientist: hypothesis, experimentation, and refinement of the hypothesis in response to test re-

⁷³ See Hovhannisian, *supra* note 37, at 4.

⁷⁴ *Id.* at 14-16.

⁷⁵ *Id.* at 10.

⁷⁶ As discussed *supra* in note 25, Christopher Columbus Langdell also conceived of law as a science and saw his case method as embodying a scientific approach to the study of law.

sults.⁷⁷ Professors do this by employing interactive teaching methods – students are asked not merely to read and listen, but to work with and test their understanding of the legal doctrine imparted by the professor. In doing so, students become actively engaged in their own legal education.

But this scientific legal “laboratory” involves more than interactive teaching methods. Students are required to examine these legal principles through the lens of their effect on society and clients. Just as a chemist is interested in examining the results of mixing different substances, the law student engaged in scientific methods will be interested in examining the effect of applying the pure substance of legal doctrine to particular societal contexts: How do these laws work in practice? Do they achieve their desired effects? Are they logical? Just? Equitable? These are some of the questions that can be tested through this process. The professor guides the students through this process of investigation and reflection by designing case studies, simulations, topics for small group discussions, and other interactive exercises.

Seeing clinical teaching as a way of employing “scientific” techniques to teach substantive law is, I think, the key to making clinical legal education succeed in civil law countries and to developing clinical programs that will have long-term viability. Those of us who seek to introduce our U.S. clinical teaching methods into civilian societies must respect the dominant role that the teaching of doctrine plays in these societies. As discussed above, clinical legal education is a kind of “legal transplant” from the United States, and scholars agree that such transplants cannot be successful unless they are seen as meaningful and beneficial to the receiving society.⁷⁸ It is important for U.S. law teachers to recognize that a stand-alone course that focuses on process and the teaching of skills and values does not fit easily into the civilian legal culture. Because of the importance that this culture places on doctrinal, “scientific” teaching, clinical methodology will be seen as valuable only if it is employed in service of that core civilian educational mission. A corollary of this is that clinical teaching methods should be seen as a supplement to, rather than replacement for, lecture-based teaching. Lecturing is an efficient and often effective way to impart doctrinal concepts and provide students with a breadth of substantive knowledge, and it will therefore continue to play an

⁷⁷ These concepts correspond roughly to the U.S. clinical approach of planning, doing, and reflecting. See, e.g. Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 *CLINICAL L. REV.* 273, 278 (2000).

⁷⁸ See Berkowitz, Pistor & Richard, *supra* note 12, at 167; Merryman, *supra* note 11, at 386.

important role in civilian legal education, even as this education becomes more interactive.

Viewed in this way, clinical education can be an extremely valuable complement to the civil law curriculum. Clinical teaching methodology supports the goals of doctrinal civilian legal education in at least two ways: First, by causing students to work directly with legal principles and assume responsibility for their own learning, clinical teaching methods deepen the students' understanding of the legal doctrine. Second, to the extent that clinical teaching methods cause students to participate more actively in all of their courses, professors will get a better sense of how well the students understand the material, and professors can then adjust their teaching accordingly. By making the professor's teaching of substance more effective, this approach will also reinforce the role of the professor as the expert, from whom the students are learning the science of law.

The civil law "cathedra" system of organizing subject matter by scientific discipline can also be used to introduce new disciplines to the curriculum to support the goals of clinical education. For example, legal ethics is not currently taught systematically in European law schools. A U.S. law teacher might suggest modifying the content of existing substantive courses by inserting ethics teaching into these courses through a kind of "pervasive method."⁷⁹ However, a civil law professor, who views each substantive course as encompassing a discrete topic, would find this to be a strange approach and would likely resist it. A more productive alternative approach might therefore be to work within the existing cathedra system and introduce ethics as an additional "scientific" discipline.

Finally, the cathedra system will also largely dictate the types of cases that the clinical program will handle. Each clinic in a civilian system will typically be attached to a cathedra, and the clinic's caseload will correspond to that cathedra's area of substantive law.⁸⁰ This method of caseload selection contrasts with the more freestanding law reform approach often favored by U.S. clinical teachers. The caseload in a civilian clinic will instead be seen as supporting the scientific substantive teaching mission of the cathedra.

CONCLUSION

Over the past several years, clinical programs have developed

⁷⁹ See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

⁸⁰ Ideally, there will be some cross-disciplinary collaboration among clinics, reflecting the fact that client cases in practice do not typically fit neatly into discrete subject-matter "boxes."

with financial and technical support from U.S. foundations and clinical teachers. U.S. clinical teachers have enjoyed a fruitful collaboration with their European colleagues. The resulting professional and personal relationships have been rewarding to all parties.

However, these harmonious partnerships may mask a significant cultural divide and blindness to that divide among U.S. clinical teachers. U.S. clinical teachers may be guilty of some of the mistakes of the Law and Development movement, because we do not typically have a sufficiently deep and nuanced understanding of the civil law systems with which we work. Beyond the most obvious differences, such as the role of judges, lawyers and parties in litigation, there are less visible, but no less important, cultural differences between the two systems. In attempting to “transplant” models of clinical legal education developed in the United States into these civilian educational settings, we often overlook the ways in which these models may be inappropriate to the receiving societies. As a result our efforts may not be useful to the receiving schools and may even be counterproductive, if they cause our hosts – whether out of politeness, funding concerns, or other reasons – to implement ill-fitting educational models that cannot achieve long term success.

In this essay I have tried to outline some of the most important differences – in history and culture, education, and lawyering – between the two systems, and I have offered a framework for thinking about the role of clinical methodology in civil law curricula and teaching. To test and develop these ideas I recommend two broad projects for U.S. clinical teachers, as we move to the next stage of collaboration with our civil law colleagues.

First, we need to educate ourselves about what clinical models are currently in place in the civil law countries. Now that the first wave of funding and consultation has occurred, it is important to go back and simply learn, by conducting a kind of “listening tour.” Among the questions we might ask as we observe these programs are:

- Which of the law clinics that were initiated in the past few years have achieved sustainability? How were they able to do so?
- Which of the clinics were not able to survive, and why?
- What do the current models look like? Why were they designed in this way?
- What aspects of the legal culture are reflected in the choices that have been made?
- In what way are these civil law clinics different from U.S. models? What are the reasons for these differences?
- In designing the clinic, to what extent were U.S. examples followed? Were any aspects of the U.S. models specifically rejected, or tried and discarded?

- How are these clinics designed to prepare students for the legal profession that they will be entering after graduation?
- What is the place of the clinics within the broader law school curriculum?

The second project, which can occur only after we have spent time educating ourselves through firsthand observation and conversations, is to meet with our international colleagues and have a frank discussion about how (and whether) we can be helpful to them in the next stage of their work. As people who make our living training students to interview clients, we should be able to approach our civilian colleague “clients,” start where they are, learn about their future goals, and determine how we can help them achieve those goals.

Like so many of my clinical colleagues in the U.S., I have found the first stage of international collaboration exhilarating. The second promises to be no less so.