

Volume 67 | Issue 3

2017

Tribute to Professor Erik Jensen

Deborah A. Geier

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Deborah A. Geier, *Tribute to Professor Erik Jensen*, 67 Case W. Res. L. Rev. 649 (2017)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol67/iss3/6>

This Tribute is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

of the Coleman P. Burke Chair. As luck would have it, that did happen, and today, we both share the title of Coleman P. Burke Professor (emeritus) of Law. I cannot imagine a better man with whom to share it.

Deborah A. Geier[†]

[H]e was always so zealous and honorable in fulfilling his compact with me, that he made me zealous and honorable in fulfilling mine with him. If he had shown indifference as a master, I have no doubt I should have returned the compliment as a pupil. He gave me no such excuse, and each of us did the other justice.

—*Charles Dickens, Great Expectations (Chapter 24)*

I am not exaggerating the least bit when I say that I owe my career as a tax lawyer and professor to my professional mentor, Professor Erik M. Jensen.

If someone told me on the first day of law school in 1983 that I would become a tax lawyer, I would have laughed in their face. Before matriculating at Case Western Reserve University School of Law, I was a registered nurse working in Maternity Surgery (labor and delivery) for five years (which I would continue to do during my first two years of law school). My decision to go to law school was probably the most uninformed in the entire history of prospective law students, but I was getting bored in my work as a nurse. I knew that I needed to make a change when I craved being assigned a high-risk patient in crisis. “I’ll take the woman with a blood pressure of 220 over 140 and preeclampsia, who needs a mag sulfate drip stat and who will likely need an emergency C section!!” How terrible!

To make a long story short, I decided to go to law school. I assumed that, with my background, I would somehow combine medicine and the law in my nascent legal career. Perhaps I would become counsel for a hospital, I thought.

And then I took the first Federal Income Tax course with Professor Jensen in the fall semester of my second year—and I was hooked. No one was more surprised than I was! I never even took basic accounting as an undergraduate student. I had no idea then, as I am forever telling my students now, that practicing as a tax lawyer has little in common with compliance accounting.¹ But I loved tax class!

[†] Professor of Law, Cleveland-Marshall College of Law, Cleveland State University; J.D., Case Western Reserve University School of Law, Class of 1986.

1. John Grisham was a litigator before becoming a novelist, and he clearly had no idea what tax lawyers did for a living, either, when he wrote the first

Jensen's enthusiasm for tax was palpable and contagious. I found tax to be intellectually stimulating because it was more than a series of disparate rules and stand-alone policy decisions. Rather, the sum total of the separate provisions fit together in a larger intellectual construct called "income." Studying tax was like putting together the pieces of a difficult puzzle. Each little piece had little obvious significance, but it was part of a bigger picture that gradually emerged.

I also found tax to be terribly important, as I write in my own basic tax textbook.

I think that one reason why taxation is such a fascinating subject (no sniggers, please) is that it affects literally everyone in society, whether directly or indirectly—everyone from the single mother trying to make ends meet, to the bright student putting herself through college and incurring large debts to do so, to the entrepreneur with a good idea, to the Fortune 500 company contemplating a merger How we choose to tax ourselves says a lot about how we view ourselves as a country and as members of a community that are inextricably interrelated, as tax dollars create the common physical and intangible infrastructure that permits

paragraph in Chapter 29 of *The Firm*, the hero of which was—wait for it—a tax lawyer:

A week before April 15, the workaholics at Bendini, Lambert & Locke [a boutique tax firm] reached maximum stress and ran at full throttle on nothing but adrenaline. And fear. Fear of missing a deduction or a write-off or some extra depreciation that would cost a rich client an extra million or so. Fear of picking up the phone and calling the client and informing him that the return was now finished and, sorry to say, an extra eight hundred thousand was due. Fear of not finishing by the fifteenth and being forced to file extensions and incurring penalties and interest. The parking lot was full by 6 a.m. The secretaries worked twelve hours a day. Tempers were short. Talk was scarce and hurried.

JOHN GRISHAM, *THE FIRM* 306 (1991). A good read, but an absolutely *ridiculous* description of tax law practice, a point made by Jensen with his characteristic wit in his book review of *The Firm*. See Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367, 367–68 (1991) (“Those of us in the tax law business know that we are bright, engaging, and athletic; we combine animal magnetism with erudition. However, tax lawyers are lumped with accountants in the public mind, and are burdened with the images of thick spectacles, green eyeshades, cluttered minds, and unlimited capacities for boredom. One commentator has even stated that a ‘tax lawyer is a person who is good with numbers but who does not have enough personality to be an accountant.’”). “Tax lawyers are often public-spirited and always smart. Professor Amsterdam has noted: ‘It is seldom given to mortal man to feel superior to a tax lawyer.’ . . . But a tax lawyer as hero? Nobody would have thought it possible. Until now.” *Id.* at 370–71 (citations omitted).

the flourishing of both human capital and the economy. Fascinating stuff!²

I did well in that first class and took Corporate Tax with Professor Jensen in the spring, which I also loved. When Jensen learned that I had my heart set on getting a summer associate position in New York City³ between my second and third years of law school, he told me that he had been a tax lawyer with the “Wall Street” firm of Sullivan & Cromwell (which I knew from nothing in my naïveté) and that he would recommend me for a position. He was as good as his word, calling up Willard Taylor (then chair of the tax group) and telling him to hire me.

As my second year progressed and I learned of judicial clerkships, I decided that I wanted to apply for one in a Federal appellate court after graduation. Jensen encouraged my pursuit and told me of his wonderful year clerking for the inimitable Monroe G. McKay of the Tenth Circuit Court of Appeals, whose chambers were in Salt Lake City. Once again, he got on the phone and told the judge to interview me—and I got the job! To this day, my year in Salt Lake City clerking for “the Judge,” as he is known affectionately by his legion of devoted former clerks, was the most rewarding year of my professional life. And when it came time to apply for a faculty position (as I had made up my mind by the middle of the second year of law school that I wanted to be an academic), Jensen provided invaluable advice for the “meat market”⁴ and served as a reference.

As I made my summer plans for S&C as a second-year law student, however, I began to worry that perhaps I didn’t like *tax practice* so much as I liked my *tax classes* with Jensen. He brought such humor and wit to the study of tax that he made tax class fun. What if I didn’t really like tax, itself? So I asked the summer associate coordinator at S&C if I could get assignments from both the tax group and the litigation group. After just a few weeks, however, I told her to stop the litigation assignments. I did, indeed, like tax! When I returned for my third year of law school, I took Partnership Tax, the Taxation of Mergers & Acquisitions, Estate & Gift Tax, International Tax, and Business Planning with Jensen, Professor Leon Cabinet, and then-Professor (now Judge) Karen Nelson-Moore (of the Sixth Circuit Court of Appeals). I loved it all! I returned to the tax group at S&C after my judicial clerkship and was then fortunate enough to come back to my hometown to teach tax at the law school down the road.

2. DEBORAH A. GEIER, U.S. FEDERAL INCOME TAXATION OF INDIVIDUALS 2016, vii–viii (2016).

3. I fell in love with all that the city had to offer on a week-long field trip as a high school senior, and I couldn’t wait to return for a long visit. I saw a summer associate position as my chance.

4. . . . as the annual Faculty Recruitment Conference sponsored by the Association of American Law Schools is affectionately known.

How did Jensen make tax class fun? It's hard to say, really. He had such a dry wit and suffused his comments with tongue-in-cheek humor, but I find it hard now to remember examples from class. One chestnut I do remember (because I stole it and use it in my own class) arose when we were studying the seminal tax case of *Commissioner v. Tufts*.⁵ Justice O'Connor wrote an important concurrence in the case, which cited a tax law professor from her *alma mater* law school (Stanford)—“a salutary practice that I hope you all keep in mind,” Jensen drily suggested.

Professor Jensen is not merely a gifted teacher, however. He is a prolific scholar. The c.v. posted on his CWRU faculty page lists 177 books, book chapters, articles, book reviews, and newspaper pieces (not even counting his 42 published outlines and reports)!!! Now I know that he has had a long-running competition with Arthur Austin to see who would be the first to publish something in all fifty states,⁶ so I know that a few of these items are tidbits to get another state crossed off the list. Nevertheless, his productivity shames this particular academic.

Jensen is best known for his work at the intersection of tax and the Constitution, including his 2005 book *The Taxing Power*.⁷ In particular, his special expertise pertains to the history and meaning of the direct tax clause,⁸ the Sixteenth Amendment, and other clauses that touch on taxation.⁹ In particular, the longstanding colloquy between Jensen and

-
5. 461 U.S. 300 (1983).
 6. See Erik M. Jensen, *Arthur D. Austin*, 62 CASE W. RES. L. REV. 3, 8, n.46 (2011) (“For many years, Austin and I have been competing to be the first at CWRU to publish in all 50 states. 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.” [Geier note: Thanks, Lebron, for coming back and leading the Cavs to the 2016 championship!!! Now the Indians have to take away my recurring nightmares from Jose Mesa’s performance in the bottom of the 9th inning in 1997] “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?)”) *Id.* at n.46.
 7. ERIK M. JENSEN, *THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005).
 8. U.S. CONST. art. 1, § 9, cl. 4.
 9. See, e.g., Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799 (2014) (discussing the need for the Sixteenth Amendment); Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97 (2012) (considering the individual mandate in the Patient Protection and Affordable Care Act of 2010); Erik M. Jensen, *Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?*, 136 TAX NOTES 1309 (2012) (explaining the effect of the Supreme Court’s decision to uphold the individual mandate in *National Federation of*

Professor Calvin Johnson of the University of Texas about the significance (Erik) or insignificance (Calvin) of the direct tax clause is legendary in our world. Erik entitled one piece as *Jensen's Response to Johnson's Response to Jensen's Response to Johnson's Response to Jensen (Or Is It the Other Way Around?)*.¹⁰

Of course,¹¹ he has also published doctrinal tax pieces,¹² articles in the area of Federal Indian Law (a non-tax love of his that has its roots in his judicial clerkship with Judge McKay in the Tenth Circuit, an

Independent Business v. Sebelius on the taxing power); Erik M. Jensen, *Quirky Constitutional Provisions Matter: The Tonnage Clause, Polar Tankers, and State Taxation of Commerce*, 18 GEO. MASON L. REV. 669 (2011) (discussing the Tonnage Clause); Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004) (analyzing the Direct-Tax Clause of the Constitution and the Sixteenth Amendment); Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1 (2003) (considering the importance of the Export Clause); Erik M. Jensen, *The Constitution Matters in Taxation*, 100 TAX NOTES 821 (2003) (assessing taxation provisions within the U.S. Constitution); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001) (arguing that the limitations on taxation provided within the U.S. Constitution are not trivial); Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999) (discussing the original understanding of the direct-tax clauses); Erik M. Jensen, *Unapportioned Direct-Consumption Taxes and the Sixteenth Amendment*, 84 TAX NOTES 1089 (1999) (analyzing what constitutes a "tax on incomes" within the meaning of the Sixteenth Amendment); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (same).

10. 100 TAX NOTES 841 (2003).
11. See Erik M. Jensen, *Dean Breck*, 2 GREEN BAG 2D 395, 400 n.39 (1999) ("In an effort to make his script sound spontaneous, he'd inserted an 'of course' here, a 'you see' there, an 'as you might call it' somewhere else" (quoting KINGSLEY AMIS, LUCKY JIM 193 (1961))).
12. See, e.g., Erik M. Jensen, *Legislative and Regulatory Responses to Tax Avoidance: Explicating and Evaluating the Alternatives*, 57 ST. LOUIS U. L.J. 1 (2012) (examining anti-tax avoidance efforts in the United States); Erik M. Jensen, *Are Recoveries for Nonphysical Injuries Automatically Taxable?*, 105 TAX NOTES 1439 (2004) (discussing taxable recoveries); Erik M. Jensen, *The Unanswered Question in Tufts: What Was the Purchaser's Basis?*, 10 VA. TAX REV. 455 (1991) (considering in circumstances that lead buyers to acquire heavily encumbered property); Erik M. Jensen, *The Supreme Court and the Timing of Deductions for Accrual-Basis Taxpayers*, 22 GA. L. REV. 229 (1988) (discussing the timing of deductions in light of the Tax Reform Act of 1984); Erik M. Jensen, *Hughes Properties and General Dynamics: The Supreme Court, the All Events Test, and the 1984 Tax Act*, 32 TAX NOTES 911 (1986) (same); Erik M. Jensen, *The Deduction of Future Liabilities By Accrual-Basis Taxpayers: Premature Accruals, the All Events Test, and Economic Performance*, 37 U. FLA. L. REV. 443 (1985) (discussing accrual methods of accounting); Erik M. Jensen, *The Uneasy Justification for Special Treatment of Like-Kind Exchanges*, 4 AM. J. TAX POL'Y 193 (1985) (examining like-kind exchanges in the Tax Code).

important circuit in the development of Indian Law),¹³ including articles that combine tax and Indian Law,¹⁴ and even an article examining the rise of feminist and critical race commentary in tax.¹⁵ And he has written several *Festschriften* honoring those he has admired and worked with over the years,¹⁶ including Judge McKay¹⁷ and the late John Tiley of Cambridge University, one of England's most distinguished tax scholars.¹⁸ Jensen was instrumental in bringing Tiley to America to teach at CWRU for several semesters, and Jensen spent

-
13. See, e.g., Erik M. Jensen, *Indian Gaming on Newly Acquired Lands*, 47 WASHBURN L.J. 675 (2008) (discussing the history, purposes, and conceptual problems of the Indian Gaming Regulatory Act); Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3 (1999) (defending tribal sovereignty); Erik M. Jensen, *The End (of This Discussion) of Tribal Sovereignty*, 60 MONT. L. REV. 35 (1999) (same); Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385 (1993) (applying secession theory to American Indian tribes); Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1991) (rejecting the argument that the U.S. Constitution is modelled off of the Iroquois' founding document, the Great Law of Peace).
 14. See, e.g., Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1 (2008) (discussing the power to tax in "Indian Country"); Erik M. Jensen, *Chickasaw Nation: Interpreting a Broken Statute*, 97 TAX NOTES 1195 (2002) (questioning the Supreme Court's decision in *Chickasaw Nation v. United States*); Erik M. Jensen, *American Indian Law Meets the Internal Revenue Code: Warbus v. Commissioner*, 74 N.D. L. REV. 691 (1998) (discussing the relationship between the Internal Revenue Code and American Indian law).
 15. Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753 (1998) (discussing why feminist and critical race commentary emerged in tax law).
 16. Erik M. Jensen, *Henry King*, 60 CASE W. RES. L. REV. 603 (2010) (former professor Henry King); *Professor Morris Shanker*, 61 CASE W. RES. L. REV. 13 (2010) (recognizing the accomplishments of former professor and expert on bankruptcy and commercial law, Morry Shanker); Jensen, *Arthur D. Austin*, *supra* note 6 (honoring former Case Western Reserve University president, Arthur D. Austin); Erik M. Jensen, *Henry P. Monaghan: The First Keith S. Benson Professor*, 70 IN BRIEF 7 (1997) (recognizing the contributions of Professor Monaghan); Erik M. Jensen, *Tribute to Professor Leon Gabinet*, 65 CASE W. RES. L. REV. 4 (2014) (honoring "tax maven" and Case Western Reserve School of Law professor, Leon Gabinet).
 17. Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 BYU L. REV. 1103 (1987).
 18. Erik M. Jensen, *The Tiley Trilogy and U.S. Anti-Avoidance Law*, 12 EJOURNAL TAX RES. 74 (2014); Erik M. Jensen, *The US Legislative and Regulatory Approach to Tax Avoidance*, in COMPARATIVE PERSPECTIVES ON REVENUE LAW: ESSAYS IN HONOUR OF JOHN TILEY 99 (John Avery Jones et al. eds., 2008); Erik M. Jensen, *John Tiley Redux*, 68 IN BRIEF 24 (1996); Erik M. Jensen, *The Portable John Tiley*, 39 IN BRIEF 8 (1987).

time in England contributing to tax conferences with Tiley, as well. They even co-authored an article.¹⁹

I wish to focus on Jensen's inimitable gift for writing humor pieces—dubbed “tweedle”—in the author's note appending *Taxation of Beards*, which was published in *The Green Bag 2d*.²⁰

At CWRU, we've been debating whether the faculty should be writing only grand theoretical articles or whether it's OK, every once in a while, to write other stuff (you know, to look productive and pad the CV). The other stuff was characterized by a one colleague as “tweedle.” I think that wasn't intended to be praise, but I don't care. Let there be no doubt: this piece is tweedle. Indeed, everything in this journal is tweedle. In my tweedly view, the Bag is the preeminent American journal of tweedle.²¹

After all, it was his wit and humor that made those tax classes so much fun that I became a tax lawyer!

Although I'd love to describe them all, space constraints force me to choose just a few.²² One of my favorites is *The Unwritten Article*,²³ a piece in a symposium issue of Nova [Humor in the] Law Review. Imagine the text portion of each law review page containing only

-
19. John Tiley & Erik M. Jensen, *The Control of Avoidance: The United States Alternative*, 2 BRIT. TAX REV. 161 (1998).
 20. Erik (the Middlin') Jensen, *Taxation of Beards*, 6 Green Bag 2d 431 (2003) (describing the history of the tax on beards that Russia's ruler Peter the Great imposed from 1682 until 1725 in order to encourage his people to adopt the Western custom of foregoing “unnecessary, uncivilized and ridiculous” beards). I always said that I could die happy after having published something witty in *The Green Bag*—est. 1889 and re-est. 1997—“an entertaining journal of law.” I haven't yet succeeded, so I best remain healthy.
 21. *Id.*
 22. For those who wish to explore more, see Erik M. Jensen, *Planning for the Next Century or the Next Week, Whichever Comes First*, 117 PENN ST. L. REV. PENN STATIM 7 (2012); Erik M. Jensen, *Law School Attire: A Call for a Uniform Uniform Code*, 32 OKLA. CITY U. L. REV. 419 (2007); Jensen, *Taxation of Beards*, *supra* note 20; Erik M. Jensen, *The Redundant Professors Fund*, 49 J. LEGAL EDUC. 151 (1999); Erik M. Jensen, *Performance Scholarship and the Internal Revenue Code*, 29 HOUS. L. REV. 429 (1992); Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KANSAS L. REV. 433 (1990), and a sort-of follow-up, Erik M. Jensen, *Wher's the Beef? Buffalo Law and Taxation*, 36 N.M. L. REV. 517 (2006); Erik M. Jensen, *A Monologue on the Taxation of Business Gifts*, 1992 BYU L. REV. 397 (symposium issue on humor and the law). And more.
 23. Symposium, 17 NOVA L. REV. 785 (1993). Though I shall quote passages from both the text and footnotes of each article, I shall cite the article only once (rather than do pinpoint cites for each textual and footnote quotation). I know what the Bluebook says, but let's keep this as uncluttered (and as short) as possible, law review editors! No one will be confused by the lack of repetitive *id.* citations. Many thanks!

scattered footnote numbers—with no text. The only words appearing on the page are in each footnote at the bottom of the page, corresponding to those scattered footnote numbers. The humor starts with his author note: “Not written by Mr. Jensen, or anyone else, for that matter. Jensen is not a Professor of Law at Harvard. And he holds no position at the University of Chicago. The only appointment he ever had at Yale was for 9 a.m., and then he overslept.”

He explains the set-up in the text of footnote 1:

1. Ordinarily I am not one to leave white space on a page. *Cf.* JIMMY BRESLIN, DAMON RUNYON 247 (1991) (quoting Runyon: “Don’t ever leave white space.”). But I had to do (or not do) something to get into this issue of the *Nova Law Review*, and the deadline (not to mention the inspiration) was short.

Footnote 2 jabs a bit at the lack of productivity of many legal academics:

2. Not writing is a specialty of legal academics like me. Perhaps you didn’t see my unwritten articles in the *Harvard Law Review* last year, and I am unpublished in most of the other major legal journals as well.

Footnote 7 continues the theme:

7. We academics aren’t just goofing off when we don’t write something. So what if nothing appears on paper? Theories of interpretation are so much easier to apply to non-texts.

And Jensen continues to poke fun at the foibles of law professors in footnote 14, where he confesses that he usually reads “footnotes rather than texts, to see if I’ve been cited—if only as a ‘Some authors don’t have a clue. *See, e.g., Jensen.*”

Things get a bit bizarre when he introduces a subfootnote right in the middle of footnote 4!

4. Anyway, here I am. It’s humbling to be in such august company, especially when it’s only February.^{4a} I’m pleased to be in the same issue with Dean Roger Abrams [Geier note: Dean of Nova, former Jensen colleague at CWRU, and contributor of another article to the humor symposium], who rules the Nova roost (and pays his faculty chickenfeed, I’m told). Abrams has done a lot of scrambling on Nova’s behalf, and I’ve poached some of his ideas before.

^{4a}. Do we have to participate in this? It’s beneath us—and usually nothing is beneath us.

Abrams, the ultimate egghead (hard-boiled, but always sunny side up), has never written a better article than the one that appears here. (Of course, that's very sad.)

Jensen notes (in footnotes 8 and 9, with subfootnote 10 adding its two cents) that Malcolm Bradbury pioneered the genre with his “unsent letters.”

8. And consider Malcolm Bradbury's “unsent letters.”

They stay in my head, in their abstract, transcendental condition, for days, months or years, constantly being revised and improved over time. Admittedly, you cannot see them, but you cannot see the good or the true either, and it doesn't prove it's not there.

Malcolm Bradbury, *Unsent Letters* ix (1988) (emphasis added).

9. The Bradbury concept transfers quite well, I think, to legal scholarship. Bradbury did screw up the idea a bit by actually publishing the unsent letters. *See id.* But if he hadn't done that, I wouldn't have been able to fill up footnotes 8 and 9—and then where would we be?

10. I know where I'd be, and it sure as hell wouldn't be in this crappy non-article.

11. Shut up, footnote 10! This is *my* non-article. You're not even an erudite representative of your genre.

The footnotes make their escape from the madhouse on page 4 of the non-article, where they appear at the *top* of the page. Footnote 16 explains:

16. We notes will not be relegated to our historic inferior position on the page. After all, we get you academics promoted into those cushy lifetime jobs, and we deserve our place on top. Jensen, do you think you'd get any credit for this “work” if weren't for us?

17. We're taking over everywhere. *See* ROBERT GRUDIN, *BOOK: A NOVEL* 75 (1992) (“[A] number of footnotes, pretending some sort of grievance against characters in the story, left their proper stations of duty, infiltrated the text, and temporarily shut it down.”). And rightfully so. Right, note 93?

93. You betcha! And there's no reason we should have to follow an antiquated numbering system imposed on us by our oppressors. Note 10, don't take Jensen's criticisms (*see supra* marginalized notes 11–12) lying down. Stand on your own two digits! I'm note 93, and I'm proud!

66. Right on! And “footnote” is an insensitive, derogatory term

Along the same lines is Jensen’s *The Shortest Article in Law Review History*,²⁴ published in the *Journal of Legal Education* (which—by complete coincidence—Jensen edited a few years earlier). The text consists of a single sentence with two footnote numbers: “This is it.^{1, 2}” The bottom of the page contains the two footnotes, preceded by the author’s note.

I thank my colleague Arthur Austin for inspiration in the development of this article, and Arthur Austin and Jonathan Entin for comments on an earlier draft. Any remaining errors are mine.

1. A reader suggested to me that this article has insufficient legal content, that “Res ipsa loquitur” (or some other pompously legal slogan) would serve my purposes better. But it’s been decades since law review articles had to have anything to do with the law. For that matter, it’s been a long time since law review articles had to have anything to do with anything. This article has as much content as the other stuff in this issue, doesn’t it?

2. You think that, given this expansive text, you can write an even shorter article? Forget it. ‘The Shortest Article in Law Review History—Abridged Version’ is already in the works.

Of course,²⁵ he then had to follow up that gem with *The Intellectual History of The Shortest Article in Law Review History*,²⁶ where he noted that his article “has been translated into many languages^[4]—not a difficult task, to be sure^[5]—and many scholars, obviously taken with the piece, have memorized it. I know I have. I’m ready to declaim *Shortest* at cocktail parties or while out on the road, on the short circuit.” What was in footnotes 4 and 5? Glad you asked.

4. Well, one at least. See Erik M. Jensen, *Hukuk Dergileri Tarihindeki en Kısa Makale*, 2005 MEDENÎ USÛL VE ICRA IFLÂS HUKUKU DERGISI 373.

5. In case you’re interested, the text in Turkish came out “Bu, budur,” *id.* at 373, which I hope isn’t scatological.

24. 50 J. LEGAL EDUC. 156 (2000).

25. See *supra* note 11 and accompanying text.

26. 59 CASE W. RES. L. REV. 445 (2009). The bracketed footnote numbers appearing within quotations are Jensen’s original article footnote numbers, the text of which are also quoted. (You’ll understand when you go back up to the text and keep reading.)

Jensen wrote, “Many have said that *Shortest* is the best thing I’ve ever written^[6] (or, if you prefer, not written^[7]).”

6. Sad but probably true. *Cf.* E-mail from Roger I. Abrams to author (Dec. 12, 2000) (“Brilliant piece in the Journal. (Among your best.)”).

You can probably guess what footnote 7 contained: “For a really non-written article, however, see Erik M. Jensen, *The Unwritten Article . . .*”

Jensen continued:

Shortest attracted much commentary immediately after its publication. The *Journal of Legal Education* itself printed a couple of responses, demonstrating the interest in the article,^[13] and the editors gave me the opportunity to reply to my critics. My *Comments in Reply* reached a new peak in erudition-by-omission.^[14]

13. See Grant H. Morris, *The Shortest Article in Law Review History: A Brief Response to Professor Jensen*, 50 J. LEGAL EDUC. 310, 310 (2000) (“Not so!”); Thomas H. Odom, *A Response to Professors Jensen and Morris*, 50 J. LEGAL EDUC. 311, 311 (2000) (“Why?”).

14. See Erik M. Jensen, *Comments in Reply*, 50 J. LEGAL EDUC. 312, 312, (2000) (“ ”), or, if you prefer the Turkish version, Erik M. Jensen, *Cevabî Yorum*, 2005 MEDENÎ USÛL VE ICRA IFLÂS HUKUKU DERGİSİ 376, 376 (“ ”); *cf.* E-mail from Mark Cochran to author (Dec. 6, 2000) (“Your Comments in Reply . . . is the best thing you haven’t written in years. It’s far ahead of anything I haven’t written (and I haven’t written a lot).”).

Finally, Jensen got to the intellectual history of the original piece, which I quote below.

This is how it happened. A curmudgeonly colleague was perusing a reprint of one of my earlier articles, a lengthy two-pager,^[16] and he exclaimed, “That’s it?!” That was an intriguing comment—at least it was the best I could hope for from him—and it got me thinking.^[17] I know what a really long article looks like—I’ve written many myself—but what would the quintessentially short piece look like?

16. See Erik M. Jensen, *19th Century 16th Century Jurisprudence*, 3 GREEN BAG 2D 241 (2000) (noting, after exhaustive research, the absence of case law on the meaning of the Sixteenth Amendment before the Amendment had been contemplated); see also Erik M. Jensen, *16th Century 19th Amendment Jurisprudence*, 4 GREEN BAG 2D 465 (2001) (coming to a similar conclusion about a different amendment).

17. That happens.

And then the epiphany: That's it!!^[18] The quintessentially short article would be Damon Runyon's worst nightmare: a titled page otherwise generally full of "white space."^[19] We all know that it's harder to write a good short article than a long one, and drafting *Shortest* was really, really hard. I started by cutting adverbs and adjectives—normal procedure—but I then moved to nouns, and I scrutinized each pronoun and verb. "This is it" was learning distilled to its essence.

18. I drove an Epiphany once. It got good mileage, but it couldn't seat five comfortably.

19. See JIMMY BRESLIN, DAMON RUNYON 247 (1991) ("Don't ever leave white space." (quoting Damon Runyon)). [Geier note: Geez! Can't he come up with different sources? See *supra* *The Unwritten Article*, n.1.] The body of the shortest piece would look like this:

In fact, you could make several articles from the above. Please don't do so, however. That would be plagiarism.

Even then, after distilling—*burp*—my work wasn't over. Proof-reading is a never-ending task. At one point I was so tired that I dropped the proofs into the dessert.^[20]

20. The proofs were in the pudding.

That's how "This is it" came to be.

There is more entertaining stuff in that article (including a description of funny challenges to his claim of writing the shortest article in law review history from Bob Rains, Steve Bradford, and Robert Laurence). But enough of non-articles. Perhaps Jensen's most famous foray into humor—with more than a *souppçon* (*not* pronounced soup kon) of mordant commentary on the state of the legal academy—is his trilogy starring S. Breckinridge Tushingam (Breck for short). If you haven't read these stories, you should (ideally on a day when you are feeling down and need a smile). Here's a taste.

*A Day in the Life of S. Breckinridge Tushingam*²⁷ begins by noting the recent trend of law reviews publishing stories, such as *Hearing the Call of Stories* (published in the *California Law Review*)²⁸ and two essays published in the *Yale Law Journal* written by death row inmates.²⁹ So Jensen tells the first-person story of Breck's journey to obtain a law school teaching job.

27. Erik M. Jensen, *A Day in the Life of S. Breckinridge Tushingam*, 69 DENV. L. REV. 231 (1992).

28. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

29. Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993 (1991); Joseph M. Giarratano, "To the Best of Our Knowledge,

My bloodlines are good. Some of my ancestors came over on the Mayflower, heaving their guts out along the way. They could have formed chapters of Great-Great-Great-Grandfathers and grandmothers of the American Revolution, if only they'd had a better idea of what was to follow.

I was once a lawyer, and you know how that can be. Or, if you don't, consider yourself blessed. One 500-page set of lease documents too many became my designated driver, and I hit the road to drink. I was regularly crashing parties of the first, second and third parts, and my eyeballs glowed in the dark. My life, like my drinks, was on the rocks.

Therefore, be it resolved—like alcohol, some words get in the blood—I began to think of other pursuits. Why not law teaching? I know I'm supposed to care about the life of the mind and all that, and I would like to be a real academic—maybe a history professor or something—but that isn't going to happen.

Besides, law teaching has its special attractions. Law professors get paid real money . . . [T]o salve their consciences, they can make contributions to the starving historians' fund.

And . . . he was off, describing Breck's trip to the meat market³⁰ and the subsequent full-day interview at Scoff Law School.

I had heard Scoff was an up-and-coming school. Yes, I heard it from the Scoff Law interviewing team, but I did hear it. And, you know, it's comforting to be at a place where everyone pats everyone else on the back, over and over. Almost every school in the country, except overrated Yale, tells itself it's underrated. "If only the rest of the world knew how good we really are," etc., etc. You've heard it before.

After picking him up at the airport on a Thursday ("You should get here before we close down for the weekend. Monday or Tuesday would be best, but definitely don't come on Friday."), the dean showed Breck around the building.

The cafeteria was one of the finer points in the building. "We try to put our resources into those activities that generate the most student interest," he explained, "and we learned from a survey that students spend much more time eating than studying." The dean also told me, off the record,^[12] that there used to be a separate faculty dining room, until the food fights got out of hand.

We Have Never Been Wrong": *Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005 (1991).

30. See *supra* note 4 and accompanying text.

12. So sue me, Mr. Dean.

Breck was distressed to see the sorry state of the law library.

The dean was proud that the school's library had been compressed into one old classroom, with a storage closet serving as the "rare books room."^[13] "With everything on machines, we need terminals, not books," he said. "The book is as outmoded as chivalry. Happily,"—here he laughed—"we have neither."

13. The "room" contained one dusty set of Coke's *Commentaries* and the publications of the Scoff faculty, which are, I learned later in the day, rare indeed.

I grinned weakly. When I expressed some hesitancy at cramming western thought into a microchip,^[14] the dean ridiculed my neanderthalish thinking. His jab to the ribs was gentle, but pointed: "Breck, I suppose you get some tactile pleasure from holding a book in your hands."

14. *Cf.* JOHN MORTIMER, RUMPOLE A LA CARTE 101 (1990) ("The library [at Gunster University] was another concrete block. We went up in a lift to a floor which hummed with word processors and computers and even had shelves of books available.").

I do, of course. The Tushingshams raised me properly. Books are sacred. Do law professor read books?, I asked myself (and only myself).^[15] I continued to smile in what I hoped was a noncommittal way. I was trying to get a job offer, after all, and I kept thinking about those 500-page lease documents.

15. I now know the answer to that question: No.

The dean then led Breck to the faculty offices to be interviewed by several faculty members.

Just as we reached the faculty offices, I saw a blur and felt a gust of wind. The dean laughed. "That's our newest faculty star, Professor Rush, a young scholar in Caribbean semiotics. We recruited him from Ottavia Law."

"Caribbean semiotics must be a fascinating subject," I replied, although I had no idea what a semiotic is and I could think of nothing Caribbean except Harry Belafonte. "I'd like to learn more about it," I added. "What has he written?"

"Well, nothing yet," replied the dean. "Great work can't be rushed, and we know he's working. You saw how fast he walked, Breck, and he was carrying a legal pad."

. . . The dean went on to explain his theory that the less a person has written, the more likely it is that the person has thought

deeply about a subject. By that standard, Rush was an extremely thoughtful young man.

I must admit I wasn't convinced. I had recently read David Lodge's description of the once-promising Professor Masters.^[17]

17. '[Masters is] a great man, really, you know,' [Busby] said, with faint reproach.

'He is?' Morris [Zapp] panted.

'Well, he was. So I'm told. A brilliant young scholar before the war. Captured at Dunkirk, you know. One has to make allowances . . . '

'What has he published?'

'Nothing.'

'Nothing?'

'Nothing anybody's been able to discover. We had a student once, name of Boon, organized a bibliographical competition to find something [Masters] had published. Had students crawling all over the Library, but they drew a complete blank. Boon kept the prize.'

DAVID LODGE, *CHANGING PLACES* 89 (Penguin Books 1978) (1975).

But Breck admitted to himself that perhaps he was being hard on Rush. After all:

Rush had been teaching only for only ten years, and during that decade he had only one sabbatical and a couple of research leaves. And summers are short, with all the yard work to do. The rest of the time Rush was burdened with classes; he had been left with only twenty or so hours per week to work on his multi-volume project.

His first interview was with Professor Chips.

I had assumed that few members of the Scoff faculty would be willing to admit to no work-in-progress, but Chips, a student of law and appliances,^[21] was refreshingly forthright: "Teaching is our *raison d'etre*—pardon my French. Writing articles wastes time that could be devoted to our students and to writing memos."

21. *Cf.* JOHN KENNETH GALBRAITH, *A TENURED PROFESSOR* 50–51 (1990) (to avoid charges of "spread[ing]

himself too thin,” economics professor becomes world expert in refrigerator pricing).

Next was Professor Oldham, “student of Roman law, good food and fortified beverages—and a fine archeological specimen himself. Oldham fit the professor role perfectly, rumped and bursting at the seams.”

Oldham’s ample shirt showed a few dribbles of food, and it appeared to have once been very good food indeed. Wine spots also seemed to be vintage. “Uh-h-h-h, Breck, uh-h,” Oldham began, “how was your—uh—trip—uh, uh—travel—uh, uh—junktet—uh, uh—to Scoff?” My trip apparently reminded Oldham of some principle of canon law—it sounded to me like *lax lux lex et lox*²⁵—and he discoursed at some length on that subject.

25. I think it means “lazy lighted law on a bagel.”

After interruptions by Professor “Lightening” Bolt, who was fulfilling his institutional duty on the Faculty Building and Grounds Committee by checking for burned out lightbulbs, and Professor Hunque (pronounced “hoon-kay”), who just returned from the Virgin Islands on his sabbatical studying skin cancer, “one of today’s burning legal questions,” Breck was shown to Professor Madonna’s office, “whose bookshelves were stocked with girlie magazines from the past forty years.”

He was working on a pornography study, which, he told me, is likely to conclude that pornography is a good thing for society and is, in any event, a lot of fun for readers like him.

Madonna and I talked a lot about constitutional law. Madonna’s knowledge of the details of . . . cases [decided in the last seven years] was profound. I expressed my admiration for someone who had immersed himself in the Constitution.

“The Constitution?” he replied, with a puzzled look. “Oh, yes. I read that in high school.”

“But, but . . .” I tried to interject a word in favor of the Founding Fathers, to no avail. In Madonna’s universe, nothing important happened before 1950.

“Who cares about history?” thundered Madonna. “We have a living Constitution, and most life forms, after all, have no interest in their past. Do you think the polliwog gives a damn about James Madison, Breck? Of course not! Nor do I . . . Now *Dolley* Madison is another matter,” he added with a knowing wink.

Breck questioned Madonna about how he was going to get his study on pornography into print.

He was not clear on many journal practices, having last published in 1971. But that fact did not prevent him from trashing law

reviews: “Student editors don’t know what they’re doing; they can’t understand the subtleties of my arguments. If I were to send them something, it would be way over their heads.”

Next on Breck’s schedule was an opportunity to observe a Professional Responsibility class discussing the “important, but understudied, issue [of] whether a lawyer should have sex with his or her clients.”^[27]

27. Study of the issue has been restricted to specialized areas of the law. *See, e.g.*, Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988).

Breck went on to describe the class.

One student commented on the safety precautions that should be taken before lawyer-client sex. The instructor, Professor Reich, skillfully used those remarks to lead into a discussion of whether the lawyer, the client, or both have the responsibility to take protective measures.

Another student suggested that his participation in sex would depend on who the client is and how many clients he has at the time. Still another pointed to the scheduling problems that could develop if some clients were singled out for special treatment: “I would refuse to keep my other clients waiting.” Many raised questions about how time spent in sexual frolics should be billed.^[28]

28. *See* Kathy O’Malley & Dorothy Collin, *O’Malley & Collin Inc.*, CHI. TRIB., July 18, 1991, C28:

Attorney Albert B. Friedman got bad news recently: The Illinois Appellate Court ruled that a female client whose divorce he handled didn’t have to pay his full \$15,500 bill because some of the time he billed her for was time the two of them spent having sex Attorney Albert B. Friedman got good news recently: He was appointed to the Illinois Supreme Court’s Committee on Character and Fitness.

The discussion turned to whether lawyers might have affirmative obligations to engage in sex. If the “duty of client contact” ever is accepted, I have no doubt that Scoff will be known as its birthplace. But this question, too, is fraught with conceptual (and contraceptive) difficulties. For example, one student pointed out the extraordinary physical demands that might be made on a lawyer prosecuting a class action

If I smoked, I would have wanted a cigarette after that class

While interviewing with Professors Moot and Jeffries, Breck asked about a colleague’s work.

I asked the two professors about the work of Scoff Professor Dallas, which I had read about in the *Wall Street Journal* and the *New York Times*. Dallas had developed a method to evaluate legal writings in terms of adverbial and adjectival density, and he was beginning to apply his analysis to the work of William Faulkner. Journalists were amazed, and amused, at Dallas's ingenuity.

"You must be proud to get that kind of exposure," I innocently suggested.

"Proud?" It's an embarrassment to the school!" Moot roared. "What does this crap have to do with legal scholarship? Who cares what newspapers think, particularly about some southern cretin like Falconer? That idiot Dallas will probably start writing stories soon."

The temperature in the office had risen ten degrees. Moot continued: "Here! Look at this list of citations." He handed me a sheaf of papers with references to over 200 Wyoming court decisions in which his work on grazing law had been noted. "That represents real work."

"And you know what?" Moot wouldn't stop. "Dallas once *criticized* me for thinking like a lawyer! I consider that the highest compliment. Everything lawyers need to think about can be learned by studying grazing law. 'No more than 3.6 cows per acre may be grazed in Montana at elevations above 4,000 feet.' *That's* what law is all about."

I was impressed . . . but I expressed some surprise that a colleague's success could cause such a reaction. My remark was met with silence—a very loud silence.^[29]

29. See A.N. WILSON, C.S. LEWIS: A BIOGRAPHY 181 (1990) ("There is nothing like worldly success on the part of one academic to make all the others hate him or her.").

On the way to observing a class on feminist jurisprudence, Breck commented to the dean on how quiet the building was at 3:00 on a Thursday afternoon.

[T]he dean mumbled that the faculty was hooked up at home to every conceivable electronic research device. Working at home is as easy as working at the school building, he emphasized, and without the distractions. Sleeping at home, I noted mentally, is even easier

I asked the dean whether the school required that feminist jurisprudence be taught by a woman. "Of course," replied the dean. "Could a man possibly understand the female way of thinking?" . . .

Quite a few nasty glances were directed my piggish way as I entered the classroom.

The class hour was devoted (probably not the right verb to use) to evaluating the effect of sexual activity on the separation thesis.^[31] What this seemed to mean was sex, sex, sex—and in graphic detail. I learned more about copulative verbs in that hour than I ever learned in high school English.

31. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3 (1988) (“[w]omen are in some sense ‘connected’ to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and ‘connecting’ experience of heterosexual penetration . . . ; the monthly experience of menstruation . . . ; and the post-pregnancy experience of breast-feeding.”).

The name “Dworkin” was bandied about throughout the session. I hadn’t realized that old Ron had written on these topics,^[32] and I certainly didn’t recognize the usual Dworkian language.

32. I now know that he hasn’t, at least not for public consumption. *Andrea* Dworkin has. See, e.g., ANDREA DWORKIN, *INTERCOURSE* (1987).

The f-word has apparently become a term of art, and it has lost something in translation (And who’s this guy, Herman Newdics, that everyone talks about?) . . . I felt alone. These folks did speak in a different voice, and I wasn’t convinced it was deeper.

When I left the classroom, I was really all alone, except for the custodian, Jim Adam. Lacking the protection of tenure, he had to stay no matter what, even on a Thursday afternoon

Adam, it turned out, is an occasional scholar himself, one of the army of humanities majors doomed to academic unemployment [H]e told me about his frustrating life in the law school. He had kept library discards and had built a substantial collection in the school basement. “I love books,” he said, “and it’s good to have someone to talk to about books and other serious matters. I miss that at the law school.”

Nice guy. I promised Adam that I would read any draft articles that he sent me. I’m happy to report that, except for his failure to integrate the rich literature on grazing theory, Adam’s two most recent pieces are first-rate.

And so I left . . . the Scoff Law School, never to return. Although I did get an offer from Scoff, I took a job at one of the institutions I visited later. I’d like to say that I made my decision based on some grand principle, but money was the tipping factor. Grand

principles cancelled each other out. The other schools turned out to be exactly the same as Scoff Law.

As revealed in the second piece in the trilogy, *Tough on Scholarship*,³¹ Breck chose the Sloth School of Law. As he describes the school:

We plowed new ground when we became the first law school to have a gardening law clinic. And our faculty has sprouted several nationally known specialists (as well as a few budding superstars) in double-digging flower beds

And Sloth is a pleasant place to live.

The winters are mild, and the culture abundant. The Sloth Philharmonic provides just the right combination of soothing sounds—they're doing a Montovani cycle this year—and the Sloth Museum of Art has one of the world's best collections of toothpick sculptures.^[21] Everyone likes the life in (and of) Sloth.^[22]

21. Venus de Milo made from toothpicks is an astonishing, even disarming, sight. And if one of your children bumps a sculpture, it converts to an entertaining game of pick up sticks.

22. Potential students (our student body is made up of “potential students”) seem to have found our advertising slogan (“Join in the intellectual life of Sloth”) attractive.

Breck describes Sloth's attempt at “pruning the deadwood among the senior faculty and depositing the remains on the compost heap” by entering the market for lateral hires from Scoff Law School, “which I have written about in another journal.”

We directed our firepower at three Scoff stars—Bolt, Rush, and Dallas—whom you may already know.^[28] We hoped to be able to get at least one of them to move.^[29]

28. *See A Day, supra* note 1, at 237 (Bolt), 234–36 (Rush) & 240 (Dallas). We would also have been interested in Moot, the foremost grazing law scholar in the country, see *id.* at 239–40, but he was too firmly rooted to be moveable. He had signed a contract to do a treatise, *Moot on Grazing*, that should dominate the field (and pastures) in Scoff.

29. Of course, we've unsuccessfully tried to get movement out of a lot of long-time Slothians, too.

Bolt had “a national reputation in academic maintenance.” At his interview:

31. Erik M. Jensen, *Tough on Scholarship*, 39 WAYNE L. REV. 1285 (1993).

[H]e presented a faculty workshop on brickwork^[32] and carpentry. (What better subjects for a workshop?) Bolt is a strict constructionist, and many of his comments hit the nail squarely on the head. With him on board, we could tighten the screws on much of our wrongfully attached woodwork.

32. When Bolt dons a mortarboard at graduation, he knows whereof he wears.

Bolt has an intuitive sense of appropriate law school décor. Immediately after entering our building, he noted some problems with the portraits adorning our walls.^[33] He saw, for example, that the pictures were poorly matted. As he put it, “I have no idea what the intentions of the framers were.”

33. Bolt is a fine judge of hanging.

Bolt had his supporters, but other members of the faculty wanted to broaden our horizons by going after the Scoff expert in Caribbean semiotics, Professor N.A. Rush. To compete in today’s lawless academic legal world, a school needs curricular exoticism far more than it needs coherence.^[34]

34. *Cf.* United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) (“[M]any of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members . . . ”); MICHAEL MALONE, FOOLSCAP 298 (1991) (“[T]hat faction might try an end-run with those tenure slots, go for some radical feminist or psychoanalytic theorist or specialist in Native American folktales and drive-in horror movies.”).

When Rush visited Sloth, he gave a workshop on—well, I wasn’t sure what most of it was about.^[35] It dealt, I think, with his work-in-progress, which had been progressing for at least a decade.

35. Actually, it was about an hour.

. . . One of the few parts of his presentation that I could understand was a complaint about the lack of government funding for innovative legal scholarship—work like his own. The Eurocentric emphasis on literacy is a product of our benighted past, he stressed, and the feds don’t recognize “performance scholarship” for the invaluable contribution that it could become.^[36]

36. *See* Erik M. Jensen, *Performance Scholarship and the Internal Revenue Code*, 29 HOUS. L. REV. 429 (1992) (describing performance scholarship as a replacement for actually having to write something down).

In support of his position, Rush described a belly dancer who had quite innocently, and unsuccessfully, applied to the Office

of Naval Research for a grant. Rush complained about what he saw as ONR's purposely misleading name. I was reminded of Richard Nixon, when he decried the similarity in pronunciation of "Du Bois Clubs," which had been designated as a Communist front organization, and the Boys Clubs of America. It was, he said, "an almost classic example of Communist deception and duplicity." N.Y. TIMES, Mar. 9, 1966, *quoted in* STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN 1962–1972, 81–82 (1989).

The final candidate was Dallas, "who has published quite a bit and, as a result, has attracted a great deal of public attention," though some complained that he wrote "in an angry style."³⁹

39. The style is, however, accessible—a fatal flaw in an academic. See Erik M. Jensen, *Law Review Correspondence: Better Read Than Dead?*, 24 CONN. L. REV. 159, 166 (1992) ("impenetrable prose is presumed to contain profound insights"); see also Kenneth Lasson, *Scholarship Amok: Excesses in Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

One of the things that intrigued Breck about Dallas is that he "has this strange goal of publishing in all fifty states before he dies."

The committee charged with making a recommendation to the full faculty contained Gabrielle "Gabby" Hayes.

My friend Gabby is one of the strongest proponents of scholarship on the faculty. She can tear up other people's work with the best of them,^[45] and occasionally she reads it first

45. She had practiced on the Manhattan telephone book.

At the critical appointments committee meeting Gabby wore a "Tough on Scholarship" sweatshirt, which portrayed a gowned and blindfolded scholar plunging from the gangplank of the U.S.S. Academe

The discussion of Dallas was short Everyone had problems with his work. There was so much of it. It was wide-ranging, interesting, and well-written (some of us thought) but—well—not up to our standards.

"Anyone who doesn't aspire to publish regularly in top law reviews is fully incapacitated bovine flesh!"^[56] Gabby roared. "Duke, Columbia, Virginia, Vanderbilt?! Crap reviews! And the man doesn't use a single 'with respect to' or 'take account of' in most of his articles. How can anyone do topnotch legal work without using the profession's terms of art?"

56. That's "dead meat" to those of you not fluent in legal jargon.

Some members of the committee found the ferocity of Gabby's outburst surprising, I suspect, because she last published something in 1974, when she went up for tenure. And the journal was not exactly *Harvard*.^[58] But we all recognize Hayes's superstardom, and no one was enthusiastic enough about Dallas to take up the fight on his behalf. I certainly wasn't.

58. We have heard about several major projects in the meantime, but all have apparently bitten the dust before publication. No one is sure why the dust has gotten involved. Gabby may believe in publication standards so tough that no one, including Gabby herself, can meet them. Under that theory, Gabby's non-publication is conclusive evidence of her service to the cause of scholarship She has, however, jokingly promised to review a book as soon as she reads one.

Rush fared better.

Gabby raved about him: "The guy's a genius. His written work is beyond criticism." . . .

Professor Heep noted hesitantly: "Well, he hasn't really written anything."

Hayes: "That's it precisely. The promise, the potential, is there. He has published in no second-rate journals, and no one has disparaged his work in print. What more could anyone ask?"

Heep meekly replied: "But he hasn't really done any work that we can evaluate."

Hayes: "Yes, exactly. I'm glad you agree."

Breck preferred Bolt, however.

I began the discussion of Bolt with what I hoped was a winning position: "We've been having a lot of difficulty with the urinals in the building. Bolt is just the man to deal with that issue, and I am particularly well-disposed to him."

After my opening salvo, the committee engaged in a lengthy debate about men's and women's restrooms, much of it not suitable for reproduction in a family publication. Happily, that's not what this rag—er, *Review*—is.^[60] A specimen therefore follows:

60. For those who question the relevance of this issue to scholarship, see Tony Horwitz, *Endangered Feces: Paleo-Scatologist Plumbs Old Privies*, WALL ST. J., Sept. 9, 1991, at A1 (describing new archeological field of "paleo-scatology," studying such artifacts as the "Lloyds Bank T*rd," deposited 1,000 years ago by a Viking who must have been upset at the

slow-moving line). For most of us, excrement research is not a field of dreams. *But see* SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 367–68 (James Strachey trans.; Avon Books ed., 1965) (“A dreamer remarked that at one point ‘the dream had been wiped away’; and the analysis led to an infantile recollection of his listening to someone wiping himself after . . .”—well, you know the rest). “Oh, s***!” I hear you say, and you are right. It is nice to think of a discipline in which “Your work is a crock” may be regarded as a compliment. Imagine one scholar (of Italian descent?) making his research materials available to another: “I’ll make you an offer of a can of refuse.”

Professor Harp: “All you men ever think about is urination.”^[61]

61. *Cf.* Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 *BERKELEY WOMEN’S L.J.* 263 (1990–91).

Professor Ding: “It’s the only output we get around here. We have become a peer institution all by ourselves.”

Professor Traub (a constitutional law type) mumbled something about streams of commerce.

Professor Green, an environmentalist: “We should have fewer receptacles for everyone—male, female, and others. Otherwise, it just encourages them.

. . . And so on.

Despite these comments, the committee was overwhelmingly positive about Bolt. Some members noted how wonderful it was that Bolt’s work had sparked a spirited academic debate. If the budget permitted, Bolt and Rush were clearly shoe-ins.

Unfortunately, Breck describes that the budget permitted only a single hire. Whom did they choose?

With catastrophe facing us, Gabby saved the day with a gracious concession speech: “I am convinced that Bolt can become a scholar with respect to who (or is it ‘whom’?—oh, I don’t know) we will be proud. We will continue to be tough on scholarship at Sloth!” As she said this, she pointed to her sweatshirt. “To take account of the interests of collegiality, let us all rally around Benjamin Bolt.”

Whew! This was a great victory for those who want to be tough on scholarship. And we have every hope that we’ll be able to afford Rush as well in a year or two. Double tough. I know how happy these events made me; at all costs I wanted to avoid a blood and guts battle. What’s more, I’m sure I detected a look of

relief on Gabby's face, too, as she left the meeting to return to her own works-in-progress.

The first page of the final piece in the trilogy, *Dean Breck*,³² shows a copy of a memorandum to “faculty minus one” from Reginald Cuthbert, Cheesesticks Professor of Law at Siwash School of Law, regarding “Tushingham’s Antics,” quoted below.

The S.O.B. has written another story!

Several of us were horrified when a “colleague,” Professor Tushingham, published a story—with footnotes yet!—that denigrated the legal-academic profession. He’s done it again. A little criticism is all in good fun, but his last “story” is beyond the pail. (I put it behind the slop bucket in the barn.)

It’s about a hiring dispute at a “fictional” law school. The school’s goal is diversity—more minorities and women—although a few old geezers hold out for merit hiring, and a few others think diversity of views should matter. And then the school winds up hiring a white male anyway, apparently because he’s lazy enough not to threaten anybody.

No one should think that the fictional—and stupidly named—“Sloth” law school is anything like our school. But Tushingham uses our names in his sophomoric work. Some people out there might not be able to distinguish between Tushingham’s rantings and the true Siwash.

We have to do something.

Tushingham knew his days at Siwash “were numbered^[1]” when he received “a pirated copy, marked with a black spot, of Cuthbert’s memo.”

1. And the numbers were all negative.

At a public hearing, at which his “heresy could be discussed in a properly academic way,” his colleagues let loose. I’ll provide one example.

“I’d cut his ****,” Professor Gabriella (Gabby) Hayes told the audience that overflowed Siwash classroom A, “after providing full due process, and then make him into processed cheese.” She had begun her speech by saying she would take the high road, but she obviously got off at Exit 1.”^[11]

11. Academic behavior is the result of evolution. “For the better part of a century, we have been selecting for certain kinds of alienation and aggression on campus.” DAVID

32. *Jensen, Dean Breck, supra* note 11.

DAMROSCH, WE SCHOLARS: CHANGING THE CULTURE OF THE UNIVERSITY 9 (1995); *see also id.* at 78 (“[T]he university is a home for perturbed souls . . .”).

After several more faculty members vented, Breck realized that he had to get out of Siwash. “When things aren’t going well, what better way out than becoming a dean?”

I know that everyone doesn’t have a high opinion of deans,^[16] but I do. Being a dean gives one the opportunity to shape legal education, to help mold the minds of the next generation of lawyers, to . . . well, to get paid a lot more than anyone else in the building.

16. *See* Richard Russo, STRAIGHT MAN 242 (1997) (“There are lots of dull teachers. You can’t make them all deans.”); *id.* at 246 (He’s been a reasonably well-intentioned, lazy, honorable, mildly incompetent dean, and that’s about the best you can hope for.”).

In preparation for the process, Breck grew a beard “to look suitably academic^[18]” and, once word got out, he was on everyone’s search list.

18. “Exaggerated facial hair probably serves adaptive functions. As a social organ it inflates apparent body size, thereby helping to establish and maintain the group dominance hierarchy.” Jerry N. McDonald, NORTH AMERICAN BISON: THEIR CLASSIFICATION AND EVOLUTION, caption to plate 28 (1981).

The deanship interviews themselves were predictable.

“We want our dean to be outgoing,” said the chair of just about every school’s search committee.^[21]

21. Sure enough, many of the deans they hired were gone within a year. *See* Cynthia Cotts, *No Good Dean Goes Unpunished*, NAT’L L.J., May 11, 1998, at A1.

“We want to make a Quantum leap in reputation.” (Quantum U. is the other law school in the state.)

“We want to be better endowed.”^[22]

22. You know what they meant. Larry Flynt may now be our national ethicist, but get your mind out of the gutter. [Geier note: Here, he cited his own prior work *Tushingam on Roofs*, about which “one caustic critic said I spent too much time on gutter issues”].

That’s about it. Maybe a little talk about academic philosophy or something, but nobody takes that stuff seriously.

After visiting several schools:

Fate intervened and made everything easy. In late March I met with President Fate of South Soybean University. Soso State is a school at just the right level for me.^[26]

26. “‘So so’ is good, very good, very excellent good: and yet it is not; it is but so so.” William Shakespeare, *AS YOU LIKE IT*, act V, sc. i.

. . . When the president asked if I wanted to assume the deanship, I thought he wanted to engage in a tough experiment. I’m willing to assume almost anything.

But, no, he offered me the Soso job, and I accepted on the spot.^[28] The fit was nearly perfect, and I was sure I could make any necessary alterations.

28. I didn’t want him to see that I’d spilled my drink on the couch.

Soso State Law School was now my baby.^[29] waiting to be crafted in my image. Both of us needed a facelift, and a little belt-tightening wouldn’t have hurt either.

29. See J.C. Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888) (“The greatest teacher the world has ever known was fond of comparing himself to a midwife. His task, he said, was to aid the scholar to bring forth his own ideas. He, to-day, will be the most successful teacher who can best exercise this obstetrical function.”).

Upon his arrival at Soso State (and after having the blackboards cleaned because he “wanted to start with a clean slate”), Breck wasted no time in making changes. “But of course a dean can’t really change anything important, . . . so what I had to do was make it look like I had.” He had a faculty retreat to decide what “niche” to create for the law school (where they spent a productive morning trying to agree on the word’s proper pronunciation), and they decided to create the Soso Center for the New Empirics. “If necessary, I could divert money from other sources—for example, by chopping the budget for trivial studies, like those in taxation.”

He sent out glossy new brochures “to all law professors in the western hemisphere,” noting the works-in-progress of Soso faculty members, including Professor Clinton’s “seminal work on law review rejection letters, ‘I Hear America Dinging’” and the study of Professor Sanders exploring “the danger that the spread of Chinese restaurants poses to the American chicken population.^[36]”

36. This article will surely move us up the pecking order. An excerpt:

In 1988 Wong and Wong noted a concentration of four Chinese restaurants per square block in American metropolitan areas—a figure that represented a doubling in ten years. Perdue later concluded that in the main the two Wongs were right, but they had *underestimated* the rate of restaurant spread. If the current rate continues, Ehrlich determined that the United States will have three Chinese restaurants per capita by 2010. One can foresee the day on which the last chicken lays down her life for moo goo gai pan.

As Breck notes, “[i]t may not all be law, but it’s not not law.” He continues:

Don’t misunderstand; we aren’t just ivory-tower empiricists. Some of this work has important policy implications. For example, Professor Clinton comes out strongly in favor of honest rejection letters, which would replace the mealy-mouthed forms now used by most law reviews. What a refreshing change: “Unfortunately, we cannot publish all the fine manuscripts we receive. We also cannot publish yours.”

Breck touts Professor Dior’s “definitive call for a national law school dress code (the Uniform Uniform Code, she calls it).”

And Professor Walker’s monumental article on comparative jay-walking law is the first step on a new path for the school. Walker hated my predecessor, whose name I’ve forgotten, because the dean criticized Walker’s placement of the article in a pedestrian law review. But I didn’t want Walker to take a hike: I gave him the green light to go ahead with further boundary-crossing work.

. . . And we’re on the brink of a major discovery: Professor Zenger’s work on his “encrypted” article will, I hope, come to fruition soon. It may even allow us to break several codes, and find twenty years’ worth of hidden scholarship by several other faculty members.^[43]

43. See *Secret Messages*, A.B.A. J., Jan. 1999, at 78 (noting effect of federal regulations governing export of encryption software on, among other things, ability to complete law review articles).

To respond to students’ “reasonable complaint that grades are oppressive,” the faculty jettisoned the grading system. “As Professor Scarlet noted, to student acclaim, ‘Take Hester Prynne. She got an A, and look what happened to her.’”

So things are going pretty well; Soso has entered an era of good feeling. We have become a close knit community, with a faculty Weaving Committee that is, as far as I know, unique in legal

education. With it we are now able to tie up loose ends; I do so myself. I hope any day now—or at least before I retire—to meet Professors Geist and Caspar, valued members of our faculty, who have been out each time I’ve tried to see them over the last four years. Geist’s secretary regularly tells me to “[c]ome back another day, when once more he’s not here.”^[50] Reflecting the high value Soso places on truth, she’s been right every time.

50. [Malcolm Bradbury, *WHO DO YOU THINK YOU ARE?* 143 (Penguin Books 1993); *see also* Kingsley Amis, *LUCKY JIM* 92 (Penguin Books 1961)] (“Welch was known to be taking the whole day off, as distinct from days like yesterday . . . when Welch merely took the early and late morning and the afternoon off.”).

In sum, there is much to be done to prepare our students for the challenge of legal practice in the twenty-first century. We must

Forgive me. I started to lapse into my stock alumni speech, and you don’t need to hear that. Anyway, it will be published in an upcoming issue of the *Journal of Legal Education*, between two articles on Siberian feminist theory.^[50] You can read it there.

51. I know the Green Bag’s rule is only 50 footnotes, but I have a couple more points to make. First,

I understand that Professor Emeritus Jensen will continue to make his points in retirement, with several pieces in the pipeline. Thank goodness that we don’t have to go cold turkey!

* * *

When my esteemed tax colleague Lou Geneva retired from Cleveland-Marshall College of Law, I decided to read all of his student evaluations to find some tidbits to talk about at his retirement party.³³ By pure happenstance, I stumbled upon evaluations written by students of Helen B. Jensen—Erik’s beloved wife and also a talented tax and benefits lawyer (they met as law students at Cornell)—when she taught the basic Federal Income Taxation class as an adjunct professor at Cleveland-Marshall many years ago (on top of her full-time day job at then-BP America). I was not at all surprised to read student after student commending her sense of humor and wit. After all, Helen is often

33. We made hard copies—as Jensen would say, remember hard copies?—of all student evaluations publicly available for students to read in books at the library. At least we did until the central administration forced us to stop using paper evaluations—which had a high response rate—in favor of using the central university’s electronic faculty evaluations, which far fewer students complete. *See supra* note 6 (referencing Jensen’s affinity for hard copies).

mentioned as a first reader in Jensen's author notes.³⁴ A match made in heaven! And I wouldn't be surprised to learn that their daughter Addie—who just graduated from CWRU with her undergraduate degree and, I understand, was handed her diploma by her dad—has a wonderful sense of humor, as well—even if, concerning her dad, she might agree with John Lithgow that “[a]cademics tend to have wonderfully infantile senses of humor.”³⁵

34. *See, e.g.*, Jensen, *supra* note 31, author note (“[CWRU law librarian] Christine A. Corcos and Helen B. Jensen made many helpful comments on an earlier draft; all the nasty stuff is theirs.”).

35. *See* AZ QUOTES, <http://www.azquotes.com/quote/634814> [<https://perma.cc/F55G-XKSL>] (last visited Sept. 15, 2016) (attributing the quote to John Lithgow).