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Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption Commentary

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Commentary

Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption

by Ronald J. Krotoszynski, Jr.*

For some time, multiple constituencies within the legal community have waged a pitched battle over the direction of legal scholarship in the United States. Historically marginalized groups within the legal academy have demanded—and in some measure have received—voice through the nation's preeminent national law reviews. Although doctrinal scholarship continues to fill the pages of many law reviews, persons of color, women, and gays and lesbians have offered alternative visions of the scholarly project, establishing a beachhead within the mainstream of the American legal academy. Providing a variety of postmodernist critiques, these groups have challenged more traditional legal scholars to re-examine what counts as scholarship and to consider the possibility that alternative conceptions of the scholarly project possess both utility and quality.

This evolution in legal scholarship has not been without controversy. Just as the Legal Realists faced opposition from those wedded to the notion of legal science,[1] so too postmodernist legal narratives have been subjected to attack and vilification.[2] At the moment, the ultimate outcome of the

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1. *See* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 539-40 n.254 (1988) (describing the contemporaneous dismissal of legal realism by some academics on grounds that it reduced law to a mere collection of judicial subjectivities).

2. *See, e.g.*, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) (arguing that the members of the Critical Legal Studies ("CLS") movement should be excluded from law schools because, in his view, they espouse a dangerous and misguided form of nihilism). For a discussion of the genesis of the nihilism rap against CLS and related approaches to legal scholarship, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). *Cf.*

conflict has not yet been determined. Although a perusal of a recent issue of the *Current Index to Legal Periodicals* immediately demonstrates that "outsider" scholarship is becoming increasingly mainstream,[3] some prominent academics and jurists openly call for a counter-revolution.[4] In sum, an ongoing *Kulturkampf*[5] presently exists within the legal academy regarding both the direction and meaning of legal scholarship.

Conflicts inevitably breed casualties and sometimes even atrocities. In my view, a recent volley fired by Professor Dennis W. Arrow should be deemed a war crime.[6] Open and honest debate about the wisdom of nontraditional legal scholarship is both desirable and healthy. From time to time, academics from both sides of the divide can and should raise the "Admiral Stockdale" question: "Who are we, and why are we here?" Ad hominem attacks, on the other hand, do not represent a form of constructive engagement. It seems to me that the contribution to the debate offered by Professor Arrow constitutes the latter rather than the former.

Discerning readers must immediately have wondered what had transpired simply from the cover of the December 1997 issue of the *Michigan Law Review* ("MLR"). The presence of four sets of quotation marks around the word "Article" suggested rather strongly that something strange was afoot. After all, how could such an obvious glitch make it past the MLR's editorial staff? Rather than an error, it constituted a kind of foreshadowing device.

For reasons that largely escape me, the MLR editorial board dedicated over two hundred pages (228 pages, to be exact) to a clever prank.

Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051, 1054-56, 1066-72 (1998) (arguing that too many critics of nontraditional legal scholarship fail to engage the ideas set forth in such works and instead rely upon ad hominem attacks leveled against the entire genre).

3. Although this observation is anecdotal, objective evidence also supports the existence of this trend. A recent LegalTrac search for the terms "post-modern," "deconstruct," "deconstruction," or "deconstructing," yielded well over 200 hits. Even Professor Richard Delgado, a persistent critic of institutional resistance to "outsider" scholarship reports that "[o]utsiders currently have a substantial presence in 'elite' law reviews." Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing*, 140 U. PA. L. REV. 1349, 1352 n.15 (1992). Moreover, "most civil rights writing published in top law reviews these days is written by women and minorities." *Id.* at 1353.

4. *See, e.g.*, DANIEL A. FARBER & SUZANNE SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989); Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

5. *Cf.* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."). The *Kulturkampf* was Germany's "official attempt to create a homogeneous national culture" in the late nineteenth century. HELMUT WALSER SMITH, GERMAN NATIONALISM AND RELIGIOUS CONFLICT: CULTURE, IDEOLOGY, POLITICS, 1870-1914, at 8 (1995).

6. *See* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

Perhaps the articles staff, tiring of a steady diet of Foucault, Derrida, or, for the less Eurocentric, domestic deconstructionists like Stanley Fish,[7] decided to signal its sense of frustration with the collective output of the legal academy.

Giving the student editors the benefit of the doubt, perhaps they considered *Pomobabble* a logical continuation of the project that the MLR began in 1992 with its publication of Chief Judge Harry T. Edward's *The Growing Disjunction Between Legal Education and the Legal Profession.*[8] In this widely read and highly controversial article, Chief Judge Edwards argued that U.S. law schools are in danger of losing sight of their core institutional mission: the preparation of lawyers for practice and the indoctrination of young lawyers as members of a profession.[9] Legal scholarship, according to Judge Edwards, should bear some relationship to this core mission, by (at least potentially) being of some use to lawyers and judges.[10]

In 1993, the MLR continued to contribute in a constructive way to the ongoing debate about the nature of legal education and legal scholarship by publishing a symposium dedicated to legal education.[11] This issue featured articles and essays by prominent legal academics, judges, and practitioners.

Fast forward to 1997 and Professor Arrow's *Pomobabble.* In *Pomobabble*, Professor Arrow parodies the new postmodern constitutional jurisprudence by mocking both the style and substance of such scholarly endeavors. There are fewer than three dozen pages of full text, and virtually all of these consist of dictionary-style definitions. The vast bulk of the article consists of extremely long, seemingly stream-of-consciousness style footnotes, with a great many literary references.[12] To put the matter simply, imagine Hunter S. Thompson as a professor of constitutional law.[13] Now imagine a law review article by Hunter S. Thompson after

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7. Professor Fish merits at least two mentions in *Pomobabble. See id.* at 470 n.40, 522. n.29. For an example of Professor Fish's legal scholarship, see Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

8. *See* Edwards, *supra* note 4.

9. *See id.* at 35-42, 57-66.

10. *See id.* at 42-57. As he put it, "In short, I believe that 'practical' scholars serve our whole legal system: judges, legislators, and administrators, as well as practitioners, both private and public." *Id.* at 56.

11. *See* Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

12. *See, e.g.*, Arrow, *supra* note 6, at 507 n.27, 585 n.39, 590-91 n.39 (citing Conrad); *id.* at 461 n.1, 640-41 n.46 (citing Orwell); *id.* at 546 n.30 (citing Hemingway). On the other hand, the author does provide amusing headings for his endless footnotes. *See* Arrow, *supra* note 6, at 526-38 (featuring in the following order these headings: "'We'?," "Professor Schleppfuss?," "France?," "Serotonin?," "Introspection?," "Diaries?," "Sunshine?," "Prozac?," "Life?," "Reality?," "Do You Like Dada?," "Horror?," "Equality?"). This is, at best, a small offsetting consolation.

13. The possibility has a certain sitcom kind of appeal: *Fear and Loathing in Las Vegas* meets Yale Law School. *Cf.* HUNTER S. THOMPSON, GENERATION OF SWINE: TALES OF SHAME AND

a really bad trip. That hypothetical article would probably look a lot like *Pomobabble*.

Most readers will get the joke—some legal scholarship has devolved so far into deconstructionist or postmodernist jargonism as to no longer be coherent. Moreover, legal academics from a variety of ideological backgrounds are falling prey to the siren song of "postmodern newspeak."[14] The trend is reasonably clear and Professor Arrow is perfectly entitled to bemoan this turn of events. His satire is creative, witty, and often biting.[15]

That said, if, as Shakespeare once wrote, "brevity is the soul of wit,"[16] then *Pomobabble* is not very funny. Shakespeare's aphorism identifies a truth about comedy: as the length of a comedic exercise increases, the payoff associated with the work must also increase proportionately. Hence, a stand up comedian will often rely on a litany of one-liners rather than tell a single hour long story. From this perspective, one might fault *Pomobabble* as bad comedy; that is to say, the length of the enterprise does not bear a reasonable relationship to its value as humor. A reader who undertakes twenty pages of *Pomobabble* (*i.e.*, approximately ten percent of the total work) is apt to reap as much comic or satiric value

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DEGRADATION IN THE 80S (1988) (containing various and assorted materials suggesting that Mr. Thompson probably would not fit in very well as a law professor—even at Yale).

14. *See* Arrow, *supra* note 6, at 473 n.12 (citing Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995)). Professor Arrow's point is, at least arguably, on the mark. Even nonmembers of the postmodernist scholarly community have self consciously adopted rhetorical devices championed by so-called outsider scholars. *See, e.g.*, Farber & Sherry, *supra*, at 879, 884 (using postmodern nomenclature and narrative forms of argument in support of their thesis that the "radical constructivist" critique of merit based selection schemes has anti-Semitic implications); *see also* William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1727-31 (1985) (presenting a fictionalized narrative set at the Constitutional Convention of 1787). Professors Farber, Sherry, and Van Alstyne are far from members of the CLS choir. *See* FARBER & SHERRY, *supra* note 5; Delgado, *supra* note 3, at 1355-56; *see also* Farber & Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

15. I particularly liked Professor Arrow's citation to *You Are Special*, written by Fred Rogers (aka "Mr. Rogers"). *See* Arrow, *supra* note 6, at 553 n.33. Coming in a close second was Arrow's reference to the Oklahoma City telephone book. *See id.* at 471 n.10. It boggles the mind to consider the effort that the second year members of the MLR expended cite checking Arrow's article. Notwithstanding the profoundly Sisyphean nature of the task, a very reliable MLR source has informed me that, in point of fact, the second year staff did source gather and cite check *Pomobabble*—the Oklahoma City telephone book and *Barney's Imagination Island* included. Karl Llewellyn would weep. *Cf.* KARL N. LLEWELLYN, THE BRAMBLE BUSH 189 (1960) (explaining that normally a "rule follows where its reason leads; where the reason stops, there stops the rule"). The traditional reasons associated with cite checking sources simply do not apply to *Pomobabble*. No one is likely to rely on the veracity of the propositions asserted, nor are readers likely to rely on the footnote source materials without independently checking the sources. What's more, the occasional spelling error, misquote, or similar glitch could simply be written off with a smile as "part of the fun." In my view, the task of cite checking *Pomobabble* more befits the pages of a Kafka novel than the lived reality of a national law review staff.

16. William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act II, sc. II.

from the "article" as someone who reads 228 pages of *Pomobabble*. Given this state of affairs, a strong argument can be made that it is not possible to justify *Pomobabble*'s girth: the gag runs dry well before the article concludes.

Perhaps the editors thought that the length of the article enhanced the strength of their "statement." Certainly, running a book-length prank does reflect a stronger sense of mission than running a shorter and more obvious "humor" piece. That said, the opportunity cost of making such a statement seems far too high to pay, at least if the editors of the MLR view their publishing labors as a worthwhile enterprise.[17]

It is perhaps understandable that the MLR would find sufficient merit, or utility, in Arrow's article to justify according it a few pages. The fact of the matter, however, is that the MLR afforded Arrow's work the better part of an entire issue. Do pages in national law reviews come so cheaply that a political prank (albeit a very clever one) merits 228 pages? The entire MLR symposium on legal education consumed 298 pages of text; Chief Judge Edwards's provocative initial volley totalled a svelte forty-four pages. One does not have to question the spirit in which the MLR elected to run *Pomobabble* in order to question the resource allocation that publishing this piece in the "Director's Cut" version represents.[18]

Going beyond relatively easy questions regarding the opportunity cost of the space allocation, there is a larger question that the MLR's editorial decision raises: Is there so little scholarship of merit available to the MLR that allocating an entire issue to *Pomobabble* represents a reasonable editorial decision? The articles editors must have resolved this question affirmatively, otherwise they would have allocated the space to something else or required Professor Arrow to put his magnum opus on Slim-fast. This is a profoundly depressing statement for a national law review to make to the professorate.

As winter ebbs and spring flows, younger (read: untenured) faculty across the United States race to complete works in the hopes of presenting their wares to the new editorial boards just assuming their year-long stewardship of the nation's law reviews. Many law professors work long hours and weekends, trying to complete works before the crush of

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17. If they do not view legal scholarship as having any intrinsic value, perhaps they should consider the wisdom of abandoning the enterprise. If the choice is truly between publishing pomobabble and publishing nothing, the more honorable course of action would be to publish nothing.

18. *Cf.* Keith Aoki & Garrett Epps, *Dead Lines, Break Downs & Troubling the Legal Subject or "Anything You Can Do, I Can Do Meta,"* 73 OR. L. REV. 551 (1994) (using a comic book format to note the difficulties that can sometimes arise between student editors and non-traditional authors, gently parodying alternative forms of scholarship, and, perhaps most importantly, offering up a kind of visual paean to the Grateful Dead). If a picture is worth a thousand words, perhaps Professor Arrow might take a lesson from Professors Aoki and Epps.

examinations and the pleasures of a summer associate's existence take articles editors' minds from legal scholarship to exam panic followed by the relatively indolent state of summer associatedom.[19]

Between January and April 1998, I read nearly a dozen law review articles by colleagues from law schools across the country. None of these articles takes up Foucault, Fish, or Derrida. All of them, it seemed to me, spoke to issues that were relevant to judges, practitioners, and other legal academics. Legal scholarship is not limited to "pomobabble." Indeed, even within the field of constitutional law, pomobabble is the exception rather than the rule.[20] To the extent that the MLR's editorial decision to publish *Pomobabble* reflects a contrary inference, I think that it is quite mistaken. Moreover, to the extent that pomobabble finds currency in the pages of elite national law reviews, it is as much a function of the tastes and sensibilities of student law review editors as it is of constitutional law scholars.[21]

One could take *Pomobabble* as a particularly cynical exercise; as between editing and publishing 228 pages of gibberish and 228 pages of something else, there is no reason to prefer the latter to the former. In some sense, this argument would go, all contemporary legal scholarship constitutes pomobabble and Professor Arrow is to be praised for his candor. Given that the emperor has no clothes, Arrow, like the young boy in the children's tale, should be lauded for stating openly what we all

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19. Having served as an articles editor on the *Duke Law Journal* and also having served as a summer associate in four law firms over the course of three summers, I have relevant first-hand knowledge on this issue. Were I to provide a narrative account of my experiences in this footnote, however, I would risk proving Professor Arrow's point.

20. *See, e.g.*, Lynn Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). Even scholars identified with the CLS movement often write articles that speak to general audiences. *See, e.g.*, Mark Tushnet, *Policy Distortion and Democratic Deliberation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997). This is not to say, however, that so-called "outsider" scholarship lacks merit simply because it is not directed at majoritarian tastes or sensibilities. *See* Delgado, *supra* note 3, at 1349 (tracing Critical Race Theorists and Feminist Legal Scholars' rise from marginalized outsider scholarship to prominence in top law schools and law reviews and reporting on horror stories associated with the early years of postmodern legal scholarship); Jean Stefancic & Richard Delgado, *Outsider Scholars: The Early Stories*, 71 CHI.-KENT L. REV. 1001 (1996) (surveying the rise of outsider scholars in law reviews). *But cf.* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (describing the CLS movement as a form of "nihilism" and urging that the "nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school").

21. In fairness to the student editors, there is undoubtedly some relationship between the scholarly tastes of the professorate at a particular law school and the editorial policies of the student editors. *See* Edwards, *supra* note 4, at 38-42, 61-64; Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132-35 (1995).

secretly know to be true. If this argument is correct, I must rethink my professional commitments.

At the risk of appearing terminally naive, I have always assumed that legal scholarship, in whatever form, had as its object influencing the direction of the law—ideally by moving judges, lawyers, legislators, and bureaucrats to rethink or reconsider a particular problem. Whether the argument uses doctrinal analysis, tells a story, or musters empirical social science data, the author's objective is to alter the existing legal landscape—to push or pull the law in a particular direction.[22]

Most law review articles will fail in this effort and most law professors expect that their work will go unnoticed. But the improbability of success does not make the effort a waste of time and energy. If probability of success were the sole criterion for evaluating whether to attempt a particular undertaking, most human endeavors would grind to a halt. Millions of people play a variety of sports; most players are mediocre (at best). For every Michael Jordan there are literally millions of hacks whose play brings them no glory or positive attention (much less lucre). For every Mozart, there are thousands of would-be composers whose works are not as pleasing to the ear as they might wish (or believe). Does the fact that most who try will fail make the effort a waste of everyone's time and effort?

In the case of legal scholarship, I think the answer to that question is "no." Even if I knew to a moral certainty that citations to my writings never would grace the pages of the *United States Reports*, I would not cease my labors for even an instant. The cause and effect relationship of a legal scholar's labors is not an exercise in Euclidean geometry or pool hall skill. When a legal academic plants the seed of an idea, whether with a reader or a student, there is no way of knowing what effect it may ultimately have on either the recipient or the larger community. This basic indeterminacy is both the promise and curse of being a legal academic.

A practicing lawyer enjoys the benefit of seeing, usually in relatively linear terms, a cause and effect relationship between her efforts and particular results. A lawyer files an appeal for her client, the court of appeals either grants or withholds relief; perhaps it grants relief based on an

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22. *Compare* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN *passim* (1979) (arguing that Title VII should be read to provide women with legal protection from sexual harassment in the workplace, including "hostile work environments"), *with* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-67, 73 (1986) (adopting Professor MacKinnon's position that Title VII prohibits sexual harassment in private workplaces including claims based on the existence of a "hostile work environment"). Relatedly, the very existence of the *Alaska Law Review* demonstrates the perceived relevance of legal scholarship by at least one state bar association. Although Alaska lacks a law school within its borders, the Alaska Bar Association has made arrangements with the Duke Law School for the publication of the *Alaska Law Review*. Obviously, the bench and bar in Alaska believe that legal scholarship confers tangible benefits on the Alaska legal community.

argument contained in the lawyer's brief. If it does so, the lawyer may take some measure of professional pride in securing through the exercise of her legal skills the result that her client desired. Conversely, if a lawyer fails to convince a judge to hold in her client's favor, the relationship between her efforts and the ultimate resolution of the case also remains true—even if the causal connection is more painful.

Unlike a practicing attorney, a law professor's efforts do not bear immediate fruit. Whether teaching students in a classroom setting or engaging in scholarly activities, a law professor has to place some hope in the ultimate efficacy of her efforts without getting the benefit of actually seeing the relationship between effort and result. That such a relationship even exists is, to a large degree, a matter of professional faith. Nevertheless, the first premise of our enterprise is that what we do matters both to our students and to the larger community in important ways.

With these thoughts in mind, let us return to *Pomobabble*. Not only does the MLR's decision to publish *Pomobabble* in an unredacted form raise serious and troubling questions about the editors' attitude toward legal scholarship, it also raises serious and troubling questions about Professor Arrow's motivations for writing it. Make no mistake, *Pomobabble* represents a major undertaking on his part. It roams across a vast expanse of knowledge, from main-line legal scholarship, to pop culture, to relatively complex theories of language and epistemology. There is some method to his madness (which perhaps explains, at least in part, the MLR's decision to publish the article).

Does Professor Arrow view the time and effort he expended writing *Pomobabble* as well spent? Put differently, is his point that writing *Pomobabble* reflects a use of time and effort that is no more, and no less, legitimate than the time and effort expended on more traditional scholarly efforts? Given the scope of his effort, it is difficult not to reach such a conclusion.[23]

To the extent that the MLR's decision to publish *Pomobabble* reflects a profound cynicism, this cynicism is more than matched by Professor Arrow's decision to author the """"Article"""". In this sense, Professor Arrow's work is a powerful, but sad, statement about the contemporary legal academy and the value of its scholarship. One might ask Professor Arrow if contemporary constitutional scholarship is so awful, why not produce a less esoteric work that demonstrates the potential excellence of

23. By way of comparison, the Journal of Legal Education regularly publishes "humor" pieces. *See, e.g.*, Eric J. Gouvin, *Catty Remarks About Animal Correctness*, 47 J. LEGAL EDUC. 433 (1997). These articles vary in their subject, style, and execution, but never exceed more than a few dozen pages in length and are usually considerably shorter.

an alternative conception of the scholarly project? National law reviews regularly publish works that do not constitute pomobabble.

Perhaps Professor Arrow assumed that efforts spent on a more traditional, doctrinal work would go unnoticed and unrewarded by most preeminent law reviews. Such an assumption would be reasonable, given the elaborately structured hierarchy that pervades the article selection process. An identical article submitted by a person holding an academic appointment at the Yale Law School will probably receive a stronger law review placement than it would if submitted by a person holding an appointment at LSU.[24] Most law review editors do not conduct double blind reviews of submissions and, as a result, submissions by persons from high profile law schools enjoy something of a competitive advantage in the article placement sweepstakes.[25] Chief Judge Richard Posner has argued that "[t]he reputation of the author, corresponding to a familiar trademark in markets for goods and services, is one [criterion], and not the worst."[26] Many law reviews use not only a particular author's reputation as a shorthand, but also use the author's institutional affiliation as a convenient proxy for gauging the probable merit of a submission.

Authors seeking expedited reviews of their articles know all too well the routine. Law reviews invariably ask would-be authors to provide, in the order requested, the following information: name, title of the article,

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24. *See* James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 530-31 (1994) (describing the importance of hierarchy in many law reviews' consideration of authors' manuscripts); *see also* Erik M. Jensen, *The Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 385 (1989) ("To get the stack of manuscripts to a manageable level, editors need some winnowing criterion; credentials, which bear some relationship to the quality of an author's past work, serve that function.").

25. I can report that, as an articles editor at the *Duke Law Journal*, I routinely read submissions from professors at top ten law schools as quickly as possible, on the assumption that an appointment at a top ten law school probably represented an effective proxy for merit. That is not to say that I did not read submissions from other authors, nor is it to say that I unfailingly recommended the publication of articles submitted from professors at elite law schools. I am simply reporting that submissions from professors at elite law schools received more immediate attention than many other submissions. *See* Lindgren, *supra* note 24, at 528, 530-31. Given the tsunami of submissions, attempting to give every submission the same amount of attention would not have been an effective way to approach article selection. *See* Posner, *supra* note 21, at 1133-34. This is, of course, an embarrassing confession for me to make. All editorial decisions should reflect the merit of the particular work in question and not the perceived rank of the author's stationary. *Cf.* The Articles Editors, *A Response*, 61 U. CHI. L. REV. 553, 554 (1994) (arguing that student editors should not rely on "credentials rather than merit" but also observing that relying on credentials might not be such a bad thing because "[a]fter all, professors get jobs at elite schools precisely because they are good, original writers").

26. *Id.* at 1133-34. On the other hand, Judge Posner notes that other "dysfunctional" shorthands include "the congeniality of the author's politics to the editors, the author's commitment to gender-neutral grammatical forms, the prestige of the author's law school, a desire for equitable representation for minorities and other protected or favored groups, the sheer length of an article, the number and length of footnotes in it, and whether the article is a 'tenure article' on which the author's career may be riding." *Id.* at 1134.

law review offer in hand, the deadline that the author has received, and the law school at which the author holds an appointment. Plainly, the third and fifth items speak to hierarchy rather than to necessity. Law review editors do not need to know where an author teaches or which law review has offered to publish her article in order to determine the merit of her submission. As a theoretical matter, a submission's merit should stand or fall on the quality of the author's research and writing. The rules of the game strongly suggest, however, that factors unrelated to pure merit (however defined) will play an important role in a given law review's publication decision.

As it happens, Professor Arrow teaches at the Oklahoma City University School of Law.[27] Given the institutional hierarchies associated with the article selection process, Professor Arrow's chances of securing an MLR placement for a doctrinal piece are substantially lower than they would be if he held an appointment at Northwestern.[28] In this respect, Professor Arrow's decision to invest significant effort on *Pomobabble* might be viewed as a prudent allocation of time and energy. Indeed, having cracked the MLR, his chances for publishing subsequent works in top twenty-five law reviews is now significantly enhanced. Although a strong past publication record does not necessarily ensure that a future work will receive a good placement, it does make it more likely that the author's work will get more serious attention, in a shorter period of time, than in the absence of such a record.

I do not have an answer for the problem of hierarchy in the article selection process. Given the practice of multiple submissions, it seems inevitable that student editors at upmarket journals will have to use a variety of shorthands to keep up with their overflowing inboxes.[29]

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27. *See* Arrow, *supra* note 6, at 461 n.2 (reporting that Mr. Arrow is "Professor of Law, Oklahoma City University" and explaining that "not wishing to privilege even my personal (let alone my *relational*) identity . . . over the context of my discourse, I have, in the interests of avoiding crypto-hegemonic behavior, left the traditional identification until this point in the text" (emphasis in original)).

28. *See* Arrow, *supra* note 6, at 461 n.2 (admitting that it was unlikely his article would be published in a top journal (citing THOMAS MANN, DOCTOR FAUSTUS 3-4 (H.T. Lowe-Porter trans., Vintage Books 1992) (1947))); Lindgren, *supra* note 24, at 530. Note also that the hierarchy repeats itself in the citation practices of many authors. An article published in the MLR is far more likely to be read and cited than an identical article published in the *University of Hawaii Law Review*. Indeed, a colleague of mine published his first post-law school scholarly effort in the *University of Hawaii Law Review*; the article is an excellent piece on gay essentialism and the possible intersection of biology and equal protection/substantive due process doctrine. *See* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571 (1996). Without pointing any fingers or naming any names, this article has not been cited with the frequency of other works in the same area, even when the article is, at least arguably, more directly on point than the articles cited. As it happens, I plead guilty to following the same general sort of citation convention. I am much more likely to read and cite an article that appears in the MLR than an article published in the *University of Hawaii Law Review*. Given the abundance of scholarly outlets, perceived rank becomes an all too easy marker for quality, notwithstanding the obvious pitfalls and biases built into such an approach. *See* Posner, *supra* note 21, at 1133-35.

29. The *Duke Law Journal*'s practice of affording expedited review to articles circulated to no more than five journals merits some consideration in this regard. *See* Announcement, *New "Priority*

Moreover, it is not clear that peer-edited journals are significantly less hierarchical in their selection procedures.[30]

To the extent that these considerations might have motivated Professor Arrow, his decision to pen *Pomobabble* comes into clearer focus. On the other hand, whether the MLR should have published *Pomobabble* in unexpurgated form remains, at least in my own mind, a matter about which reasonable minds could disagree.

If the decision to publish *Pomobabble* does in fact reflect a genuine sense of concern about the direction of legal scholarship, other more constructive options existed. For example, the editors could have sponsored a symposium on the state of legal scholarship. The *Stanford Law Review* published a symposium on student-edited law reviews three years ago,[31] and, as noted above, the MLR published a symposium on legal education five years ago.[32] Debate about the nature and direction of legal scholarship is not only desirable, it is essential to the vitality of the legal academy. Indeed, it seems particularly appropriate to consider such issues systematically as we approach the close of the twentieth century. Rather than simply facilitating the trashing of a trend that seems disturbing or undesirable to a particular author, why not attempt to shed some light on the larger problem (assuming, for the moment, that a problem exists)? Constructive engagement, rather than mud slinging, is in order.

At the end of the day, Professor Arrow's satire undoubtedly will provoke much debate in the halls of law schools across the United States about the nature of the scholarly enterprise. I also suspect that the student editors' decision to publish *Pomobabble* will outrage faculty coming from a wide variety of ideological positions. In this sense, *Pomobabble* might serve some larger purpose and confer a benefit on the legal community. Whether it represents a justifiable allocation of scarce pages and staff resources remains a question about which I harbor some rather serious doubts.

Pomobabble's potential audience consists not only of legal academics, but also of law students, judges, practitioners, and the general public who rely on the nation's law schools to graduate high quality lawyers. In the end, however one views *Pomobabble*'s ultimate merits, the piece speaks to anyone who cares (or should care) about legal scholarship in the United States. To this extent, and perhaps to this extent only, kudos are in order.

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30. Even when periodicals attempt to use "blind" selection procedures, reviewers often have a good idea of who is writing what in their field. This is particularly true in highly specialized areas of scholarly inquiry (*i.e.*, Russian environmental law). *See* The Articles Editors, *supra* note 25, at 554-55 (noting that acknowledgment notes, textual references to earlier articles by the same author, and footnote content offer substantial indication of an author's identity).

31. *See* Symposium, *Law Review Conference*, 47 STAN. L. REV. 1117 (1995). In addition to the Stanford symposium, Chicago-Kent and Akron have also recently published symposia on legal scholarship. Symposium, *Trends in Legal Citations and Scholarship*, 71 CHI.-KENT L. REV. 743 (1996); Symposium, *Who Needs Law Reviews?: Legal Scholarship in the Age of Cyberspace*, 30 AKRON L. REV. 173 (1996).

One can only hope that the debate *Pomobabble* generates will actually engage the serious issues that divide legal academics, judges, and practicing lawyers—rather than offer up a host of raspberries to a bewildered readership.