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## Arthur D. Austin

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# ARTHUR D. AUSTIN

*Erik M. Jensen*<sup>†</sup>

Arthur D. Austin (or Edgar Hahn, as he is sometimes known<sup>1</sup>) was one of the bright young men Louis Toepfer—legendary dean and later Case Western Reserve University president—brought to this law school in the late 1960s. Youthful though Austin then was, I suspect he already had curmudgeonly qualities. If he didn't, he developed them soon thereafter, and he has kept them well-watered and fertilized.<sup>2</sup> He'll enter retirement as a Certified Curmudgeon.

Arthur Austin is known to generations of CWRU students. He has made Contracts come alive, sort of, at six o'clock in the morning.<sup>3</sup> His classes have stimulated interest in antitrust,<sup>4</sup> unfair competition,<sup>5</sup>

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<sup>†</sup> David L. Brennan Professor of Law, Case Western Reserve University. Using lots of footnotes in this essay seemed appropriate. See Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987) [hereinafter *Footnotes*] (making chic the study of footnoting practices). And I thank William Faulkner, Willie Mays, and Ralph Sampson for their support. Cf. Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1 (1989) [hereinafter *Vetting*] (noting increasing use of famous names in vetting footnotes, like this one, to impress student editors and to increase authors' chances of being published).

<sup>1</sup> Since 1978 Austin has been the Edgar A. Hahn Professor of Jurisprudence, and those citing his work occasionally mix up Austin and Hahn. See Robert H. Bork, *Adversary Jurisprudence*, NEW CRITERION, May 2002, at 4, 17 (citing, with approval, the work of Professor Edgar Hahn, a professor of jurisprudence at Case Western Reserve University). Austin and Hahn have collaborated, however, suggesting that there is more going on here than a divided personality. See, e.g., Arthur D. Austin, Edgar A. Hahn & Erik M. Jensen, *Scholars United Against Suppression of the Cleveland School*, 9 GREEN BAG 2D 221, 222 (2006) (identifying Austin and Jensen, but mysteriously providing no biographical information for Hahn). Maybe we (or you, wealthy reader) should endow an Arthur D. Austin Professorship at Case Western Reserve University and find an Edgar Hahn to fill it.

<sup>2</sup> Who else would post a "Bah Humbug" sign on his office door at Christmas time every year?

<sup>3</sup> Well, not six a.m., but close. You have to get up pretty early to slip one past Arthur Austin. Cf. PAUL DICKSON, *BASEBALL'S GREATEST QUOTATIONS* 7 (1991) (statement of Joe Adcock) ("Trying to sneak a pitch past Hank Aaron is like trying to sneak the sunrise past a rooster.").

<sup>4</sup> God only knows why we should care about antitrust, and He, working in mysterious ways, isn't talking.

<sup>5</sup> Competition that is unfair to the University of Virginia, that is. (UVA's having to

and legal education in general.<sup>6</sup> He has won teaching awards without stuffing the ballot box. And for years Commissioner Austin's Phlegm Snopes basketball tournament was the law school's top extracurricular activity.<sup>7</sup>

Professor Austin has been a prolific writer, and, as he would be the first to tell you, he has published in far more top law reviews than anyone else on this faculty.<sup>8</sup> He is an antitrust scholar of the first rank.<sup>9</sup> He knows more about how juries actually work than Henry Fonda and the other angry men,<sup>10</sup> and certainly more than most trial tactics teachers.<sup>11</sup> He has studied legal education,<sup>12</sup> legal publication,<sup>13</sup> and lots of other meaty subjects.

compete in anything other than foreign games like soccer.)

<sup>6</sup> He has taught a course called Trends and Tensions in Legal Education, and he has created some of each.

<sup>7</sup> In praising the tournament before a group of alums, a dean of this school pronounced phlegm "fleg-em," with a hard "g" and two syllables. He was apparently unfamiliar with both mucus and Faulkner.

<sup>8</sup> He's published, sometimes more than once, in *Columbia*, *NYU*, *Michigan*, *Virginia*, *California*, *Penn*, *Duke*, *Northwestern*, *Southern California*, and *Vanderbilt*, and I probably missed a few. See Footnotes, *supra* note †; Arthur D. Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant*, 65 CALIF. L. REV. 1143 (1977); Arthur D. Austin & Elinor Harris Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. PA. L. REV. 366 (1973) [hereinafter *Antitrust Problem*]; Arthur D. Austin & Elinor Harris Solomon, *The Antitrust Implications of Compensating Balances*, 58 VA. L. REV. 1 (1972); Arthur D. Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970); Arthur Austin, *The Postmodern Infiltration of Legal Scholarship*, 98 MICH. L. REV. 1504 (2000) (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999); JAMES BOYD WHITE, *FROM EXPECTATION TO EXPERIENCE* (1999)); Arthur D. Austin, *The Waste Land of Law School Fiction*, 1989 DUKE L.J. 495 (reviewing KATHERINE BROOME, *THE LETTER OF THE LAW* (1979); MICHAEL LEVIN, *THE SOCRATIC METHOD* (1987); JOHN OSBORN, *THE PAPER CHASE* (1971)); Arthur D. Austin, Book Review, 121 U. PA. L. REV. 409 (1972) (reviewing WALTER A. WEISSKOPF, *ALIENATION AND ECONOMICS* (1971)); Arthur D. Austin, Book Review, 39 S. CALIF. L. REV. 157 (1966) (reviewing LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965)); Arthur D. Austin, Book Review, 60 NW. L. REV. 414 (1965) (reviewing A MAN'S REACH: THE SELECTED WRITINGS OF JUDGE JEROME FRANK (Barbara Frank Kristein ed., 1965)).

Of course, Austin has published in an incredible proportion of the *least* prestigious legal journals as well.

<sup>9</sup> *But see supra* note 4.

<sup>10</sup> Of course, they're all dead now.

<sup>11</sup> See, e.g., ARTHUR D. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* 39 (1984) (containing interviews that Austin conducted with real jurors).

<sup>12</sup> See ARTHUR D. AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 69 (1998) [hereinafter *EMPIRE*] (discussing the Socratic and storytelling methods in legal education); see also Erik M. Jensen, Book Review, 52 OKLA. L. REV. 515 (1999) (reviewing, and gushing over, *EMPIRE*).

Austin has also written about law school fiction. See, e.g., Austin, *The Waste Land of Law School Fiction*, *supra* note 8 (discussing fictional accounts of law school such as John Osborn's 1971 book *The Paper Chase*).

<sup>13</sup> See, e.g., Arthur Austin, *The Top Ten Politically Correct Law Reviews*, 1994 UTAH L. REV. 1319, 1321 (analyzing how the political correctness movement had infiltrated law

In short, Austin has done a lot of serious work, and he knows that writing can be hard. He also believes that writing should be fun, however, and much of his is. He has written stories,<sup>14</sup> done deconstruction graphics<sup>15</sup> (whatever they are), and entertained (and occasionally outraged) the academic world.<sup>16</sup>

Most academic work is unknown to the larger public, and deservedly so. Austin can do the obscure stuff with the best of them, but he has had a larger audience, too. His work was the subject of a front-page story in the *Wall Street Journal*<sup>17</sup> and columns in the *New York Times*<sup>18</sup> and the *National Law Journal*.<sup>19</sup> If that is not impressive enough, he has been quoted in the *Youngstown Vindicator*.<sup>20</sup> People actually want to read Austin and hear what he has to say. Unlike many academics, he is tied to reality, to real people.<sup>21</sup> For years, Austin was the writer-in-residence at Hinckley, Ohio's<sup>22</sup> famed

reviews).

<sup>14</sup> See, e.g., Arthur Austin, *An Allegory on the Banks of the Nile*, 39 U. KAN. L. REV. 929 (1991) (exploring, through allegory, the storytelling school of legal education and the politics of granting tenure); Arthur Austin, *The Waste Land*, 1991 BYU L. REV. 1229 (criticizing the increased emphasis on sensitivity to others in legal education).

<sup>15</sup> See, e.g., Arthur D. Austin, *Storytelling Deconstructed by Double Session*, 46 U. MIAMI L. REV. 1155, 1159 (1992) (using deconstruction to explore the divide within legal academia over the role of storytelling for "oppressed people"); Arthur D. Austin, *What Differs? Who Differs? What is the Différance?*, 13 CARDOZO L. REV. 1351, 1352-53 (1991) (deconstructing issues in law and legal education).

<sup>16</sup> See, e.g., Arthur D. Austin, *Why Haven't the Crits Deconstructed Footnotes?*, 17 NOVA L. REV. 725 (1993) (providing entertainment); Arthur Austin, *Womanly Approach Harms Future Lawyers*, NAT'L L.J., May 18, 1998, at A23 (eliciting outrage).

<sup>17</sup> See Paul M. Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, WALL ST. J., May 10, 1988, at 1 (discussing *Footnotes*, *supra* note †).

<sup>18</sup> See David Margolick, *At the Bar: The Fetish of Footnotes, or the Folly of Trying to Eradicate the Profession's Enduring Trends*, N.Y. TIMES, June 8, 1990, at B16 (explaining why legal scholars opt to use large quantities of footnotes). That column in the *Times* has a nice picture of a page from Arthur Austin, *Footnote Skullduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009 (1990), and one can plainly see citations to an article of mine in the picture. *Id.* Has Cass Sunstein or Larry Tribe ever appeared in a footnote in the *Times*?

<sup>19</sup> See Edward A. Adams, *Writer Gives Advice on Footnoting One's Way to Professorial Tenure*, NAT'L L.J., Jan. 11, 1988, at 4 (discussing the signaling power of article quality based upon the quantity and content of different types of footnotes); see also Ken Myers, *The Kindness of Their Colleagues: More Academics Decry Vetting*, NAT'L L.J., June 11, 1990, at 4 (describing *Vetting*, *supra* note †, and quoting the then-president of the *Harvard Law Review*, one Barack Obama, who claimed the editors paid no attention to vetting footnotes: "'We don't even look at them. We don't care who's in there.'").

<sup>20</sup> John Kovach, *Exemption Removal Could Spur Settlement*, *Youngstown Vindicator*, Feb. 12, 1995 at G1 (interviewing Austin about the implications of Major League Baseball being granted an antitrust exemption) (article on file with author).

<sup>21</sup> Unreal people pay attention too. See, e.g., *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 114 n.23 (1975) (citing *Antitrust Problem*, *supra* note 8); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 512 n.2 (1969) (White, J., dissenting) (citing Arthur D. Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. Rev. 88).

<sup>22</sup> Buzzard City, USA. Austin has had to live in Hinckley because he was zoned out of Shaker Heights.

Reggie's Chicken House,<sup>23</sup> where beer went to die.<sup>24</sup> You can't get more real than that. And he almost always rode the RTA's Red Line to work, or what we academics call work,<sup>25</sup> to hear what the folks were thinking, to keep his fingers on the pulse of the nation.<sup>26</sup>

Although this piece is not an obituary, a recap of the as-yet-unfinished Austinian life is still in order.<sup>27</sup> Full disclosure: I know only the broad outlines, and I probably have some of the details wrong.<sup>28</sup> For that matter, most of what I know comes from Austin himself, and some, ah-h-h, shall we say, *embellishment* might be involved.<sup>29</sup>

Arthur Austin had an apparently idyllic boyhood in Waynesboro, Virginia,<sup>30</sup> you know, frequenting pool halls, running from the cops (generally successfully), and playing the easy sports.<sup>31</sup> One of my favorite stories is of young Donnie Austin going with his dad to revival meetings. The reason wasn't religious fervor;<sup>32</sup> it was eddication.<sup>33</sup> Dad "was a small-town lawyer who did a lot of litigation before God-fearing local juries, and to him the best instructors in persuasion, rhetoric, and ability to read an audience were God's litigators."<sup>34</sup> That background has helped Austin evaluate others' work. For example: "I can spot a sermon when I see one, and [Derrick] Bell's 'Final Report' is a classic sermon."<sup>35</sup>

Donnie Austin was a star athlete at Waynesboro High, class of 1950, quarterbacking the football team for two years (Honorable

<sup>23</sup> Being writer-in-residence at Reggie's was like being snowboarder-in-residence in Khartoum.

<sup>24</sup> I'm told that Reggie's is no more, which is probably just as well if the proprietor permitted the Hahn (German for rooster) Professor, *see supra* note 1, in the Chicken House. Whatever happened to parietal hours?

<sup>25</sup> I know an academic whose spouse responds to talk of his retirement by asking, "How could anyone tell?"

<sup>26</sup> On the Red Line, he also had to keep his fingers on his wallet.

<sup>27</sup> The recap is in order, even if the life hasn't been.

<sup>28</sup> Victors write history. Unfortunately, Victor was unavailable to help me with this essay.

<sup>29</sup> Nothing should get in the way of a good story.

<sup>30</sup> The town was named after Mad Anthony Wayne, which explains a lot.

<sup>31</sup> He was terrified by curve balls and therefore couldn't participate in a man's game. Nevertheless, baseball is part of a life well lived, and, although Austin won't admit it, baseball is in his blood, at dangerously high concentrations. He saw Willie Mays play at Fort Eustis, Virginia. (Mays was drafted during the Korean War and spent his military time playing baseball.) While Austin was killing time waiting to be shipped out after basic training at Camp Pickett, he caught rides into town with Dodger great Don Newcombe, also playing ball in the military.

<sup>32</sup> Austin's only conversions as a kid came after scoring touchdowns.

<sup>33</sup> An army drill sergeant said, as he was looking the young Private Austin up and down, "If that's education, I don't want none of it."

<sup>34</sup> EMPIRE, *supra* note 12, at 126.

<sup>35</sup> *Id.* (citing Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989)).

Mention All-District<sup>36</sup>) and captaining the basketball team while leading the squad in scoring (2d Team All-District and All-State).<sup>37</sup> After graduating from Waynesboro, he spent a year at Fishburne Military School, which needed athletes to defeat a hated rival.<sup>38</sup> While there, Austin set a record for demerits that, depending on whom you believe, may still stand.<sup>39</sup> He then briefly played football and basketball at West Virginia's Salem College, a school that no longer exists. (Austin has closed down many an establishment.)

Austin moved on to what he sees as the center of the universe, the University of Virginia, which does still exist.<sup>40</sup> He interrupted his scholarly career a year and a half later, however, when he enlisted in the Army. As a medic in Korea, he was a hero, about that there is no doubt whatsoever, and he was badly injured at Pork Chop Hill.<sup>41</sup> He recovered and returned to Mr. Jefferson's University, where he honed his great love for the North Carolina Tarheels and Virginia Tech. (Yes, as anyone who has been in an Austin class knows, I'm being sarcastic.<sup>42</sup> Whatever he thinks of Carolina and Tech, however,

<sup>36</sup> That's like being in the top 50 in *U.S. News*.

<sup>37</sup> Scoring was lower in those days because it took so long to get the ball out of the peach basket after each field goal.

<sup>38</sup> It worked. See *Fishburne Defeats Woodberry by 12-7*, RICHMOND TIMES-DISPATCH, Nov. 11, 1951 (highlighting exploits of quarterback Donnie Austin and noting that "[t]oday's victory marked the first time Fishburne had downed the Tigers in 16 years").

<sup>39</sup> As I understand it, wrestling impresario Vince McMahon, Fishburne class of 1964, claims to have a headlock on the record.

<sup>40</sup> It's dominating college polo these days, as of this writing, having just won the men's championship (beating Cornell), while finishing second in the women's tourney (losing to Cornell). Cf. *supra* note 5 (noting UVA's supremacy in un-American sports). Playing polo is like being in a high school graduating class of eight students: you're sure to finish in the top ten (Cleveland Indians designated hitter Travis Hafner was in that happy situation growing up in Sykeston, North Dakota, or so he says.).

<sup>41</sup> He was awarded the Bronze Star with V and the Purple Heart. A commendation contains the following passage:

Private AUSTIN personally carried four men to a nearby bunker and established an aid station there. Private AUSTIN continued to treat the wounded until the bunker received a direct hit, seriously wounding him. Private AUSTIN remained in the area and continued to treat the wounded and help load them on the personnel carriers, refusing to be evacuated himself in order that others might be cared for first.

Commendation from McGarr, Major, to Arthur D. Austin, Private in Company L 32d Division (on file with author). I'll joke about many things involving Arthur Austin, but not this. I am in awe.

<sup>42</sup> Austin has often said, "All dirt roads lead to Tech." And his true feelings about the Tarheels were emblazoned on a T-shirt he used to display in his office: Friends don't let friends go to North Carolina. In particular, his dislike of Dean Smith knows no bounds and was often extended to other deans as well. See *EMPIRE*, *supra* note 12, at 58-59 (noting that deans are unlikely to have been productive faculty members themselves due to their affinity for shirking and that they are almost always failures at increasing the productivity of their faculties, perhaps due to their sympathies as former shirkers themselves).

during those years he really did develop a lifelong love of Faulkner and Yoknapatawpha County.<sup>43</sup>)

After graduating from UVA in 1958 near the top of his class,<sup>44</sup> Austin spent a couple of years in New York City, looking unsuccessfully for Jack Kerouac<sup>45</sup> and doing many things unsuitable for mention in a family publication. In 1960, he and the brave and tolerant Irene Austin (who certainly is suitable for mention in a family publication) embarked for the Big Easy, the swamps of Plaquemines Parish, and Tulane University Law School. The area's populations of shrimp, snapper, and Wild Turkey were reduced during the next three years, but the humans prospered.

He might have had a law degree in 1963, but Austin successfully avoided getting a real job then and forevermore. He taught at the business schools of William & Mary and Bowling Green State from 1963 until 1966, when he joined the law faculty at Cleveland State. He moved to CWRU in 1968, and, except for a year on leave with the Policy Planning Section of the Department of Justice's Antitrust Division in 1970-71, he has been here ever since.

For many years, Austin and I have been competing to be the first at CWRU to publish in all 50 states.<sup>46</sup> Since he is much, much older and has been in the academy much, much longer, he is ahead; the score is something like 39 to 34 in his favor. He knows I'm gaining, however, *fast*, and he obviously thinks retirement provides an easy way out. For Austin, retirement might be the equivalent of giving up and taking his talents to South Beach.

Nevertheless, I hope he won't stop writing (as long as he doesn't publish in new states); he writes wonderful stuff. One reason he can't completely retire is that we haven't finished an important project, having the Cleveland School of Legal Scholarship recognized as the innovative group it is, with its "robust conception of jurisprudence, born on the rusty banks of the Cuyahoga."<sup>47</sup> Those in the know (both of us) revere the Cleveland School, and its existence has been

<sup>43</sup> Austin was in a class co-taught by Faulkner, who was in Charlottesville at the time because his daughter Jill was there. This probably explains why I've always had difficulty understanding what he (Austin) is trying to say. (I've never been able to get past page 40 of *The Sound and the Fury*.) Cf. *supra* note 7 and accompanying text (describing the Phlegm Snopes tournament).

<sup>44</sup> Alphabetically favored, the name Arthur Austin heads many lists.

<sup>45</sup> He did find Allen Ginsberg; the results of this encounter, however, I don't know (and don't want to know).

<sup>46</sup> We have special rules for the competition. Only hard copy publications count. (Remember hard copy?) *The Alaska Law Review*, published at Duke, will do for Alaska, which neither of us has yet picked up. Publication in academic journals isn't required; bar journals and newspapers work just as well. (Remember newspapers?)

<sup>47</sup> Austin et al., *supra* note 1, at 221.

acknowledged in a leading journal.<sup>48</sup> If Arthur Austin's retirement means that the Cleveland School must be renamed the Hinckley School, so be it, as long as the project survives.

Although the Cleveland School could become the Hinckley School, some things will never change. It is 2011, but, just as he did in 1871 (or whenever), Austin writes by hand. No word processing for him.<sup>49</sup> Computer research? Nope. He does that by hand too, or with help from librarians and students. Blogging or tweeting? *Are you crazy?* For Austin, being electronically challenged has made the *National Enquirer* and similar publications essential research tools.<sup>50</sup>

I've made fun of Arthur Austin in this essay. À la Richard Nixon, however, let me make one thing perfectly clear: Arthur Austin has been an important part of this law school. I don't want to get gooey here, but I admire and respect him, I wish he weren't retiring, and I'll miss the old buzzard.

But maybe I won't have to miss him too much. Even if he isn't in Gund Hall every day, I hope he visits early<sup>51</sup> and often. (How else will he get his typing done?) At a minimum, I hope he maintains telephonic contact. (E-mail is out of the question.<sup>52</sup>) Professor Austin, call the office.

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<sup>48</sup> See *id.*; Arthur Austin, *The Cleveland School of Legal Scholarship?*, 3 GREEN BAG 2D 73 (1999) (referring to me as "one of the co-founders of the Cleveland School of Legal Scholarship," on a page titled "The Cleveland School of Scholarship."); Erik Jensen, *The Cleveland School, Part Deux*, 3 GREEN BAG 2D 215 (2000) (citing the Cleveland School); Erik Jensen, *To the Bag*, 4 GREEN BAG 2D 313, 314 (2000) (referring to Austin as founder of the Cleveland School of Legal Scholarship). The founding documents of the School have been electronically preserved and are available for inspection upon request from recognized scholars. (I promise to recognize you.)

<sup>49</sup> In recent years, he had a computer in his office. As far as I could tell, however, it was used only as a paperweight. I'm not sure that he knew how to turn the thing on. In his defense, I should note that he does know how to use a telephone (land-line version, that is) and a copy machine.

<sup>50</sup> See, e.g., EMPIRE, *supra* note 12, at 56 (quoting Sidney Zion, *Burger's War*, THE VILLAGE VOICE, Feb. 4, 1980, 39, 41 (reviewing BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979)) ("[A]s character builders, law reviews rank a cut above high-class bordellos.") (alteration in original)).

<sup>51</sup> See *supra* note 3 and accompanying text.

<sup>52</sup> See *supra* notes 48–49 and accompanying text.