

ITALIAN LEGAL SCHOLARSHIP UNBOUND WORKING PAPER SERIES



A TINY HEART BEATING: STUDENT-EDITED LEGAL PERIODICALS IN GOOD OL' EUROPE

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ABSTRACT

This paper has a twofold aim: to analyze the possible opportunities disclosed by the observed growth of student-edited law reviews in Europe and to propose an innovative model of student participation to legal publication.

The first part explores the phenomenon of student-edited law reviews in the U.S., focusing on its recognized educational benefits. Among others, it is observed that participation in student-edited law reviews might promote greater scholarly maturity among J.D. students, who might in turn be better equipped for a career in the academia after finishing law school, in comparison to their same-age European peers. Hence, there follows an examination of the possible beneficial repercussions that the establishment of student-edited law reviews may yield on the process of faculty education in (continental) Europe, in light of the general practice therein endorsed of academic "apprenticeship" under a mentor. Such benefits may consist, among others, in the enticement of larger numbers of potential academicians and in their possible greater intellectual maturity, providing new meaning to the aforementioned time-honored European practice.

The second part of the paper focuses, instead, on the drawbacks brought about by excessive proliferation of student-edited law reviews in the U.S., such as alleged decrease in the quality of published scholarship as a consequence of the superficial quality control that student editors sometimes perform. In view of the foregoing, an innovative model of student publication is proposed, in order to prevent the onset of such drawbacks in Europe, while retaining the above-outlined benefits of early student involvement in academic discourse. It is suggested to complement few, authoritative sources of published scholarship in the form of peer-reviewed journals with student-edited working paper series which, if based on the guideline to provide substantial constructive feedback to authors, could ultimately help foster a quality improvement of published scholarship.

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I. INTRODUCTION

Student-edited law reviews are generally regarded by non-American jurists as a distinctive feature of the United States legal education system.¹

Speaking of which, it can be observed how – in more recent years – the latter has witnessed a literal proliferation of law (schools and law) reviews, general and specialized. In this context, publication in highly ranked student-edited law reviews has also acquired great significance in relation to the law faculty selection and tenure-granting mechanism.²

Finally, this central role acquired by the law review institution has eventually earned it sharp criticism, particularly in light of the fact that – more and more often – the author’s previous publishing history or her law school of affiliation are – allegedly – used as proxies for article quality in the selection process,³ thereby hindering the adoption of truly meritocratic criteria

In this context, Europe has long been a rather amused – yet distant – spectator, being dominated by the presence of peer-reviewed journals. Things, however, have started to change. Since the birth of the *Irish Student Law Review* in 1991,⁴ student-edited law journals have started to grow in the United Kingdom,⁵ Ireland,⁶ Germany,⁷ the Netherlands⁸ and, most recently, in Italy.⁹

¹ See Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659, 660 (1998) (“[T]hey [i.e. law reviews] are one of the most remarkable institutions of American legal culture.”). The only other place displaying a tradition of student-edited law reviews is Australia, where, however, one has to wait until the mid-fifties for the first attempt by the University of Tasmania; for further information on the point, see Michael L. Closten & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 41-43 (1996).

² James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 40 AM. J. COMP. L. 367, 377 (1993) (“[I]n making a tenure decision, the faculty’s entire capacity for sustained critical evaluation descends on the candidate’s written work like a sort of laser directed landslide.”). See also, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 752 (“Many law faculties adopt in practice (though not in theory) a rule that if you publish some number of articles on clearly legal topics in well regarded law reviews, you will get tenure. Period.”).

³ Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power – Student Editors*, 59 SOUTH CAROLINA L. REV. 465 (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002640 (last visited Apr. 15, 2008); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results From a National Study*, 71 ALB. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=988847> (last visited Apr. 15, 2008).

⁴ Available at www.islr.ie (last visited Apr. 15, 2008)

⁵ CAMBRIDGE STUDENT L. REV. (est. 2003), available at <http://www.srcl.ucam.org/csrlr/> (last visited Apr. 15, 2008). Actually, an attempt at the creation of a student-edited law journal in Cambridge had already been carried out in 1921, with the CAMBRIDGE LAW JOURNAL. Shortly thereafter, however, faculty took over and Cambridge University has not had another student-edited journal since.

⁶ GALWAY STUDENT L. REV. (est. 1998), available at <http://www.nuigalway.ie/law/GSLR/> (last visited Apr. 15, 2008), U. COLLEGE DUBLIN LAW REVIEW (est. 2001), available at <http://www.ucdlawreview.com/archive.htm> (last visited Apr. 15, 2008); CORK ONLINE LAW REVIEW (est. 2002), available at <http://www.mercuryfrost.net/colr/index.php> (last visited Apr. 15, 2008).

⁷ Just to mention those that publish in English: HEIDELBERG STUDENT L. REV. (est. 2004), available at www.studzr.de (last visited Apr. 15, 2008); FREIBURG L. STUDENTS J. (est. 2007), available at www.freilaw.de (last visited Apr. 15, 2008); BUCERIUS L. J. (est. 2007), available at www.law-journal.de (last visited Apr. 15, 2008); KONTAKT: KIELER OSTRECHTS-NOTIZEN (est. 1998), available at http://www.uni-kiel.de/eastlaw/cgi-bin/cms/front_content.php?idcat=60 (last visited Apr. 15, 2008).

In view of the foregoing, the purpose of this Article is twofold. Part II aims to examine the interrelation between student-edited journals and the peculiarities of faculty selection in the United States, and to further consider how the birth of such type of publication venues in Europe as well might represent a new spring for change.

More specifically, it has once been observed¹⁰ how law faculty recruitment in the United States places great weight on a candidate's scholarly potential. In this respect, the same author criticised such a heavy reliance on people's potential, essentially basing his position on the obvious remark that the latter is just a hope - not a fact - and that, therefore, there is room for disappointment. In so doing, however, he did not touch - because it likely laid outside his scope of inquiry - another important aspect, hereafter summarized.

True, law professors in the U.S. are generally appointed at an age that is often unimaginable for their European colleagues, which may sometimes yield some "false positives," meaning the appointment of scholars that are not yet "ripe" for teaching and high-level publication. What, however, he probably took for granted is that - along with "false positives" - there are also many "true positives." In other words, many American law professors - albeit being appointed little after finishing law school - do successfully withstand the impact with a life in the academia, and they do so earlier than their European peers.¹¹

While there might be many reasons behind this phenomenon (e.g. the use of the Socratic method, that does not relegate students to a passive learning role) - whose discussion lays beyond the scope of this paper - we believe that one of them lays precisely in the greater familiarity which American law students have with legal scholarly writing and commentary, due to previous experiences as law review editors/authors.

In light of this, the birth of a "class" of young European jurists gaining early experience in legal scholarly debate might be a sign that something is changing - in the same direction - in Europe as well.

Part III, instead, presents a view on the possible new role of student-edited publications within legal scholarship. Such a view may be considered as a response to recent criticism brought - in the debate internal to the United States (a criticism which, however, Europe's initial experiences in the field cannot ignore) - against the alleged excessive proliferation of student-edited law reviews.¹² Namely, that the number of law reviews has become such as to enable publication of works of poorer quality, to the point that papers actually relevant to the legal debate could theoretically be found only in the best, e.g. top-100, law reviews.

⁸ HANSE L. REV. (est. 2005), available at www.hanselawreview.org. The HANSE L. REV. is actually published by a consortium of Universities, including Rijksuniversiteit Groningen (Netherlands), Bremen University (Germany) and Carl von Ossietzky University of Oldenburg (Germany).

⁹ ITALIAN LEGAL SCHOLARSHIP UNBOUND WORKING PAPER SERIES (est. 2008), available at www.ilsuwps.org (last visited Apr. 15, 2008).

¹⁰ J. Gordley, *supra* note 2, at 372-75.

¹¹ To mention one example, Professor Guido Calabresi was in his early thirties when he wrote - during his sabbatical leave - THE COST OF ACCIDENTS (1970), as mentioned in Guido Calabresi, *Giustizia e Analisi Economica del Diritto* [Justice and Economic Analysis of Law], Speech held at Bocconi University, Milan, March 17, 2008. Although it is clear that one (furthermore extraordinary) case does not prove them all, it can - at least - weaken the contrary (i.e. that American legal scholars do not withstand well the test of participation in legal scholarship and academia).

¹² Karen Dybis, *100 Best Law Reviews*, THE NATIONAL JURIST 22 (Feb. 2008).

In light of the considerations presented in the paper, we then conclude that the growth of student-edited law reviews in Europe may be regarded as a welcome new opportunity, that may bring interesting changes in the education of tomorrow's European law teachers and in the quality of legal scholarship. Particularly so, if a proposed "European way" to legal periodical publication were able to find its way, in order to avoid some of the problems currently experienced in the United States.

More specifically, student-edited law reviews could be seen as a complementary – rather than substitute - resource to peer-reviewed journals.

While, in fact, peer-reviewed journals alone may close legal scholarship to collateral and valuable contributions from non-professors (students and practitioners), peer-reviewed scholarship coupled with the presence of widespread student-edited law reviews may bring about virtuous competition at attracting the best and most innovative scholarly contributions. Hence, this would open up the circle of peer-reviewed journals to non-professors while simultaneously offering more opportunities for legal scholars to educate themselves to the practice of scholarly discussion on the pages of student-edited law reviews.

II. LAW REVIEWS AND THE RIPENING OF LEGAL SCHOLARS

A. *The Birth and Role of Law Reviews in the U.S.*

Law reviews were gradually introduced in the United States during the nineteenth century, as a source – mainly addressed to practitioners – of recent court decisions, local news and editorial comments in a legal writing style that made them more easily accessible, compared to "the tedious and encyclopaedic treatises of Blackstone, Kent and Story."¹³

In this context, the first student-edited law reviews appeared towards the end of the same century. Following the short-lived experiences of the *Albany Law School Journal* (1875) and the *Columbia Jurist* (1885) came the *Harvard Law Review* (1887), which "rapidly developed influence in academic and professional circles."¹⁴ Yale (1891), Penn (1896), Columbia (1901), Michigan (1902) and Northwestern (1906) followed suit. "In 1937, there were fifty law reviews; by the middle of the 1980s, there were about 250."¹⁵ Nowadays, the most comprehensive database of English-language legal periodicals¹⁶ maintained by John Doyle, librarian at Washington & Lee Law School of Lexington, Virginia, lists 595 student-edited journals, both general and specialized, only in the U.S.

Such a rapid proliferation of law reviews is also partly attributable to the recognition, on the part of law schools, of "the educational benefits of such student-run operations."¹⁷ Educational benefits which may be summarized as follows:

¹³ Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L. J. 739, 741 (1985).

¹⁴ *Id.*, at 778-79.

¹⁵ R. Zimmermann, *supra* note 1, at 662.

¹⁶ Available at <http://lawlib.wlu.edu/LJ/index.aspx> (Select "All subjects" and "US" in the scroll-down menus, tick the "Student-edited" box and press "Search" button)

¹⁷ M. Swygert & J. Bruce, *supra* note 13, at 779.

[I]n writing the Note or Comment required of each law journal member, the student undertakes a research and writing responsibility unparalleled in the law school curriculum and rarely matched in the careers of most lawyers. The average student spends much of an entire year researching and writing her paper, usually with several upper-class journal members providing close supervision. As a matter of necessity, the student must master every avenue of legal research, both printed and computerized, and must quickly become proficient with the acceptable formats and citation methods found in the "Bluebook." The student must also become intimately familiar with the way lawyers structure legal arguments, in both a logical and persuasive sense. Finally, the student must condense her research into the clearest, most well-written piece she has ever produced, as this will most likely be the first time her work will be considered for publication in such a prominent forum.

Not only do the law review members gain from writing their Note or Comment, but all of the other tasks that they must perform significantly sharpen their practical skills and enhance their ability to communicate at a scholarly and professional level. The process of editing works written by, and interacting with, the nation's leading legal scholars not only provides an educational benefit but instills one with a sense of confidence and legitimacy. Additionally, while cite-checking and editing these articles, students are often forced to track down obscure and ancient sources, a hassle to students, but a task that deeply indoctrinates them in advanced methods of legal research.¹⁸

Empirical research has also been undertaken in this respect. It is, in fact, possible to mention a survey of attorneys, law professors, and judges across the United States who were, among other things, asked to evaluate "how helpful they felt their law review experience was in several categories: enhancing the precision of their writing and editing, improving their ability to work with others, and teaching them substantive law."¹⁹ Preferences were further scaled from zero to five, with zero meaning that the law review experience had not yielded any benefit to the interviewee, and five that it had turned out to be helpful in honing the skill in question. "Former law review members enthusiastically endorsed law reviews for their improvement of writing and editing skills. . . . [T]he mean response for judges was 4.02, for professors 3.73, and for attorneys 3.66."²⁰

In sum, the role of student-edited law reviews can be synthesized as follows:

[L]aw reviews offer an outlet for fresh and innovative ideas and provide a venue for students, professors, politicians and practitioners to discuss and debate issues of

¹⁸ Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER J. 59, 65 (1995). A Note generally "analyzes a recent case that has either solved or created a legal problem." (M. Closten & R. Dzielak (note 1), 20). A Comment, instead, "seeks to reveal a legal problem and then attempts to propose a solution to that problem by the end of the comment." (M. Closten & R. Dzielak (note 1), 19).

¹⁹ Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1491 (1992).

²⁰ *Id.*

interest to legal-minded individuals. These publications unquestionably serve as the legal community's primary "marketplace of ideas."²¹

B. *Law Reviews and Faculty Education*

In a critical recollection²² of the manner in which faculty recruiting takes (or used to take)²³ place in the United States, Prof. James Gordley of Boalt Hall Law School observed, as to the law review experience, how a newly-appointed member

[W]ho for over a year has had professors point out his deficiencies, can now point out theirs. He rewrites their articles, adding arguments of his own, deleting arguments he considers to be weak, criticizing the citation of authorities, and altering the style until the piece has the lawyerlike tone of a bond indenture. In his third year, if he becomes an officer of the law review, he has the final say about which articles should be published, and about how severely to treat a professor who stubbornly clings to his own arguments and style.²⁴

Despite the critical and analytical thinking skills which such a process may help students develop,²⁵ he showed – however – to be rather sceptic in regard to the actual scholarly “quality” of the graduates the U.S. system may educate.

In particular, his scepticism emerges from this statement regarding the way faculty recruitment takes place, criticising

[T]he way competition among law firms and law schools affects recruitment. To be the best, they try to hire and promote the best. Highly qualified graduates therefore command high prices but for much the same reason as thoroughbred colts: not because of what they have achieved but because of what they may achieve someday. As with colts, the price is paid in hopes of getting a champion, though that will not happen all the time or even most of the time. Law graduates, however, unlike colts, keep the price themselves. Law schools, moreover, unlike law firms, cannot pay much in cash. So they make their offers look attractive in other ways: an immediate professorial appointment, no control over one's work by a hierarchical superior, and a short wait for tenure. These very features cause the trouble. *Bright people are hired before they are trained as scholars, given a status so high that they cannot get their training by working under a senior scholar, and given little time to train themselves.* The same competitive forces that produced the attractive offer then demand that the law school get rid of them if they do not quickly show they can do first class scholarly work.²⁶

²¹ Mark A. Godsey, *supra* note 18, at 59.

²² See J. Gordley, *supra* note 2. The author's critical attitude towards faculty recruitment methods in the U.S. is evident in his closing evaluation: “Perhaps the best way for any of us to promote a flourishing of legal scholarship at our schools is to spend less time recruiting and more time thinking about law.” (*Id.*, 384).

²³ Considering the “age” of the work, still the only one approaching the subject from a comparative perspective.

²⁴ J. Gordley, *supra* note 2, at 370-71.

²⁵ See *supra* text referring to note 18.

²⁶ J. Gordley, *supra* note 2, at 380 (emphasis added).

As has been observed in the introduction, however, it is respectfully submitted that the account provided by the referenced commentator, while sharply and effectively criticising the way faculty recruitment is carried out, is not enough to actually have a negative bearing on the American system of legal education altogether and, with it, on the practice of student participation in law review activities.

True, J.D.s may need to “teach themselves” how to become true legal scholars, and need to do so fast to meet the deadlines for tenure. However, we mustn’t forget to consider that faculty selection is taking place amongst students that – generally – might have spent little to no time outside law school. And yet, among the “false positives”, there will inevitably also be “true positives”, i.e. scholars that are able to find their way despite the lack of further postgraduate (e.g. doctoral) education. And this, I feel, is one of the merits attributable also to the law review institution, to enable at least *some* to “come out of their shell” early on in their academic career, gaining valuable years.

Trying to provide a reading of professor Gordley’s account that were compatible with this view, it could be said that the cause of the alleged “academic immaturity” of newly-recruited law professors in the U.S. may be found more in the abruptness and early stage at which the recruitment process takes place than in the actual ill-education that law school and – in particular – law review membership may provide candidates with.

Student-edited law reviews, instead, offer promising students a means to express themselves and be heard, learning skills which would otherwise be learned only later on in their scholarly career; as exemplified by the fact that:

Similar to lead articles, student comments can be influential. Indeed, with some regularity, student comments have been so thorough and thoughtful that they have resulted in significant attention and impact. For instance, courts and scholars often cite favourably to student articles for their research and/or analytic value.²⁷

In this respect, there is much to be said regarding the trend which the wave of student-edited law reviews may be bringing about in Europe.

It is, in fact, a practice in European or – I had better say – Continental European faculty recruitment that a particular relationship be established with a mentor, called “Doktorvater” or “Habilitationvater” in Germany,²⁸ “Maestro” in Italy.²⁹ In Germany, in particular, this is probably due to the very time-consuming training consisting in a Doctorate and a further period of study called “Habilitation” that brings scholars in their late thirties to be ready for appointment.³⁰ In Italy, instead, although a Doctorate is all that is generally required to obtain a

²⁷ M. Closet & Robert Dzielak, *supra* note 1, at 19. For a supporting statement, underlining how the lack of student-edited law reviews in the United Kingdom affected the faculty’s publication experience, see Tony Weir, *Recruitment of Law Faculty in England*, 41 AM. J. COMP. L. 355, 359 (1993) (“First appointments being made at such a young age, it is unrealistic to expect applicants to have done much in the way of publication, perhaps a case-note or a book review. Editorial experience cannot be looked for, since the major law reviews are not run by students.”).

²⁸ Jürgen Kohler, *Selecting Minds: The Recruitment of Law Professors in Germany*, 41 AM. J. COMP. L. 413, 419-20 (1993).

²⁹ Ugo Mattei & Pier Giuseppe Monateri, *Faculty Recruitment in Italy: Two Sides of the Moon*, 41 AM. J. COMP. L. 427, *passim* (1993).

³⁰ See J. Kohler, *supra* note 28.

professorial appointment, it is the Maestro who ultimately determines whether a certain “pupil” will or will not achieve tenure.³¹

This state of – so to say – dependence between potential teachers and tenured professors within the faculty education and recruitment process does, in our view, also react on the general student attitude towards legal research in European Law Schools.

The Professors’ “hierarchical” pre-eminence over all other figures present in legal academia, in fact, often ends up putting an unintended but inevitable distance between students and teachers. Continental Law students are generally expected to study their textbooks and listen to lectures, that are usually not delivered via the Socratic, interlocutory method, but by means of more formal, conference-like talks.

The doors to active participation to legal scholarship generally open, instead, as one undertakes a further academic degree (usually a Doctorate), under the supervision of a Maestro or Doktorvater.³² While, of course, this leads to the appointment of professors that have been able to benefit from the necessary time and – most importantly – guidance to become mature scholars,³³ it does not eliminate the involuntary segregation that – one way or the other – usually affects students (prior to the undertaking of a research degree) with respect to active involvement in legal writing and publication.

A clear symptom of this may be found in that law practitioners in countries where such a “segregation” exists are generally disadvantaged in obtaining teaching positions.³⁴ It can be hypothesized that this happens because the education which practitioners receive (no research degrees are required to gain bar admission) does not generally afford them a chance to develop that depth in legal analysis which only a further career in the academia discloses.

Another indicator of the plausibility of the hypothesis herein sketched is the absolute preponderance of peer-reviewed journals,³⁵ in a manner that exacerbates the segregation between professors and “the rest” as regards participation in legal scholarship. In fact, peer-reviewed journals are the designated publication venue for professors or apprentice teachers: not as a matter of – so to say – spirit of “caste”, but rather as a consequence of the fact that the latter groups are usually the only ones possessing the necessary skills to publish.

³¹ U. Mattei & P.G. Monateri, *supra* note 29, at 435 (“New professors are coopted by ‘maestri’ on the basis of gentleman’s agreements. So one needs, first of all, to be the disciple of a maestro. A maestro teaches one how to write the graduation thesis or the doctoral dissertation, and how and where to publish the first papers. He suggests what to study and the topic of a book. He introduces the young scholar to editors and publishers. He entrusts the young scholar to deliver a paper at conferences where he was invited but cannot attend. The maestro is supposed to know the value of his disciple and the content of his writing, and he is supposed to defend him. In fact, it is the maestro who asks a faculty for a post for his disciple; he will vote and influence others to vote for committee members on the basis of their willingness to appoint his disciple.”).

³² *See id.*, at 435 (mentioning that the publication of a – so to say – disciple’s *first papers* takes place under the supervision of a Maestro.).

³³ A possible criticism “to the apprenticeship system based on the relationship between professor and pupil [is that it] could inhibit the development of new ideas.” (Ugo Mattei & Pier Giuseppe Monateri, *Foreword: The Faces of Academia*, 41 AM. J. COMP. L. 351, 352 (1993)).

³⁴ Bernard Rudden, *Selecting Minds: An Afterword*, 41 AM. J. COMP. L. 481, 483-84 (1993) (“Not only does the bar play a small role in selecting academic professors, but there seems to be little recruitment of full-time professors from the ranks of the profession. This may be because . . . the scholars feel a certain disdain for the *pragmatici*.”).

³⁵ *See* R. Zimmermann, *supra* note 1, at 660, 693 (Highlighting the international uniqueness of the American law review system, implying that peer-reviewed journals generally prevail elsewhere).

In this respect, the birth of student-edited law reviews may be a sign that what has been a cultural barrier between students and active participation in legal scholarship may be starting to crumble. The possible benefit is evident. On the one hand, the distinctively European tradition of “academic apprenticeship” which – after all – does help teachers in their intellectual ripening, may extend its reach to law students trying to publish their papers as well, providing them with more rigorous intellectual and academic work-out early on in their educational path. This, in turn, might provide students with a better knowledge of what academic life is about, so as to confront them with a wider range of available professional choices upon graduation, thereby also increasing the pool of potential teachers and their overall “brilliance,” if what one commentator said were – at least partially – true.³⁶

Additionally, the fact that more and – foremost - more experienced “pupils” might decide to undertake the path of academic apprenticeship might further increase their intellectual autonomy vis-à-vis the intellectual orientations of their respective Maestro or Doktorvater, in a manner that may help them “come out of their shell” in expressing their views (thereby favouring scholarly innovation). This way, the presence of a mentor would only serve its designated purpose: that of providing suggestions and constructive criticism, rather than the establishment of a form of cultural hegemony over tomorrow’s ideas.

Last, but not least, the way students look at the law is inherently different from the way law professors do. While the latter are used to dealing with complexity and high elaboration, students (and practitioners alike) generally require cleaner arguments, whose logical flow be apparent to the reader. In this respect, I believe that the onset of different student-edited publication venues where it be students to decide who gets published, might provide a valuable alternative to the “professorial”, more elaborate – yet sometimes more obscure - style of writing. Simplification does not always mean lesser scholarly quality. Instead, it may indeed help make scholarly thought accessible to wider scores of legal operators, first and foremost practitioners, making them gain attention to what Universities have to say, thereby bridging one often controversial gap between theory and practice.³⁷

III. RE-THINKING THE ROLE OF STUDENT-EDITED STUDENT PUBLICATIONS

In the last portion of the foregoing Section, it has been observed how beneficial the introduction of American-style student-edited law reviews may prove for the European legal community in general.

Yet, the phenomenon of student-edited law reviews may not be fully endorsed, if one does not consider the drawbacks displayed – in the U.S. – by a system of legal scholarship entirely based on this kind of publications.³⁸

³⁶ See B. Rudden, *supra* note 34, at 486-87 (“[I]t would seem very likely that the number of able law students eager to become a law professor must be proportionately much smaller [in countries other than the U.S.] than the numbers ready to spend their lives as professors of some other field of learning. Since so many good students do not apply for law posts, one suspects that the average of the ability available in the pool of talent is lower than in those of other subjects. It seems to follow that, by comparison with their colleagues in other faculties (and on the whole, and by and large, and present readers always excepted) law professors are stupid.”).

³⁷ This is the spirit which animated the creation of the first law reviews in the United States; see M. Swygart & J. Bruce, *supra* note 13, at 741.

³⁸ See *infra* note 62.

First of all, if their great educational value for student editors does justify their maintenance, it might have done so despite the fact that offer exceeded demand.³⁹ This has, in turn, caused some commentators to observe how the presence of too many law reviews in the U.S. might have eventually brought about an overall decrease in the quality of published scholarship.⁴⁰

Additionally, the incredible amount of submissions top U.S. law reviews are generally addressed sometimes forces Editors to consider other extrinsic data as a proxy for an Article's quality.⁴¹ In this respect, an Author's previous publication history, or the law school she is affiliated with may sometimes doom an article to rejection at a highly ranked law review.⁴² This - considering the role that publication in top-tier venues plays in the professor appointment and tenure process - does further contribute to make "the rich richer, and the poor poorer": teachers being appointed at lower-ranked law schools may find it harder to make their voices be heard in the legal community, and to possibly gain recognition for the ideas they might have contributed to.

Finally, law reviews do not generally provide feedback as to the acceptance or rejection decision, so that, faced with multiple rejections, authors are left to wonder whether their long-awaited work has been rejected because the topic was not of interest, or because the volume was full or - worst case scenario - because it lacked academic rigour.⁴³

It is this last point which, I feel, deserves the most criticism. Feedback is the very engine of scholarly creation and improvement. Leaving authors to wonder the causes of a possible rejection may, more often than not, spur them to keep seeking publication of the article somewhere else, while missing possible room for improvement.

Eventually, the author feels she might have added a bullet to her curriculum vitae, by adding one more law review to her publications list. In cases, however, where a previous rejection has been caused by quality defects in the article (which later went unnoticed), a mistake hasn't been corrected and - for limited a journal's circulation may be - this exposes the whole legal

³⁹ As one commentator once observed: "Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written." (Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22, 24 (1956)).

⁴⁰ See K. Dybis, *supra* note 12, at 26 (quoting Professor Robert Jaris, Nova Southeastern University Law Center) ("Nowadays, you could get anything published," he said. "I could publish my grocery list some law reviews are so desperate. The reality is [law school] deans should come out against so many law reviews and the number of times they publish.").

⁴¹ See J. Nance & D. Steinberg, *supra* note 3, at 5. For some sample figures, see Eugene Volokh, Questions for Law Review Articles Editors, Sept. 12, 2005, available at <http://volokh.com/posts/1126582538.shtml> (last visited Apr. 15, 2008) (respondents to Prof. Volokh's blog post speak of 80-100 submissions per week in the "high submission season").

⁴² See Paul L. Caron, What Are Law Review Articles Editors Looking For?, March 24, 2006, available at http://taxprof.typepad.com/taxprof_blog/2006/03/what_are_law_re.html (last visited Apr. 15, 2008) (mentioning the "prestige" of an author's employer as a possible influencing factor for law review editors).

⁴³ See Bernard J. Hibbits, *Last Writes? Reassessing the Law Review on the Age of Cyberspace*, 71 N.Y.U.L.REV. 615, 645 (1996) ("[T]hey [i.e. student editors] have increasingly refused to provide rejected law review authors with substantive written or even oral reasons for their rejection. There is little documentary evidence as to when editors began to abandon the practice of providing reasons, but anecdotes suggest that by the late 1970s it had died out at all but a few institutions, accelerated perhaps by the . . . professorial strategy of multiple submissions. Students were too pressed and too stressed to provide reasons or feedback. This deprived faculty of potential useful input and unfortunately helped to create an atmosphere in which it was easy to impute improper selection motives to student editors who no longer made even a pretense of offering evidence to the contrary.")

community to further spreading of imperfections or misconceptions which remained undetected at the lower-ranked law reviews that eventually took charge of the work's dissemination.

Namely, it is a known fact that, in writing an article, it is possible that authors may "get tunnel vision: they focus on the one situation that prompted them to write the piece—usually a situation about which they feel deeply—and ignore other scenarios to which their proposal might apply. And this often leads them to make proposals that, on closer examination, prove to be unsound."⁴⁴

In this respect, one way to improve arguments about the law may be that of a critical self-reassessment of the authors' contributions, as the above-referenced paper seems to suggest.

However, another way to bring a fresh new look at somebody's argument would be that which has long been abandoned in the law review world, which – however – cannot deserve enough praise: constructive feedback.

In order to solve - at least part of - these problems, one prominent commentator proposed the substitution of law reviews with independent web publication by authors themselves, cutting out the middle man.⁴⁵ The same author further proposed that, in order to prevent web-published works to become unfindable in a sea of information, "a legal academic institution . . . created, publicized, and maintained a Web site to which all law professors could submit or hypertextually 'link' their scholarly work. The site would be somewhat similar to an electronic archive insofar as scholars and others would access it to look for articles."⁴⁶ Today, this seems to me the role that has gradually been achieved by scholarship repositories such as, for instance, SSRN and Bepress.

The drawback in such repositories, however, is that no substantive quality control is performed.⁴⁷ True, "the current law review system operates with minimal quality control in the generally accepted ('peer review') sense of that term."⁴⁸ In our view, however, this is not sufficient argument to dismiss the need for "quality control" altogether.⁴⁹

⁴⁴ Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 440, available at <http://www.law.ucla.edu/volokh/testsuites.pdf> (last visited Apr. 15, 2008).

⁴⁵ See Bernard J. Hibbits, *supra* note 43, at 667-88.

⁴⁶ *Id.*, at 675.

⁴⁷ As Hibbits himself recognizes; see *id.* 671-72.

⁴⁸ *Id.*

⁴⁹ In Bernard J. Hibbits, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (1996), Prof. Hibbits attempts to provide a counter-argument to the lack-of-quality-control criticism that has been made above in the text. In particular, he seems to argue that: 1) "quality in an electronic self-publishing system could be maintained via a system of post hoc reader comments Good articles would presumably receive good comments; bad articles would receive bad comments or no comments." (*Id.*, 295) (in a manner that, therefore, would not so much differ from the evaluation systems currently adopted by websites such as www.youtube.com, although with reference to different types of content); 2) "[i]n a self-publishing system, quality control would also be enforced by self-policing. . . . [S]elf-interest would suggest that law professors post quality material lest they publicly embarrass themselves and do serious damage to their own academic reputation." (*Id.*, 297). It is respectfully submitted that such an argument might however display some criticalities. In fact, on the one hand, Hibbits correctly perceives how "[i]nstant dissemination of legal scholarship . . . has the potential of provoking instant reader responses which can reach a legal author directly, can reach her while her mind is still on her subject, and can reach her while she can still react and/or make revisions in light of comments received." (*Id.*, 280). In this respect, it is a known fact that the type of feedback that usually calls for an improvement or however a reassessment of a work's conclusions is generally a critical and – from the author's point of view – "negative" one. Yet, in a world without law reviews, authors' scholarly caliber would – inter alia - be derived from the relative success "in eliciting positive comments from many scholarly readers (or from a few high-profile ones)." (*Id.*, 300). Now imagine an author,

First of all, there still exist traces of quality controls in the way articles are currently selected by law journals. In particular, we are referring to the weight given to expedite requests. Lower-ranked law reviews generally receive less submissions and, therefore, it can be hypothesized that they use this “extra time” to actually read the submitted contributions. Once an author receives a publication offer from one such law review, she then “shoots” an expedite request upwards to other journals, that end up paying closer attention to manuscripts already judged of publishable quality. In this respect, one student editor has observed that “[t]he lower journal [sic] vet out the weaker articles and the cream rises to the top.”⁵⁰

In light of the above considerations, a new proposal for change can be made. Not a “drastic one” that would require to do away with law reviews but, on the contrary, one that allowed to enhance their role as disseminators of quality legal knowledge.

There is wide consensus on the fact that there are more law reviews than would actually be optimal to allow publication of quality scholarship alone. Additionally, it is the growing number of law reviews that may actually be the cause of the urge to “publish or perish” that hit law faculties across America in recent times, an effect (rather than a cause) of which might then be the decrease in overall quality of published articles.⁵¹

The usefulness of lower-tier law reviews as a vehicle of scholarship dissemination has therefore become limited, probably bringing more of an educational service to students than a benefit to the legal community. On the other hand, lower-tier journals have instead become a source of external benefits to the legal periodical “industry” on the whole, by screening out worse articles while opening the way for better ones to be accepted in more prestigious venues upon request of expedited reviews.

Why, then, do lower-tier journals not transform themselves in online working paper series? A first experiment thereof already exists, and it is the *Italian Legal Scholarship Unbound Working Paper Series*.⁵²

These are the basic functioning rules that could govern such publication venues:⁵³

particularly a relatively young one (e.g. a student – postgraduate or doctoral –, a young associate, a newly-hired professor), who were confronted with the option of publishing a work in progress in order to obtain feedback, but to do so with the risk of exposing herself to the academic community’s possibly negative judgment, which could chill her incentive to publish altogether (an interesting hint to the problem is done by Dan Markel, *Whither SSRN?*, Jan. 19, 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/01/whither_ssrn.html (last visited Apr. 15, 2008)). The intermediate solution consisting in the partial substitution of law reviews with student-edited working paper series (see *infra* p. 10) could provide a viable intermediate ground, accommodating the needs of that (more or less conspicuous) segment of legal authorship that may demand some pre-emptive feedback, before actually “going public.”

⁵⁰ See Blog Post, <http://volokh.com/posts/1126582538.shtml#19143> (last visited Apr. 15, 2008).

⁵¹ See Hibbits, *supra* note 43, at 640.

⁵² Available at www.ilsuwps.org (last visited Apr. 15, 2008). There actually exists another similar experiment, although outside the legal field: the concerned publication is WORKING PAPERS (est. 1996), available at <http://www.pennworkingpapers.org/index.html>. It is a journal published by graduate students in Romance Languages at the University of Pennsylvania, showcasing original works-in-progress by graduate students, giving them the opportunity to present their research in its preliminary stages and to receive feedback from colleagues

⁵³ All in all, we feel that direct provision of constructive feedback by the series’ editors and the adoption of open submission policies - i.e. not restricting submission to specific groups of individuals - could become the distinguishing features of student-edited working paper series, in comparison to existing working paper series available at most law schools.

1. substantial review of submitted contributions, with supply of constructive feedback to authors;
2. no more bluebooking: this would enhance the time editors actually spend thinking about the intellectual merits of what they decide to publish, while disregarding a practice whose usefulness is - to say the least - debated;⁵⁴
3. possibility for authors to amend the accepted works even after publication.

As to the first rule, it could be objected that students may lack the ability to offer pervasive or truly useful commentary. Quite on the contrary, I feel it is possible to object that the assessment of the clarity of an article's "logical flow", or the detection of contradictory, apodictic, excessively broad or narrow statements are skills that students naturally acquire when "questioning" a textbook in the course of preparation for any exam, trying to discover connections and uncover contradictions.⁵⁵

Of course, this may require authors to make their articles as self-contained as possible, leading authors, "in an effort to overcome the inexperience of student readers, [to] feel compelled to include large, expository sections that place their insight in the context of existing scholarship."⁵⁶ This, however, could only enhance the function of scholarly articles as reference material for practitioners and judges.⁵⁷

Secondly, the lack of bluebooking could enhance - in our view - the educational usefulness of such editorial experiences. Future lawyers would in fact be given the opportunity to actually cultivate those skills at validating judgments and constructing arguments that will be most useful to them in their professional future outside law school, thereby recovering in full the educational value that originally justified the diffusion of student-edited law reviews.

Ultimately, authors - especially students and young scholars - could be given the opportunity to experiment and refine their works over time, taking the publication process "piecemeal." The fact that working paper series could already represent publication venues for curriculum purposes would in fact quench the urge to "publish or perish" that might often take over during

⁵⁴ See R. Zimmermann, *supra* note 1, at 675 ("The Bluebook, with its pedantic obsession with detail and zeal for regulation, has driven generations of reviewers to scorn and sarcasm, and generations of authors and (presumably) editors of law reviews to despair."); Paul Gowder, Blog Post, Feb. 12, 2008, *available at* <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/too-many-law-re.html> (last visited Apr. 15, 2008) ("[I]t ought not to be called a worthwhile skill, for several reasons: - It's not something you need a lawyer to do. A paralegal can check to see if citations conform to the rules. . . . - It's not objectively worthwhile . . . society does worse with the existence of a bunch of lawyers who are trained to check whether the comma is italicized than it would do if that training were not present. . . . - It's overall bad for the poor fool who gets the training. I can't prove that, but I intuit that spending a couple years of one's life scrivening over a bunch of citations and being conditioned to enforce . . . little rules about things like citation signals will produce a person with a notable narrowness of spirit and sensibility. This policy is already followed by the law journal, based at Harvard Law School, UNBOUND (est. 2005), *available at* <http://www.legalleft.org/> (last visited July 31, 2008).

⁵⁵ "Respectable arguments can be made that some contributions to the literature could be appreciated better by experienced faculty members as opposed to law students, although one can make an equally persuasive argument that *good* writing can be appreciated by those without unusual levels of specialized education and experience." (Henry H. Perritt Jr., *Reassessing Professor Hibbits's Requiem for Law Reviews*, 30 AKRON L. REV. 255, 256-57).

⁵⁶ J. Nance & D. Steinberg, *supra* note 3, at 4.

⁵⁷ *Id.*; see also M. Closet & R. Dzielak, *supra* note 1, at 24 ("Another primary purpose of American law reviews is their function as reference material.").

the process of article drafting,⁵⁸ affording authors the opportunity to better focus on the merits of works produced by them.

In sum, high-quality legal scholarship is a matter of patience and meditation. What value does a mediocre article published in a “Shech-Tech Law & Truck Driving Law Review”⁵⁹ bring to the legal community? There are probably enough last-tier law reviews, which is why the proposal of a venue where to publish works - with the “promise” of revising them and improving them further - might actually do society a better service. Published working papers would need to make solid, internally coherent arguments, thereby entrusting working paper series editors with the preliminary quality screening that would otherwise be lacking in case of spontaneous self-publication on the Web by authors themselves.

It is not good for the purpose of educating students and scholars to give them the illusion that they have published in a “law review” that nobody reads. Instead, they should be directed to take the publication process step-by-step, to take their time to think and revise and, eventually, to publish in law reviews that people actually read. Having a work published in a working paper series would ultimately enable authors to decouple the “publish or perish” urge they may have, from the necessity to take some time to give their work a second thought.

This, of course, would require lower-tier publication venues to admit to being “secondary.”

The price to pay, in the U.S., would then be one in terms of prestige. In this respect, what could be done would be to try and establish such working paper series next to existing law reviews, and see which ones would students rather participate in, based on their relative educational value; contrasting “bluebooking” with “focused thinking about the improvement of legal arguments.” Giving people a choice could, in our view, spontaneously lead to a “survival of the fittest,” without requiring direct, authoritative intervention on the part of law school deans.

IV. CONCLUSIONS

A. *A European way to student –edited publications?*

The foregoing proposal may also have a bearing on the future organisation of the European legal periodical publication system which, however, differs from the American one in one important respect.

Namely, the lack, until recently, of student-edited law reviews in Europe has led to a proliferation of faculty edited journals. A concurrent factor responsible for this may be found in that not only are student-edited law journals of recent establishment, but they are also mostly online-only publications.⁶⁰

⁵⁸ All the more so, if – over time –working paper series managed to differentiate from one another based on their “prestige” which would, in this case, come to depend on the relative importance of the law reviews where accepted working papers subsequently achieved publication.

⁵⁹ This fantasy name has been used in a humoristic recollection of the frustration authors often endure in the course of lengthy reviews by law journal editors; see Brandon P. Denning & Miriam A. Cherry, *The Five Stages of Law Review Submission*, Sept. 1, 2005, at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796264#PaperDownload (last visited Apr. 15, 2008).

⁶⁰ Which, for a widespread as – probably – unjustified bias, are generally regarded as less relevant.

Without student-edited publication, the sole presence of faculty-edited law journals may give way to criticism of this sort: “they can easily become hidebound, their boards can be ‘captured’ by particular viewpoints or schools of thought, and their editors can select articles on scholastically illegitimate or arbitrary grounds.”⁶¹

When the former, however, are coupled with student-edited journals the tendency to “silence” unwanted opinions in faculty-edited law journals may decline, seeing that such opinions may nonetheless find their way to the public through other publication venues. Aside from this possible risk, it can instead be hypothesized that faculty-edited journals could turn out to be more effective in selecting papers based only on their intellectual merits, given the lower “deference” that faculty editors would be in a position to pay to extrinsic data (e.g. authors’ affiliation, publication record, law school of graduation, etc.), in light of their generally more robust knowledge of topics dealt with in articles and of the usual practice of blind review in faculty-edited publications.

In conclusion, it is submitted that - if coupled with student-edited publications - faculty-edited law journals could conclusively become Europe’s most valuable asset.⁶²

It is, in fact, unquestionable that an article that has been peer-reviewed will tend to be regarded by legal operators as more authoritative than an article published elsewhere.

In this context, student journals should be seen as a great complementary addition rather than as a replacement of the former resources.

Not only, in fact, may they provide alternative venues for “discriminated” opinions, thereby opening up the legal marketplace for ideas. Additionally, if run with the spirit of working paper series,⁶³ they may further become a resource for non-academicians to refine their works for the purpose of publication in peer-reviewed journals. Working papers later passed on to faculty-edited journals could further display that clarity required in order to make students understand complex concepts, thereby also leading to a simplification of articles’ structure and language, enhancing their possible use as reference material, much as it happens in the United States.

In sum, this would enable to both create alternative channels for the transmission of legal thought as well as powerful tools for the diversification of legal scholarship.

In particular, for European legal scholarship, this would in fact mean striking a successful balance between

1. the maintenance of few, very authoritative and select publication venues, since a preliminary screening would be carried out by student journals, thereby allowing faculty-edited publications not to become engulfed with submissions;⁶⁴
2. the creation of powerful educational opportunities for law students, that could really gain an insight on tomorrow’s innovation in its making;

⁶¹ Hibbits, *supra* note 43, at 653.

⁶² In the U.S., instead, “[f]rom time to time there are suggestions to create a greater number of journals that are published by university professors rather than students, and contributions to which are thus approved by peers. Although such journals exist, they have not been able thus far to shake the traditional, and internationally unique, law review system.” (R. Zimmermann, *supra* note 1, at 693).

⁶³ See *supra* p. 10.

⁶⁴ Despite the possible increase in scholarly production that may follow the onset of student-edited publications.

3. the introduction of “publication tools” (again, student-edited law journals) to both provide visibility to the works of – among others - authors generally left out from mainstream academia and – simultaneously – feedback for the later improvement of such works for purpose of later publication in more authoritative media.

Finally, the reputation of a publication venue would come to depend less on the “prestige” of the issuing law school but rather more on the number of working papers its editors managed to help successfully improve, later obtaining a slot on faculty-edited law journals.

True, Europe’s student-edited law reviews are still a tiny heart beating in legal academia. Yet, in view of the foregoing, they represent one that could pulse new life into the “European way” to legal scholarship, possibly offering a model for the rest of the world.