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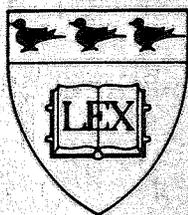
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PERFORMANCE SCHOLARSHIP AND THE
INTERNAL REVENUE CODE

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COMMENTARY

PERFORMANCE SCHOLARSHIP AND THE INTERNAL REVENUE CODE

Erik M. Jensen

The world of permissible legal scholarship is expanding at an exponential rate. Dry-as-dust doctrinal work used to dominate law review pages, but today we get correspondence,¹ stories,² deconstruction graphics,³ and God knows what else.⁴ Any day now I expect to open a law review and see a photographic exhibit—perhaps some nice bathroom art.⁵ Or maybe a three-dimensional graphic, complete with 3-D glasses. Or one of those cut-out things that pops up when you turn the page.⁶

In a legal-academic world where anything goes, it is hard for those building a career to come up with something new, something really trailblazing, to put into print. You work hard on a traditional article, but, by the time galleys arrive, someone from Punxatawney Law School has stolen your thunder with a sculpture of Buddhist racial theory or something.

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1. See Erik M. Jensen, *Law Review Correspondence: Better Read Than Dead?*, 24 CONN. L. REV. 159 (1991) (discussing the addition of correspondence sections to law reviews).

2. See, e.g., Arthur Austin, *An Allegory on the Banks of the Nile*, 39 U. KAN. L. REV. 929 (1991) (discussion of nontraditional academic writings in a fictitious faculty meeting).

3. See, e.g., Arthur D. Austin, *What Differs? Who Differs? What is the Difference?*, 13 CARDOZO L. REV. 1351 (1991) (using graphics to "flush the conflicts and differences of major issues in law, legal education, and earth").

4. See, e.g., Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KAN. L. REV. 433 (1990) (calling for more academic writings that develop buffalo law).

5. Son of a gun! Yale did it already. Well, not bathroom art, but photographs. See Barbara Kruger, *Art-Commentary*, 97 YALE L.J. 1105 (1988).

6. On pop ups, see the extensive literature on the infield fly rule cited in Erik M. Jensen, *Food for Thought and Thoughts about Food: Can Meals and Lodging Provided to Domestic Servants Be for the Convenience of the Employer?*, 65 IND. L.J. 639, 640 n.9 (1990).

But I am about to jump far ahead of my competition. My reputation will be made with *performance scholarship*.

I'm not thinking of smearing myself with a scholarly layer of chocolate or putting jello into private, scholarly places.⁷ At least not right now.⁸ What I have in mind is both a return to time-honored practices and a bold step into the future. I propose to reintroduce the methods of the roving minstrels: the dissemination of thought through song, speech, and drama performed by bands of itinerant scholars.

To begin this new tradition or, if you will, to revive this old tradition, I am prepared to present scholarly performances analyzing the corporate liquidation provisions of the Internal Revenue Code. The performances will be fully footnoted⁹ and will otherwise conform to the highest standards of legal scholarship.¹⁰

Until Lexis and Westlaw become more sophisticated than they are now—so that I can be instantaneously, electronically retrieved in person¹¹—you'll have to book me into your place¹² or travel to my home base. I know that means added effort on your part if you want to see my work. But what you'll lose in convenience, you'll gain in spontaneity: the joy of *live scholarship*.

Despite its ancient roots, performance scholarship is a fundamentally new concept in the modern legal-academic world. It bears only a superficial resemblance to the faculty workshops now held at most law schools. Workshops purport to be presentations of papers-in-progress or of finished papers. With performance scholarship, *there will never be any papers*.¹³ That's the beauty of the whole thing.

7. Please, no nasty letters. Of course I don't mean to suggest that these are anything but perfectly appropriate practices for legal scholars. I understand quite well that the concept of academic freedom forbids any constraints on what we do in the name of scholarship. Refer to notes 1-6 *supra* and accompanying text; notes 8-26 *infra* and accompanying text.

8. Refer to note 12 *infra* (hinting that perhaps I can be bought).

9. Perhaps with the assistance of Victor Borge, the world's expert on performance punctuation. I'd thought of using my feet for footnotes until someone asked what I'd use if an audience demanded endnotes instead.

10. Although I suppose I ought to be able to meet higher standards than *that*.

11. Even then, before I participate, I'll want to make sure that the technicians have all the bugs out of the system. See *THE FLY* (Twentieth Century Fox 1986); *THE FLY* (Twentieth Century Fox 1958); see also Lauren Ina, *Giant Bipedes Meet Blood Suckers and Assassins!*, WASH. POST, Mar. 14, 1992, at A3 (quoting entomologist May Berenbaum: "All flies want out of life is a little bit of sugar and a little warm dung for their offspring.").

12. Please contact my agent for details on prices and available dates.

13. I recognize that this characteristic, standing alone, does not distinguish performance scholarship from the practices of most law school faculty members today.

The printed word is confining. It is subject to much closer scrutiny than live performances. If you say something in print, it's hard to deny later that you said it.¹⁴ With performance scholarship, errors and stupidities disappear into the ether.¹⁵

And each performance is different. Permanent impermanence is inevitable in our deconstructionist world, with our fast-moving molecules and all the rest of it.¹⁶ The world is fuzzy,¹⁷ and we should make the most of that fact. One reprint of an article looks like any other,¹⁸ but the contributions to knowledge made by performance scholarship can be continuous and unending.¹⁹

Oh, sure, you'll be able to get video or audio tapes of much performance scholarship in the future.²⁰ The trial practice folks, who have some trouble with reading and writing, have already developed a market for similar products.²¹ But as any concertgoer knows, recorded works are poor substitutes

Nevertheless, performance scholarship should not be confused with *Schlafengewissenshaft*, or "sleep scholarship."

14. Not impossible, just harder. It is possible to suggest that what you thought the words meant—if you had such thoughts to begin with—has no relevance to a reader. And vice-versa (whatever that means). See DAVID LODGE, *SMALL WORLD* 25 (1984) (quoting Morris Zapp: "If the words are fixed once and for all, on the page, may not their meaning be fixed also? Not so . . .").

15. I know, I know. Many now think there is no such thing as an error. *But see* Cleveland Indians (1991).

16. See LODGE, *supra* note 14, at 25 (quoting Zapp: "Time has moved on since you opened your mouth to speak, the molecules in your body have changed, what you intended to say has been superseded by what you did say, and that has already become part of your personal history, imperfectly remembered.")

17. Wow! There's another idea for law reviews that are pushing the envelope of legal scholarship: pettable articles. *Cf.* DOROTHY KUNHARDT, *PAT THE BUNNY* (1968); *see also* MARJERY W. BIANCO, *THE VELVETEEN RABBIT, OR HOW TOYS BECOME REAL* (1983); John Farley Thorne III, Comment, *Mathematics, Fuzzy Negligence, and the Logic of Res Ipsa Loquitur*, 75 NW. U. L. REV. 147, 173 (1980). This innovation would be in keeping with the desire of many law schools to become more nurturing.

18. Refer to note 14 *supra* (Zapp's discussions on the lack of fixed meaning in the world). Some of you might wonder what will happen to law reviews in a universe dominated by performance scholarship. The answer is obvious: those who would have performed editorial tasks in our soon-to-be-forgotten world must become impresarios, putting together packages of performances for their institutions. And some things will remain the same, I suspect: performing at Harvard or Yale will be just as difficult in the future as it is today.

19. It is, I admit, more of a problem to determine what constitutes a contribution under this scheme, with no permanent record. That issue is beyond the scope of this article, however, and it will have to await consideration in a future scholarly performance.

20. However, scholarly audiences will not be permitted to photograph or tape any performances in progress. Flashing lights and electronic noises are disconcerting and can lead to injury of the performing scholars.

21. Some might suggest that, even when trial practice specialists write their stuff down, they are engaging in performance scholarship. Could trial lawyers receive any higher praise?

for the real thing. Performance scholarship, I repeat,²² demands spontaneity.

Unfortunately, until you can see me in person, you'll have to make do with substitutes. All you can do right now, to make the best of a second-best situation, is set aside the time that you would have spent reading a traditional article and *imagine* my performance on the tax consequences of corporate liquidations.

Visualize me at the podium: tall, dark, handsome,²³ in a three-piece, gray, pin-striped suit, carrying a briefcase and a paperback volume of the Internal Revenue Code. I'll begin by symbolically demonstrating the new directions in scholarship. For example, I could tear up a few pages of the Code and throw the scraps into the audience—an artistic distribution in liquidation.²⁴ Then I might sing a little song: "Liq'ui-date, liq'ui-date, fnance to the mu-u-u-usic . . ." And then, perhaps a tax joke or two?²⁵ And then, the old soft shoe?²⁶ And then? . . .

Enjoy.

22. I'm repeating, but the configuration of my molecules has changed in the interim. Refer to note 16 *supra*. How about yours?

23. I assume that the editors don't check pieces like this as closely as they do conventional articles.

24. My colleague Arthur Austin is responsible for this vivid image—and a lot of other nonsense as well. Refer to notes 2 & 3 *supra*.

25. See, e.g., Erik M. Jensen, *A Monologue on the Taxation of Business Gifts*, 1992 B.Y.U. L. REV. 397 (tax article improbably included in a symposium on legal humor).

26. Cf. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* (1987) (narrating the saga of the development of the Tax Reform Act of 1986).