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# Tribute to Professor Erik Jensen

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## TRIBUTE TO PROFESSOR ERIK JENSEN

The editors of the *Case Western Reserve Law Review* respectfully dedicate this issue to Professor Erik Jensen.

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*Arthur D. Austin, II*<sup>†</sup>

### HOW ERIK FINESSED THE TAX LAW EMPIRE

Upon serious reflection, it was evident that the only method of weaseling into Erik's strategy was to follow the tactics of Sergeant Tooks. I encountered him in Korea. He was a legacy from WWII with an extensive commitment to combat tactics. Tooks was infantry. The first thing he did was set up a string of "fatigue" areas whose purpose was to attract the interest of the enemy who, as he predicted, would open fire on a death trap of vulnerable G.I.'s. The con worked as the enemy suffered extensive casualties. Erik adopted a similar ploy; he relied on his experiences in the use of sophisticated skills with tax programs that covered activities from taxing every conceivable object, even boards, which on occasion "were cut by the roots while maintenance was expensive"—if one wanted to look like Gabby Hayes, he had to pay for it.

When the footnote explosion occurred, it dominated Law Review publications. Erik appropriated its popularity for its convoluted consequences. The greater the extensive coverage of never ending disputes, the more explosive funds of a wide spread of devious and profitable are infinitely malleable. To confirm his assumption, he exploited a Columbia Law Review Article packed with a brisk cryptology mist from LAW to confirm: . . . .<sup>1</sup>

### THE FLIPPANT LAW PROFESSOR

To counter his drossier commitment to the tax siren which entices sailors to destruction and thus vulnerable to flippancy and side ventures in tax deals caused a drift to murder. The editor-in-chief is pushed to an untimely grave. His response—seeking distance but realizing that, "blood stains can be hard to get out but also interfere with important activities." The solution:

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<sup>†</sup> Edgar A. Hahn Professor Emeritus of Law, Case Western Reserve University School of Law.

1. Erik M. Jensen, *The Apportionment of "Direct Taxes:" Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997).

*Performance Scholarship*

In which each performance has its own thesis and stupidities, which disappear into ether.

*Also Consider Sleep Scholarship*

Erik has dedicated his lifestyle to the Drama of Dross. “Besides I like dross.” The dictionary surmises, it [dross] is the scum thrown off in smelting, also rubbish—also impure matter, drossel, also a solven slut.<sup>2</sup> Law professors favor dross. Jonathan Entin observes, “The difficulty of good scholarship over hundreds of journals, most containing few nuggets alone with much dross made good scholarship difficult to find.” Erik’s response—he published three articles. Dross—Dross—Dross!

Erik was frustrated with the nasty critics—especially footnoters. “Maybe I should give up.” He capitulated to his fans with: *The Shortest Article in Law Review History*.<sup>3</sup>

ERIK AS NEOLGIST

*The Unwritten Article* by Erik M. Jensen was “[n]ot 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.”<sup>4</sup> *A properly Bluebooked footnote can be a thing of beauty*.<sup>5</sup> The Bluebook “has been called the ‘pioneer’ manual, the ‘Bible,’ the ‘final arbiter,’ even the ‘Kama Sutra’ of legal citation,”<sup>6</sup> while footnotes are “an excuse to let the law review writer be obscure and befuddled.”<sup>7</sup> So great is the alarm in some quarters that a new brand of literature has sprung up in which law professors bemoan their pedantic ways. “A chorus of critics,” says Professor Arthur D. Austin of Case Western Reserve University, and argues that “footnotes have become a serious embarrassment to legal scholarship and one of the main culprits ‘in the death of decent writing in law reviews.’”<sup>8</sup> Or, in the words of Noel

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2. See THE CONCISE OXFORD DICTIONARY (9th ed. 1995) (defining dross).
  3. Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. LEGAL EDUC. 156 (2000).
  4. Erik M. Jensen, *The Unwritten Article*, 17 NOVA L. REV. 785, 785 (1993).
  5. See Arthur D. Austin, *Footnotes as Project Differentiation*, 40 VAND. L. REV. 1131, 1153–54 (1987); G.W. Bowersock, *The Art of the Footnote*, 52 AM. SCHOLAR 54, 54 (1983) (“In the hands of a master . . . [a footnote] can become a work of art and an instrument of power, and deception.”).
  6. Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 LAW LIBR. J. 3, 21 (1982) (citations omitted).
  7. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 40 (1936).
  8. Austin, *supra* note 5, at 1133.

Coward, encountering a footnote “is like going downstairs to answer the doorbell while making love.”<sup>9</sup>

*The Shortest Article in Law Review History*.<sup>10</sup> “This is it.”<sup>11</sup> “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.”<sup>12</sup> “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 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?”<sup>13</sup> “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.”<sup>14</sup>

Is neology relevant?

A tax issue?

Covered by the Cleveland School of Legal Scholarship?

The Solution?

The first man Flem would tell his business to would be the man that was left after the last man died. Flem Snopes dont even tell himself what he is up to. Not if he was laying in bed with himself in a empty house in the dark of the moon.<sup>15</sup>

*The Intellectual History of the Shortest Article in Law Review History*.<sup>16</sup> “That’s it”—the white space.<sup>17</sup> Read, the body of the shortest piece would look like this.<sup>18</sup>

He is not going to quit!<sup>19</sup>

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9. Bowersock, *supra* note 5, at 54.
  10. Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. LEGAL EDUC. 156 (2000).
  11. *Id.*
  12. *Id.*
  13. *Id.* at n.1.
  14. *Id.* at n.2.
  15. WILLIAM FAULKNER, *THE HAMLET* 279–80 (1940).
  16. Erik M. Jensen, *The Intellectual History of the Shortest Article in Law Review History*, 59 CASE W. RES. L. REV. 445 (2009).
  17. *Id.* at 447.
  18. *See id.* at n.19 (“The body of the shortest piece would look like this:”); *but see* Erik M. Jensen, *Legislative and Regulatory Responses to Tax Avoidance: Explicating and Evaluating the Alternatives*, 57 ST. LOUIS U. L.J. 1 (2012) (being an example of something written by Professor Jensen).
  19. *But see* phlegm snopes. “Phlegm Snopes” apparently was the name of a basketball tournament for Case Western Reserve University law professors.

### A FINAL COMMENT

“There is another reality that Farber and Sherry fail to acknowledge: Why should the radical Outsiders shoot themselves in the foot by compromising? They are now an Institution, conducting careers both in law and in the public intellectual sector supported by the imprimatur of the law academy. As Outsiders they are the beneficiary of a symbiotic relationship with Empire critics like Farber and Sherry, who, incidentally, devoted a book to them—and not to the respectable progressive reconstructivists. The effect of the stinging crossfire critiques is to validate the resonance of the radical multiculturalist voice. To engage in a transformative dialogue would fatally compromise their role as oppressed victims and concede that the days of the Empire plantation are over. It is the total exclusion by the mainstream Empire that confirms oppression status.

A safe prediction is that hostilities between the radical Outsider wing and Empire scholars will continue unabated. There is too much at stake and, for many, it is a lot of fun. The forum will embrace more public intellectual exchanges, especially from Outsiders. It is a medium with the advantage of a quick line of communication to a wider audience than readers of law journals. For the mean-spirited, going the public intellectual route is a passport to invective advocacy. The feminist movement will become more focused on defining its identity to further Balkanize legal education. Already a significant influence, feminism is forcing a debate on the Tyranny of Objectivity. The ultimate result will be a fractious, distracted, and demoralized environment, with the students, and eventually the profession, paying the price.”<sup>20</sup>

A dross presentation dedicated to Erik.

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*See* Leon Gabinet, *Tribute to Professor Arthur Austin*, 62 CASE W. RES. L. REV. 1 (2011) (explaining the reference to the Faulkner character and the basketball tournament).

20. ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 200 (1998).