

A Tiny Heart Beating: Student-Edited Legal Periodicals in Good Ol' Europe

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A. Introduction

From the perspective of a non-American jurist, student-edited law reviews seem to be one of the most distinctive features of the United States legal education system.¹ The development of law reviews in the United States has been particularly sustained in more recent years, with a literal proliferation of law (schools and law) reviews, both of general focus and subject-specific. With student-edited law journals making up the largest share of the legal periodical “market,”² publication in highly ranked student-edited law reviews has come to acquire great significance also in relation to the law faculty selection and tenure-granting mechanism.³

The preponderance of student-edited law reviews has, however, been accompanied by mounting criticism. Part of this criticism, and the one most relevant for this article’s purpose, is that the inevitable inexperience⁴ of student editors *vis-à-vis* their designated

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¹ See Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY LAW JOURNAL(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 had to wait until the mid-fifties for the first attempt by the University of Tasmania. For further background on the history of law reviews, see Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON LAW REVIEW (AKRON L.R.) 15, 41-43 (1996).

² See posting by Matt Bodie on PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/01/project_on_peer.html (2 January 2006).

³ James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 40 AMERICAN JOURNAL OF COMPARATIVE LAW (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 LAW JOURNAL (DUKE L.J.) 705, 752 (1990)(“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.”).

⁴ See Richard A. Posner, *Law Reviews*, 46 WASHBURN LAW JOURNAL (WASBURN L.J.) 155, 155 (2006).

audience of legal academics and practitioners has translated in the adoption of questionable practices in the article selection process. For instance, the alleged use of an author's previous publishing history or his/her law school affiliation as proxies for article quality.⁵ The same goes for the weight given to the length of the contribution and the wealth of footnotes included in a paper. The use of similar proxies, however, leaves room for criticism that editors fail to engage with the substantive issues which submitted articles touch upon, making the selection process ineffective and a little "opaque."

In this respect, European legal scholarship has long been a rather amused – yet distant – spectator, being dominated by the presence of peer-reviewed journals. In recent years, however, things have started to change. Since the birth of the Irish Student Law Review in 1991, student-edited law journals have started to grow in England, Ireland, Germany, the Netherlands and, most recently, in Italy.⁶

In view of the foregoing, the purpose of this Article is twofold. First of all, it attempts to try and "flesh out" what are the educational advantages of student-edited law reviews. For this purpose, particular attention is devoted to the importance of an experience as law review editors for a particular segment of legal professionals, namely academics. Secondly, a solution is proposed to try and enhance the educational value of an editorial experience for students, while simultaneously translating it into an added value for the rest of the legal community, by disclosing new opportunities for the improvement of the quality of legal scholarship.

For this purpose, Part B first of all outlines the role of law reviews as part of the legal education process and the faculty selection mechanism in the United States. Following this outline, it is then considered what repercussions the symmetric birth of student-edited publications in Europe may yield in the same areas of legal education and faculty selection. Part C presents a view on the possible new role of student-edited publications within legal scholarship, in response to recent criticism engendered by the growth of law reviews in the United States.⁷

⁵ See 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 LAW REVIEW (SOUTH CAROLINA L. REV.) 175 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002640 (last visited 15 April 2008); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results From a National Study*, 71 ALBANY LAW REVIEW (ALB. L. REV.) (forthcoming 2008), available at <http://ssrn.com/abstract=988847> (last visited 15 April 2008).

⁶ For a list of the existing European student-edited legal publications, useful for appraising the size of this new phenomenon, see, *infra*, Appendix.

⁷ See, e.g., Karen Dybis, *100 Best Law Reviews*, THE NATIONAL JURIST 22 (February 2008) (contending 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).

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 was able to gather support, in order to avoid some of the problems currently experienced in the United States. A "European way" that would take advantage of the current preponderance, in Europe, of peer-reviewed journals as opposed to student-edited ones.

More specifically, student-edited law reviews could be seen as a complementary resource to peer-reviewed journals in Europe, rather than a substitute, by offering a venue of "first publication," possibly in the form of student-edited working paper series. It would involve a first round of feedback, both formal and substantial. After this initial "chisel" work, published papers could then be submitted to peer-reviewed journals, in an attempt for authors to obtain additional substantial feedback, for the further improvement of the article at issue.

B. Law Reviews and the Ripening of Legal Scholars

I. 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."⁸

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."⁹ 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."¹⁰ Nowadays, the most comprehensive database of English-language legal periodicals,¹¹ maintained by John Doyle,

⁸ Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS LAW JOURNAL (HASTINGS L. J.) 739, 741 (1985).

⁹ *Id.*, 778-79.

¹⁰ See, *supra*, note 1, 662.

¹¹ 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).

librarian at Washington & Lee Law School of Lexington, Virginia, lists 614 student-edited journals, both general and specialized, 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."¹² Educational benefits which may be summarized as follows:

[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.¹³

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,

¹² See, *supra*, note 8, 779.

¹³ 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 HARVARD BLACKLETTER JOURNAL (HARV. BLACKLETTER J.) 59, 65 (1995); See *supra* note 1, 20: A Note generally "analyzes a recent case that has either solved or created a legal problem."; See *supra* note 1, 19: 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."

improving their ability to work with others, and teaching them substantive law.”¹⁴ 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.”¹⁵

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 interest to legal-minded individuals. These publications unquestionably serve as the legal community's primary "marketplace of ideas.”¹⁶

II. Law Reviews and Faculty Education in the United States

In a critical recollection¹⁷ of the manner in which faculty recruiting takes (or used to take)¹⁸ place in the United States, professor 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.¹⁹

¹⁴ Max Stier *et al.*, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 *STANFORD LAW REVIEW* (STAN. L. REV.) 1467, 1491 (1992).

¹⁵ *Id.*

¹⁶ See, *supra*, note 13, 59.

¹⁷ See, *supra*, note 3. *Id.*, 384: 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.”

¹⁸ Considering the referenced work was written more than a decade ago.

¹⁹ See, *supra*, note 3, 370-71.

Despite the critical and analytical thinking skills which such a process may help students develop,²⁰ he seemed – however – to be rather sceptical in regard to the actual scholarly “fitness” of graduates educated in the law school system. In particular, his scepticism emerges from this statement regarding the way faculty recruitment takes place, criticising, “the 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. . . . 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.”²¹

In other words, it seems that academics hired right out of law school are simply unfit to take on the burdens of scholarly discourse. While this criticism goes to the heart of the way in which faculty recruitment is carried out, it is respectfully submitted that the picture it appears to draw of American legal education is overly dark, particularly when compared to legal education as it usually takes place in continental Europe.

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, we 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 more balanced reading of professor Gordley’s view, it could then 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, learn skills which would otherwise be learned only later on in their scholarly career; as exemplified by the fact that:

²⁰ See, *supra*, note 13.

²¹ See, *supra* note 3, 380 (emphasis added).

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.²²

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.

III. Law Reviews and Faculty Education in Europe

It is a practice in European or, more accurately, Continental European²³ faculty recruitment that a particular relationship be established with a mentor, called *Doktorvater* or *Habilitationsvater* in Germany,²⁴ *Maestro* in Italy.²⁵ In Germany, in particular, this is probably due to the very time-consuming training required for a Doctorate and a further period of study called *Habilitation* that brings scholars in their late thirties ready for appointment.²⁶ In Italy, instead, although a Doctorate is all that is generally required to obtain a professorial appointment, it is the *maestro* who ultimately determines whether a certain “pupil” will or will not achieve tenure.²⁷

²² See, *supra* note 1, 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.”).

²³ The authors' personal experience and research has been limited to Germany and Italy. Therefore, whenever the term “Continental European” is used to refer to a particular system of legal education or faculty recruitment, a reference should be read to Germany and Italy only. While, of course, this does not exclude that similar situations may arise in other contexts, the research and experience in our possession do not allow us to draw any broader conclusions.

²⁴ Jürgen Kohler, *Selecting Minds: The Recruitment of Law Professors in Germany*, 41 AM. J. COMP. L. 413, 419-20 (1993).

²⁵ Ugo Mattei & Pier Giuseppe Monateri, *Faculty Recruitment in Italy: Two Sides of the Moon*, 41 AM. J. COMP. L. 427, *passim* (1993).

²⁶ See, *supra*, note 24.

²⁷ See, *supra*, note 25, 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.”).

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.²⁸ Continental law students are generally expected to study their textbooks and listen to lectures that do not generally require them to participate actively, but merely to listen and take notes for later study at home. The lack of student participation, in particular, is translated in very limited writing requirements: rarely do students have to write papers on particular topics and to later engage in a proper discussion thereupon. Besides writing, the conference-like nature of lectures in continental Europe also gives a more limited space for oral discussion, if any at all, than is available to American students, for instance, through the use of the Socratic method.²⁹

It can then be inferred that, on a pedagogical level, the narrower space³⁰ for teacher-student interaction (both on a written and an oral level) likely translates in more limited development – in comparison to students educated in the U.S. – of those argumentative abilities which law students will need most: lawyers write and argue, and so do judges and professors.

With particular reference to written legal argument, the doors to its theory and practice generally open (for Continental European students interested in making legal scholarship their profession) as one undertakes a further academic degree (usually a Doctorate), under the supervision of a *maestro* or *doktorvater*.³¹ While, of course, this leads to the

²⁸ See Oliver Unger, *ERAS-MUSS-NICHT*, Iss. 2/Art. 9, FREIBURG LAW STUDENTS JOURNAL (FREIBURG L. STUDENTS J.) 7 (2008) (remarking the higher level of interaction that a German law student on exchange at Oxford enjoys because of the lack of the *Lehrstuhlhierarchien* (German professorial hierarchy)).

²⁹ See, e.g., Elizabeth Garrett, *The Socratic Method*, http://www.law.uchicago.edu/socrates/soc_article.html (stating how the purpose underlying the use of the Socratic method is "to learn how to analyze legal problems, to reason by analogy, to think critically about one's own arguments and those put forth by others, and to understand the effect of the law on those subject to it.").

³⁰ Not *all* teacher-student interaction is excluded in the Continental education system. In Italy, for instance, all students are required to produce a written dissertation – that may even amount to the length of a small book – and to later defend it in the degree-awarding ceremony. However, it is our opinion that a single big instance in which students are to complete a substantial written assignment (particularly if compared to the time students spend in conference-like lectures over the course of their education) still translates in lower writing abilities for fresh law graduates, in comparison to American ones. This, for the same reason that running a marathon once in a lifetime (and without previous training) still makes one a worse runner than someone who trains regularly, albeit on shorter distances. It is only practice that "makes perfect."

³¹ See, *id.*, 435 (mentioning that the publication of a – so to say – disciple's *first papers* takes place under the supervision of a *maestro*).

appointment of professors that have been able to benefit from the necessary time and – most importantly – guidance to become mature scholars,³² it exacerbates the detachment of ordinary law students from legal writing and publication.

A clear symptom of this detachment is found with law practitioners in countries where such a “segregation” exists. These practitioners are generally disadvantaged in obtaining teaching positions.³³ 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,³⁴ in a manner that exacerbates the segregation between professors and “the rest” regarding 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, a 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 papers that will have an impact.

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 in Continental Europe as well. 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 a 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 was, at least partially, true.³⁵

³² Ugo Mattei & Pier Giuseppe Monateri, *Foreword: The Faces of Academia*, 41 AM. J. COMP. L. 351, 352 (1993) (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.”).

³³ 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*.”).

³⁴ See, *supra*, note 1, 660, 693 (Highlighting the international uniqueness of the American law review system, implying that peer-reviewed journals generally prevail elsewhere).

³⁵ See, *supra*, note 33, 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

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, at least in Continental legal scholarship, are used to dealing with complexity and high doctrinal elaboration, students (and practitioners alike) generally require cleaner arguments, whose logical flow be apparent to the reader. In this respect, we believe that the onset of different student-edited publication venues where students 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 pay attention to what Universities have to say, thereby bridging one often controversial gap between theory and practice.³⁶

C. Re-Thinking the Role of Student-Edited Student Publications

I. The Limits of Law Reviews in the U.S.

While the introduction of American-style student-edited law reviews may prove beneficial for the European legal community in general, endorsement of this phenomenon cannot come without acknowledging the previous considerations of the drawbacks of the student-edited law review system and of possible alterations that may make it work more effectively for the European scholarly community.

First of all, it has been submitted that while the great educational value of law reviews for student editors may justify their maintenance, it might have done so despite the fact that offer exceeded demand.³⁷ This has, in turn, caused some commentators to observe how

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.”).

³⁶ This is the spirit which animated the creation of the first law reviews in the United States; see, *supra*, note 8, 741.

³⁷ Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NORTHWESTERN UNIVERSITY LAW REVIEW (NW. U. L. REV.) 22, 24 (1956) (“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.”) (

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.³⁸

Additionally, the incredible amount of submissions top U.S. law reviews receive sometimes forces editors to consider other extrinsic data as a proxy for an article's quality.³⁹ In this respect, an author's previous publication history, or the law school he/she is affiliated with may sometimes doom an article to rejection at a highly ranked law review.⁴⁰ This - considering the role that publication in top-tier venues plays in the professor appointment and tenure process - does further contribute to making "the rich richer, and the poor poorer": teachers being appointed at lower-ranked law schools may find it harder to make their voices 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, when faced with multiple rejections, authors are left wondering whether their long-awaited work has been rejected because the topic was not of interest, or because the volume was full or, in the worst case scenario, because it lacked academic rigour.⁴¹

It is this last point which, we 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.

³⁸ See, *supra*, note 7, 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.").

³⁹ See, *supra*, note 5, 5. For some sample figures, see Eugene Volokh, Questions for Law Review Articles Editors, 12 September 2005, available at <http://volokh.com/posts/1126582538.shtml> (last visited Apr. 15, 2008) (respondents to Professor Volokh's blog post speak of 80-100 submissions per week in the "high submission season").

⁴⁰ See Paul L. Caron, What Are Law Review Articles Editors Looking For?, 24 March 2006, available at http://taxprof.typepad.com/taxprof_blog/2006/03/what_are_law_re.html (last visited 15 April 2008) (mentioning the "prestige" of an author's employer as a possible influencing factor for law review editors).

⁴¹ See Bernard J. Hibbits, *Last Writes? Reassessing the Law Review on the Age of Cyberspace*, 71 NEW YORK UNIVERSITY LAW REVIEW (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.")

Eventually, the author feels she/he might have added a bullet to her/his curriculum vitae, by adding one more law review to her/his 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, limited though a certain a journal's circulation may be, this exposes the whole legal 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. This often leads them to make proposals that, on closer examination, prove to be unsound."⁴² 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, but 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 the authors themselves, cutting out the middle man.⁴³ The same author further proposed that, in order to prevent web-published works from becoming 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."⁴⁴ Today, this seems to us the role that has gradually been achieved by scholarship repositories such as, for instance, SSRN and Bepress.

⁴² Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 440, available at <http://www.law.ucla.edu/volokh/testsuites.pdf> (last visited 15 April 2008).

⁴³ See, *supra*, note 41, 667-88.

⁴⁴ *Id.*, 675.

The drawback in such repositories, however, is that no substantive quality control is performed.⁴⁵ True, “the current law review system operates with minimal quality control in the generally accepted (‘peer review’) sense of that term.”⁴⁶ In our view, however, this is not a sufficient argument to dismiss the need for “quality control” altogether.⁴⁷

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 to be 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.”⁴⁸

⁴⁵ As Hibbits himself recognizes; see, *id.*, 671-72.

⁴⁶ *Id.*

⁴⁷ In Bernard J. Hibbits, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (1996), professor 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, particularly a relatively young one (*e.g.* a student – postgraduate or doctoral –, a young associate, a newly-hired professor), who was confronted with the option of publishing a work in progress in order to obtain feedback, but to do so with the risk of exposing himself/herself to the academic community’s possibly negative judgment, which could chill her/his incentive to publish altogether (an interesting hint to the problem is done by Dan Markel, *Whither SSRN?*, 19 January 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/01/whither_ssrn.html (last visited 15 April 2008)). The intermediate solution consisting in the partial substitution of law reviews with student-edited working paper series (see, *infra*, p. 1140) 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.”

⁴⁸ See Posting by an anonymous Editor-in-Chief on The Volokh Conspiracy, <http://volokh.com/posts/1126582538.shtml#19143> (13 September 2005).

D. A Proposal for the American Law Review System

In light of the above considerations, a new proposal for change can be made. Not a “drastic one” that would require doing away with law reviews but, on the contrary, one that enhances 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 for the 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.⁴⁹

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, not reduce the number of journals, substituting some with online working paper series? A first experiment thereof (albeit in Europe) already exists, and it is Bocconi School of Law Student-Edited Papers.⁵⁰

These are the basic functioning rules that could govern such publication venues:⁵¹

- (a) substantial review of submitted contributions, as well as supplying constructive feedback to authors;⁵²
- (b) no more bluebooking: this would enhance the time editors actually spend thinking about the intellectual merits of

⁴⁹ See, *supra*, note 41, 640.

⁵⁰ Available at www.bocconilegalpapers.org (last visited 23 June 2009). 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.

⁵¹ 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.

⁵² Cf. Ronen Perry, *De Jure [sic] Park*, 39 *CONNECTICUT LAW REVIEW CONNTEMPLATIONS* (CONN. L. REV. CONNTEMPLATIONS) 54, 58 (2007) (discussing the similar role of students in some Israeli law reviews, co-edited by students and professors), available at www.conntemplations.org/pdf/perry.pdf (last visited 8 May 2009).

what they decide to publish, while disregarding a practice whose usefulness is, to say the least, debated;⁵³ (c) the possibility for authors to amend the accepted works even after publication; and (d) non-exclusive license, allowing later republication in one of the higher-ranked journals.

As to the first rule, it could be objected that students may lack the ability to offer pervasive or truly useful commentary. On the contrary, we feel it is possible 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 engaging critically with their study materials in the course of preparation for any exam, trying to discover connections and uncovering contradictions.⁵⁴

More specifically, the following stipulated definition could be adopted to clarify the meaning of "substantial" review: a scrutiny of the article's coherence, logical flow and – although limited to the capabilities of a student – academic soundness.[U1] This is a crucial aspect for two reasons: on the one hand, feedback on these issues is what is most likely to "turn around" a paper's quality. Secondly, students are not confined to the work of a copy editor, checking footnotes and proofreading for mistakes, something which hardly requires any legal knowledge. Instead, they become able to engage their specific legal knowledge in the reviewing process: pointing out potential weaknesses in an author's argument which they, as "apprentice legal professionals", are able to spot.

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

⁵³ See, *supra*, note 1, 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, 12 February 2008, available at <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/too-many-law-re.html> (last visited 15 April 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.legaleft.org/> (last visited 31 July 2008).

⁵⁴ Henry H. Perritt Jr., *Reassessing Professor Hibbitts's Requiem for Law Reviews*, 30 AKRON L. REV. 255, 256-57 (1996) ("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.").

existing scholarship.”⁵⁵ This, however, could only enhance the function of scholarly articles as reference material for practitioners and judges.⁵⁶

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 of 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 the process of article drafting,⁵⁷ affording authors the opportunity to better focus on the merits of the works produced by them, with the possibility of re-publishing improved works in actual journals, that could then properly serve the role of providers of quality legal information.

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”⁵⁸ bring to the legal community? There are probably enough last-tier law reviews, which is why the proposal of a venue to publish works - with the “promise” of revising them and improving them further - might actually do the legal community 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 cases 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

⁵⁵ See, *supra*, note 5, 4.

⁵⁶ *Id.*; see also, *supra*, note 1, 24 (“Another primary purpose of American law reviews is their function as reference material.”).

⁵⁷ 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.

⁵⁸ 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*, 1 September 2005, 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796264#PaperDownload (last visited 15 April 2008).

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 of taking some time to give their work a second thought.

Finally, it is interesting to notice how similar experiments have already been undertaken. To our knowledge, *Unbound – Harvard Journal of the Legal Left* expressly abides by the first two of the suggested principles: “*Unbound* seeks to undo the traditional hierarchies of the student-edited legal journal. To that end, writers are responsible for their own citations, and student editors will provide substantive feedback on the arguments made. We’re interested in intellectual interaction – not housekeeping for authors.”⁵⁹

E. A European way to Student-Edited Legal Publications?

The foregoing proposal with respect to the United States may actually have an even stronger impact and feasibility in the European context. 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 a recent establishment, but they are also mostly online-only publications.⁶⁰

Without student-edited publications, 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

Should the former, however, be complemented by student-edited publications, 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.

⁵⁹ UNBOUND – Submit at, http://www.legalleft.org/?page_id=6.

⁶⁰ Which, for a widespread and – probably – unjustified bias, may often be regarded as less influential.

⁶¹ See, *supra*, note 41, 653.

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

The lack, until recently, of student-edited publications in Europe has translated in the situation whereby the most regarded journals (*i.e.* journals with the highest impact factor and total cites) are peer-reviewed.⁶³ This, coupled with the fact that "peer-review" is often associated with a higher threshold of substantive revision,⁶⁴ make it reasonable to infer that a peer-reviewed article might, at least with respect to European legal publications, be regarded as more authoritative than an article published elsewhere.⁶⁵ 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,⁶⁶ 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 the creation of both 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: (a) the maintenance of few, very authoritative and select publication venues, since a preliminary screening would be carried out by student journals, thereby

⁶² See, *supra*, note 1, 693 (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.").

⁶³ See, Law Journals: Submission and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (select "European Law" from the first scroll-down menu and "Non-US" from the one below it; tick "2008" in the IF and "Comb" columns on the right-hand side and press the "Submit" button) (displaying the ranking of journals publishing on European law topics: the first student-edited journal, the HANSE LAW REVIEW, is at place 17).

⁶⁴ See, Nancy McCormack, *Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind and Double-Blind Reviewing*, 101 LAW LIBRARY JOURNAL (L. LIB. J.) 12-13, (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339227 (last visited 8 April 2009).

⁶⁵ A hint in this direction stems from the fact that many legal academics tend to clearly highlight, in the respective publication records, whether a particular article appeared in a peer-reviewed or a student-edited journal.

⁶⁶ See, *supra* p. 1140.

allowing faculty-edited publications not to become engulfed with submissions;⁶⁷ (b) the creation of powerful educational opportunities for law students, who could really gain an insight on tomorrow's innovation in its making; (c) the introduction of "publication tools" (again, student-edited law journals) to both provide visibility to the works of authors generally left out from mainstream academia, and simultaneously provide feedback for the later improvement of such works for the 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" of legal scholarship, possibly offering a model for the rest of the world.

⁶⁷ Despite the possible increase in scholarly production that may follow the onset of student-edited publications.

F. Appendix: European Student-Edited Legal Publications

Czech Republic

- COMMON LAW REVIEW (est. 2001), available at <http://review.society.cz/index.php> (last visited 23 June 2009)

England

- CAMBRIDGE STUDENT L. REV. (est. 2003), available at <http://www.srcf.ucam.org/cslr/> (last visited 15 April 2008)

Germany (publishing in English)

- BUCERIUS LAW JOURNAL (est. 2007), available at www.law-journal.de (last visited 15 April 2008)
- FREIBURG LAW STUDENTS JOURNAL (est. 2007), available at www.freilaw.de (last visited 15 April 2008)
- GÖTTINGEN JOURNAL OF INTERNATIONAL LAW (est. 2009), available at http://gojil.uni-goettingen.de/joomla/index.php?option=com_wrapper&view=wrapper&Itemid=73 (last visited 5 April, 2009)
- HEIDELBERG STUDENT LAW REVIEW (est. 2004), available at www.studzr.de (last visited 15 April 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 15 April 2008)
- MARBURG LAW REVIEW (est. 2008), available at <http://law-review.de/> (last visited 5 April 2009)

Ireland

- CORK ONLINE LAW REVIEW (est. 2002), available at <http://www.mercuryfrost.net/colr/index.php> (last visited 15 April 2008)
- GALWAY STUDENT LAW REVIEW (est. 1998), available at <http://www.nuigalway.ie/law/GSLR/> (last visited 15 Apr 2008)
- IRISH STUDENT LAW REVIEW (est. 1991), available at www.islr.ie (last visited 15 April 2008);
- UNIVERSITY COLLEGE DUBLIN LAW REVIEW (est. 2001), available at <http://www.ucdlawreview.com/archive.htm> (last visited 15 April 2008)

Italy

- **BOCCONI SCHOOL OF LAW STUDENT-EDITED PAPERS (est. 2008)** (a continuation of the ITALIAN LEGAL SCHOLARSHIP UNBOUND WORKING PAPER SERIES), available at <http://www.bocconilegalpapers.org> (last visited 5 April 2009)

Netherlands/Germany

- **HANSE LAW REVIEW (est. 2005)**, available at www.hanselawreview.org (last visited 5 April 2009). 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).

