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The Rule of Law is Dead!
Long Live the Rule of Law!

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Abstract

Polls show that a significant proportion of the public considers judges to be political. This result holds whether Americans are asked about Supreme Court justices, federal judges, state judges, or judges in general. At the same time, a large majority of the public also believes that judges are fair and impartial arbiters, and this belief also applies across the board. In this paper, I consider what this half-law-half-politics understanding of the courts means for judicial legitimacy and the public confidence on which that legitimacy rests. Drawing on the Legal Realists, and particularly on the work of Thurman Arnold, I argue against the notion that the contradictory views must be resolved in order for judicial legitimacy to remain intact. A rule of law built on contending legal and political beliefs is not necessarily fair or just. But it can be stable. At least in the context of law and courts, a house divided may stand.

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In their classic discussion of legal reasoning, Carter and Burke argue that the rule of law, in its essence, is a matter of requiring people to “look outside [their] own will for criteria of judgment” (Carter and Burke 2007:147). Whatever the specific features of a given political order may be, the rule of law directs individuals to organize their lives and reconcile their disputes according to independent, publicly shared principles outside the sphere of personal attachments and private beliefs. The highly charged conflicts that end up in courts will certainly tempt people to evaluate a judge’s decision by their own feelings and convictions. But the rule of law asks us to push beyond individual preferences. “[I]f you stop and think about it,” Carter and Burke write, “judging a legal result simply in terms of one’s own sense of right and wrong won’t do. The whole point of the rule of law is to set standards of governance that transcend individual moral feelings. If all we have are our moral feelings, we are no better than Islamic or other religious fundamentalists who insist that *their* moral scheme justifies destroying other incompatible moral systems” (Carter and Burke 2007:3, emphasis original).¹

Judged by this definition, the United States is arguably experiencing a rule-of-law crisis. Public opinion polls show that substantial majorities of Americans consider judges at every level to be influenced by political preference. The belief that judges decide cases and issue rulings on the basis of partisan interests is supported by scholarship that shows the judicial process to be permeated by political claims and commitments. Rather than attempting to “look outside their own will for criteria of

judgment," participants in the judicial process appear simply to be advancing their personal political agendas.

And yet, at the same time, the rule of law in the United States also appears to be alive and doing very well. Many of the same polls that reveal a significant public belief in the political nature of judicial decisionmaking also indicate a substantial public faith in the impartiality of judges. Large majorities of Americans consider judges at every level to be fair and trustworthy arbiters, properly shielded from political pressure and allowed to reach decisions based on their own independent reading of the law. The public belief in judicial impartiality conforms with the conventional picture of the judiciary that is typically advanced by the American Bar Association and by judges themselves. Moreover, the belief in impartiality is supported by scholarship that shows the judicial process to be infused with legal principle. From this perspective, judges do indeed seem to "look outside their own will for criteria of judgment" – except, of course, when they appear to be doing the opposite.

When confronted with a tension between ideas, the natural tendency is to attempt to resolve it. In this spirit, there are many efforts to demonstrate that the American judicial process must ultimately be either legal or political, and not remain some uneasy mix of the two. In this paper, I adopt a different approach following the lead of Judith Shklar. Over four decades ago, Shklar suggested that clashing perceptions of the judiciary may never be resolved into a single, internally consistent understanding because we expect our courts to perform contradictory functions: we

constantly ask them to be guided by general principles and to be responsive to political needs (Shklar 1964). Taking my cue from Shklar, I use the contradictory elements of the judicial process as my starting point. My goal is to understand how such a half-law-half-politics system of courts may endure.

I begin with a survey of the basic tensions that characterize the American judiciary, outlining the mixed view of the courts found in public opinion and in scholarly studies.² To better understand how this house divided may stand, I then turn to the work of the legal realists. Formed in the early part of the twentieth century, the legal realists were a group of jurists who devoted themselves to exposing the role played by politics and other non-legal factors in judicial decisionmaking. The realist critique called into question conventional efforts to render judicial authority strictly as a matter of legal principle. As a result, the legal realists found themselves squarely presented with the challenge of making sense of a judicial system where political preference and personal belief occupied a central position. This is the same challenge that faces commentators today.

My particular interest is in Thurman Arnold, the legal realist who was most clearly committed to understanding how and why the tension between different elements of the judicial process was sustained. I argue that Arnold's vision of a contradictory-yet-durable legal system ultimately rested on a specific understanding of human motives as a mix of emotional impulse, rational thinking, and moral inclination. Although parts of Arnold's thinking are problematic, his mixed portrait of human nature

holds promise. As we seek an account of how our rule of law functions, and attempt to explain how it remains possible for individuals to look beyond their own insistent will for criteria of judgment, I argue that we should begin with an understanding of citizens that makes room for the contradictory set of motives on which Arnold relied.

A House Divided

Contending Public Perceptions

To begin, consider the distribution of public opinion mapped by the Maxwell Poll on Civic Engagement and Inequality. In the fall of 2005, the Maxwell Poll posed a battery of court-related questions as part of a nationwide survey (Maxwell School of Citizenship and Public Affairs 2005).³ According to the poll, an astounding 82 percent of those surveyed believed that the partisan background of judges influences court decisionmaking either some or a lot. This view was shared by very different groups. An overwhelming majority of liberals, conservatives, people who attend religious services several times a week, and people who never attend religious services, all agreed that partisanship does not switch off when judicial robes are put on.⁴

For many, a belief in the political nature of judicial decisions seemed to translate directly into doubts about the sincerity of judicial pronouncements. A majority of poll respondents agreed that even though judges always say that their decisions flow from the law and the Constitution, many judges are in fact basing their decisions on their

own personal beliefs. Judges may consistently “talk law,” but most Americans appeared to suspect that judges were simply “doing politics.”

Given the widespread agreement that partisanship skewed judicial decisionmaking, one might expect large segments of the public to view judicial selection in political terms. The Maxwell Poll confirmed this expectation. In a period when Republicans controlled Congress and the Executive, the poll showed that Republicans were eight times more likely than Democrats to trust the President and Senate to pick good federal judges. Moreover, three-quarters of survey respondents rejected the idea that fewer judges should be subject to popular election. Most Americans appeared to view judicial selection as a political process and, as a result, thought it made sense to organize judicial selection in a political way.

Even so, the Maxwell Poll also provided evidence of strong support for the idea that independent judges are impartial guardians of our constitutional rights. In spite of the widely shared belief that judging was influenced by politics (a belief that was coupled with the commonly held opinion that judges often merely pretend their decisions are derived from the law and the Constitution), most of those surveyed did not appear to think that the rule of law was simply the rule of men. Next to the finding that an overwhelming majority of Americans believed partisanship to have an influence on judicial decisionmaking, the most lopsided majority tapped by the Maxwell Poll came in response to a question about the value of judicial independence. When asked whether judges should be shielded from outside pressure and allowed to make

decisions based on their own independent reading of the law, a remarkable 73 percent of those surveyed agreed.

The large majority in favor of shielding judges from politics held straight across party lines: three-quarters or more of Democrats and Republicans agreed that the courts should be independent. The same was true of self-described liberals, moderates, and conservatives. And the results were also no different when responses were broken down according to frequency of church attendance. Americans who go to church several times a week supported the ideal of judicial independence in the same large numbers as Americans who never attend church at all. Similar results held for daily television news watchers and daily newspaper readers – two groups that the poll showed were otherwise inclined to see judging in political terms. In fact, even among those respondents who *disagreed* with the statement “you can generally trust public officials to do the right thing,” the idea that judges should be insulated from outside pressure received a high level of support.⁵

The widely shared desire to preserve judicial independence appeared to reflect a popular aspiration – and, according to the Maxwell Poll results, it also appeared to reflect a broad-based recognition that, whatever else might be said about the politics of judging, a wide variety of citizens relied on the courts to resolve disputes. When asked why so many conflicts end up in the courts, only a small percentage of Americans blamed politicians for failing to deal with the controversies in the first place and an even smaller percentage blamed judges for actively reaching out to decide hot-button

issues.⁶ Instead, almost half of those surveyed said that courts were at the center of so many conflicts because the people themselves demanded that the judiciary get involved. Many Americans appeared to believe, in other words, that the courts responded to the demands of the citizenry as a whole. Given this belief, judicial independence would appear to be quite sensible: it is by allowing judges to make decisions without pressure from specific groups or parties that the judiciary is able to preserve the trust and interests of its broad public.

The overall picture painted by the Maxwell Poll is decidedly mixed. On one hand, large majorities of Americans seem to see the influence of partisanship on the judicial process. On the other hand, large majorities of Americans appear to believe that the courts are special venues in which political pressure and partisan squabbling have no place. A faith in the importance of judicial independence and impartial decisionmaking is alive and well, but so too is the suspicion that judges are advancing political goals under the cover of legal principle.

How much weight should these results be given? Although the Maxwell Poll only provides a single snapshot of public opinion, it is also the case that the poll's findings are echoed in many other surveys taken at different times. In 2006, the year after the Maxwell Poll, the Annenberg Foundation Trust at Sunnylands released a national poll that found the same set of ambivalent opinions about the judicial system (Annenberg Foundation Trust at Sunnylands 2006). The Annenberg survey found that large majorities of Americans (i) trust the judiciary to operate in the best interests of the

people, and (ii) believe state courts and the U.S. Supreme Court have the right amount of power. At the same time, the Annenberg survey also found (i) that 75% of respondents believe that judges are influenced by their personal political views to either a great or moderate extent, and (ii) that over two-thirds of those surveyed consider the influence of judges' personal political views to be either "not too appropriate" or "not appropriate at all."

The Maxwell and Annenberg findings have been repeatedly reproduced by polls designed to survey public attitudes about state courts (as opposed to public attitudes about "the courts" more generally). For example, nine separate surveys of public opinion on state courts were conducted in the ten-year period from 1998 to 2008 (University of New Orleans Survey Research Center 1998; Connecticut Judicial Branch and the Connecticut Commission on Public Trust and Confidence 1998; National Center for State Courts 1999; Office of the Administrator of the Courts, State of Washington 1999; New Mexico Administrative Office of the Courts 2000; Anderson, Niebuhr and Associates 2000; Greenberg, Quinlan, Rosner Research 2001; Illinois Campaign for Political Reform 2002; Justice At Stake 2008). Two of the polls drew from a national sample and the other seven were conducted in individual states (two of the statewide polls were conducted in Minnesota eight years apart). All of these polls contained similar questions about judicial fairness (e.g., "How well does the word 'impartial' describe judges?") and similar questions about the impact of politics on judicial decisionmaking (e.g., "Are judges' decisions influenced by political considerations?"). In

every one of the nine surveys, clear majorities expressed their belief that state judges were impartial *and* their belief that politics was at work in the state judicial process.⁷

Polls designed to measure public opinion about the federal judiciary show similar results, indicating that the public simultaneously believes in the evenhandedness of the federal courts and doubts the degree to which the federal judges actually stick to the law. Consider the political view. When asked whether federal judges “rise above politics and hand down fair decisions” or “hand down decisions that reflect [the judges’] own political leanings,” over 60% of those surveyed agreed that federal court decisions generally reflect political preferences (Belden, Russonello, and Stewart 1998). Matters are not much different for the highest federal court. A large portion of the public believes that the Supreme Court operates with too little regard for either legal principles or impartiality: national surveys regularly find a near-majority of respondents agreeing that the Supreme Court is “too mixed up in politics” (Gibson and Caldeira 2007:51, table 1; see also Gibson, et. al. 2003: 358; Scheb and Lyons 2001:184-90; Gibson, et. al. 2005). Indeed, some polls suggest that up to 70% of Americans agree that the Court favors some groups more than others (McGuire 2007:203). With the Court widely viewed as a political institution, the public often rates the Court’s performance in partisan terms. A large number of polls show that Americans routinely evaluate the Court from the perspective of their own individual party affiliation (Gallup Poll News Service 2007).⁸ In this vein, positive opinions of the Court have fallen among Democrats and conservative Republicans because the former have found leading

decisions to be too conservative while the latter believe that the Court has not been conservative enough (Pew Research Center for the People and the Press 2005). And when asked what sort of judge is most likely to let personal beliefs influence legal decisions, 40% of those polled said liberal judges, 39% said conservative ones, and 13% thought that both were equally likely to do so (Page 2005). For many members of the public, the legal ritual and rhetoric of the Court appears to look like a sideshow; it is politics, pure and simple, that seems to hold center stage.⁹

And yet the public also thinks of federal judges in terms of fairness and neutrality. Polls show that large majorities of Americans expect federal judges to apply the law impartially and distrust federal judges whom advance narrow ideological interests (Russonello 2004; Scheb and Lyons 2001; Gibson and Caldeira 2007). Studies have shown that the Supreme Court in particular has received a good deal of public goodwill because it is generally thought to be an even-handed guarantor of basic democratic values for all (Caldeira and Gibson 1992; Gibson, et. al. 2003; Gibson and Caldeira 2007). On the whole, Americans seem to believe that the federal judiciary uses its independence to make fair decisions. Sixty-four percent of Americans surveyed in 2006, for example, trusted the Supreme Court to operate in the best interests of the American people either a "great deal" or "a fair amount" (Annenberg Public Policy Center 2006; McGuire 2007). When asked whether federal judges should be subject to greater political control by elected officials, over two-thirds of those surveyed said no (CNN.com 2006).

In sum, whether the subject of discussion is the state courts, the federal courts, or courts in general, a wide range of surveys suggest that most Americans share the same conflicting mix of legal and political perceptions, leading them to view judges as fair arbiters and political agents all at once. The consistent message conveyed by these opinion polls is reinforced by the seminal research on popular legal consciousness performed by Patricia Ewick and Susan Silbey (Ewick and Silbey 1998).¹⁰ Based on a series of in-depth interviews with 430 individuals, Ewick and Silbey's work demonstrates that ordinary Americans typically define, use, and understand law in conflicting ways: on one hand, law "is imagined and treated as an objective realm of disinterested action... operating by known and fixed rules," and, on the other hand, law "is depicted as a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals" (Ewick and Silbey 1998:28). The same people hold these contradictory conceptions simultaneously. Law is popularly understood to be "both sacred and profane, God and gimmick, interested and disinterested" all at the same time (Ewick and Silbey 1998:23).

Conflicting Scholarly Perspectives

The competing public perceptions of the courts should in some ways be unsurprising, for the clash between such perceptions is at least as old as the republic itself. Advocates of the Constitution believed that the Supreme Court would be a model of impartiality. Alexander Hamilton claimed, for example, that the lifetime tenure of justices not only would erect “an excellent barrier to the encroachments and oppressions” of the legislature but also would shield the courts from those “ill humors” of the people that had the tendency “to occasion dangerous innovations in government, and serious oppressions of the minor party in the community.” The grant of lifetime tenure to justices was, Hamilton insisted, “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws” (Hamilton et. al. 1961:465,469). This equation between lifetime judicial tenure and impartiality was, however, seriously questioned. Opponents of the Constitution feared the political power that could be wielded by permanently ensconced members of the Supreme Court: “independent of the people, of the legislature, and of every power under heaven,” the justices were ultimately bound to “feel themselves independent of heaven itself” (Storing 1985:183). Anti-federalists worried that lifetime tenure, rather than guaranteeing impartiality, would create vast opportunities for judicial elites to pursue their own political interests under the guise of unbiased adjudication.

Such competing renderings of the judiciary are to be found not only in historical debates, but also in contemporary scholarship – a fact to which the entire “What’s Law

Got to Do With It?" conference eloquently testifies. Rather than rehearse the scholarly surveys that the other conference participants have undertaken in their own papers, I will limit myself here to observing that the existence of well-developed scholarly literatures presenting conflicting conceptions of the judiciary reinforces and confirms the conflicts in public opinion. For my purposes, it is enough that there is some validity on each side in the scholarly debate and, as a consequence, there is some indication that when scholars look at the judicial process they see versions of the same tension that members of the general public do.¹¹

As an illustration of the claim that there is some truth to both the "legal" and "political" understandings advanced by scholars, consider the political science treatment of the Supreme Court. Political scientists typically view the Court as the most political bench in the country. The selection of Supreme Court Justices is understood to be a highly politicized affair, with elected officials intentionally picking nominees in order to advance issues of importance to political parties and prominent interest groups (Epstein and Segal, 2005; Silverstein 1994). Moreover, the political identity of the Supreme Court is thought to be reflected in the high level of discord in the Court's opinions (Walker, et. al. 1988; Gerber and Park 1997; Caldeira and Zorn 1998; Wood et. al. 1998; Epstein et. al. 2001). In the view of many political scientists, the great degree of disagreement does not project an image of the Court as an impartial arbiter settling individual disputes by enunciating fixed and certain principles of law. On the contrary,

the high incidence of splintered decisions makes the Court look more like a fractious political body squabbling over governance of the legal system (Segal and Spaeth 2002).

Yet, in the context of this overwhelmingly political view of the Court, political scientists themselves also argue that members of the Supreme Court are motivated by legal principle (Keck 2007; Bailey and Maltzman 2008). These studies demonstrate that members of the Court are often beset by competing forces, pulled in different directions by the pressure of politics and the requirements of law. It is worth underscoring that this research has been conducted *within* political science, the ostensible bastion of political approaches to the courts. Even among those steeped in a political understanding of the judicial process, there is acknowledgement that legal principle must be given its due. Without addressing the large scholarly literature premised on the assumption that Supreme Court decisionmaking is entirely a matter of principle (e.g., Dworkin 1977 and 1986), we can see that there is empirically grounded scholarly support for the notion that even on the most political of courts there is more to judging than partisan preference.

The Stability of Contradiction

How can a judicial system that appears to be shot through with conflicting legal and political considerations endure?

One response to this question is to deny the significance of the conflict by arguing that American judicial process is ultimately consistent, and not some uneasy mix of incongruent factors. Judges themselves often insist that even though they may have differences of political opinion, their work remains fundamentally legal, a matter of applying preexisting principle to the facts and argument of a given case. As Judge J. Harvie Wilkinson has argued, it is the law that in the final analysis provides “a medium through which judges of disparate beliefs can often find common ground” (Wilkinson 2009). Others maintain that the assertion of legal principle in judicial opinions is a mere pretense designed to protect judicial prerogatives by papering over court politics. According to Shapiro and Stone Sweet (2002), lawyers and legal academics generally work together to promote the judiciary’s reputation for independence and impartiality. It is left to others to speak the hard truth that the emperor has no clothes: “Political scientists do not have the duty to defend the courts that lawyers have, and they do have an inclination to celebrate rather than disguise politics when they see it, in courts as well as elsewhere” (Shapiro and Stone Sweet 2002:6).

The idea of ultimate judicial consistency is appealing, but unfortunately it is not particularly helpful. To demonstrate that the judicial process rests on a single set of factors, one must interpret away views endorsed by substantial public majorities and large scholarly literatures. This may be the right course in a general sense, and perhaps one day further research and study will lead to the repudiation of contradictory understandings. In the meantime, however, conflicting perceptions of the courts are

still with us. These perceptions matter because the legitimacy of courts rests on the ability of judges to convey the impression that their decisions are dictated by the impersonal requirements of legal principle (Geyh 2007; Brown and Wise 2004; Gibson, et. al. 1998). Judges must visibly appear to play the role of neutral umpire, for it is by maintaining appearances of impartiality that judges reinforce their claim of actually being impartial and worthy of receiving public support.¹²

There is a developing empirical debate about precisely which aspects of judicial behavior appear political to the public (Gibson 2008a; 2008b; forthcoming). At the level of state courts, for example, some evidence suggests that campaign contributions and negative campaign advertisements detract from popular beliefs in judicial impartiality, while policy statements by judicial candidates do not have a similar effect (at least in those states that rely on elections to select or retain their judges). As this empirical debate refines our understanding of how different kinds of judicial action trigger different public responses, it also underscores the point I have made here: we live in a time of Janus-faced judicial appearances, with large majorities of the public (and substantial bodies of scholarship) seeing judges as impartial arbiters *and* political actors. Whatever the “real” nature of the judicial process may ultimately be, judges seem to be projecting images of their work that at once sustain and undermine their claims to legitimacy. And so the question remains: How can the judiciary continue to function when courts are widely viewed in contradictory ways?¹³ I suggest that we turn to legal realism for the beginnings of an answer.

Legal Realism

Developed during the early decades of the twentieth century, legal realism encompassed a complex range of related ideas and theories (Purcell 1973; Kalman 1986; Horwitz 1992; Schelegel 1995; Duxbury 1995; Feldman 2000). Yet one theme that threaded through much of legal realism was a specific critique of judicial reasoning: most realists were skeptical that court rulings were derived solely from legal principles, and they insisted instead that the true origins of judicial decisions were to be found in the judges' circumstances and motivations. "We know, in a general way," Felix Cohen wrote in his description of the realists' common knowledge, "that dominant economic forces play a part in judicial decision, that judges usually reflect the attitudes of their own income class on social questions, [and] that their views on law are molded to a certain extent by their past legal experience as counsel for special interests" (Cohen 1935:845). Behind judicial pronouncements about what the law is, most realists saw a tangled set of social pressures and political preferences at work.

By virtue of their shared critique of judicial reasoning, the realists were confronted with the task of understanding how the mix of legal and non-legal factors attending the judicial process might fit together. In other words, the realists, like commentators today, faced the problem of determining how judges could appear to be motivated by something other than the law and, at the same time, remain legitimate legal actors. And like many commentators today, a number of realists responded by

claiming that it was possible to somehow overcome the apparent contradictions of the judicial process. Felix Cohen, for example, thought that the values and preferences driving judicial decisions could be coherently systematized and ranked according an ethical understanding of the good life (Cohen 1933). Other realists envisioned consistency emerging on different grounds. Walter Wheeler Cook called on lawyers and judges to organize their thinking around the rigorous scientific study of social and economic life (Cook 1927). For his part, Jerome Frank advocated psychological transformation: claiming that the contradictions of judicial decisionmaking emerged in the first place because judges believed legal reasoning could reach objectively correct conclusions, Frank called on jurists to dispense with their childish need for certainty and to confront indeterminacies of decisionmaking with an adult sense of candor and responsibility (Frank 1970, originally published in 1930).

None of the various realist proposals for reconciling law and politics were realized – a fact that has led many to consider realism’s most lasting contribution to be its critique of judicial reasoning (e.g., Kalman 1986; Horwitz 1992). In this sense, scholars have considered legal realism to remain relevant today mainly as a set of standing questions, challenging us to explain how a judicial process driven by politics can be consistent with the rule of law (Fisher, 1991:284-86).¹⁴

I agree that legal realism does not tell us how to overcome the tensions between legal and non-legal elements in the judicial process. But I disagree that the relevance of realism is limited to its critical analysis. In this body of thought, we can find

arguments that help us understand how conflicting factors may hang together, creating a judicial process that does not need to overcome its internal inconsistencies in order to remain intact. Although no legal realists were able to find a way out of the contradiction between law and politics, there was one figure in the movement who provided a way in: Thurman Arnold.

The Symbols of Government

In a number of ways, Arnold's work reflected the commitments of the legal realists that surrounded him at Yale Law School in the 1930s. As his biographer notes, Arnold wrote in the "slash-and-burn style" favored by a number of realists as a means of distinguishing themselves from the meticulous, formalistic legal scholarship produced by other legal academics (Waller 2005:50; see also Duxbury 1995:112). In this spirit, Arnold included few footnotes in his work and generally took a cavalier approach to citation: in one article, he "simply turned over one of the footnotes to a colleague" who used the opportunity to criticize points Arnold had made in the text (Waller 2005:50). Substantively, Arnold also accepted the realist critique of judicial decisionmaking and argued that the legal system could not be explained in logical, impersonal terms that judges offered in their opinions. He "shared with most realists an abhorrence for abstract concepts and the view that the law was inconsistent, if not incoherent, as to any individual doctrine or set of doctrines" (Waller 2005:50).

Yet Arnold also departed from other realists in one key respect: he did not argue that inconsistencies in the law had to be resolved (Waller 2005). With one glaring exception that I will discuss below, Arnold did not attempt to work out the contradictions in the judicial process. In this way Arnold differed from his contemporaries (and from many commentators today). He considered the tension between the impartial principle and political preference less as an obstacle to be overcome than as an indication of how the rule of law actually operated and endured.

Arnold developed this argument with greatest force and originality in his book, *The Symbols of Government* (Arnold 1935).¹⁵ In *Symbols*, Arnold claimed that people have a strong rational bent, with a penchant for framing life and experience within coherent systems of principles. "Rational thinking compels us to seek complete and rounded systems of doctrine and principles," Arnold wrote. "The intellectual who makes one of these systems necessarily believes that it represents the 'truth'" (5). It is the motive force of rational thinking that leads people to disparage actions that appear to contravene systematized principles or seem to operate without principles at all.

Arnold argued that rational thinking produces the same love of logical system and hatred of ad hocery when applied to law. We consider the development and application of enduring, impartial principle to be the very essence of law – such that the term "law" embodies for the public "the belief that there must be something behind and above government without which [government] cannot have permanence or respect" (44). Actions that cast doubt on this belief in impartial principles are strongly criticized

even when the actions may have beneficial effects. As Arnold noted, “a court of law which achieves a desirable result by an inexact use of legal conceptions arouses more criticism from legal scholars than one which achieves an undesirable result in a learned way” (5).

Unfortunately, our rational systems tell us little about how law, or society more generally, work. “Actual observation” indicates that the “great constructive achievements in human organization have been accomplished by unscrupulous men who violated most of the principles we cherish” (5). If we look at the world as it is, Arnold argued, we will see that we cannot discover how problems actually get solved by scrutinizing doctrines and abstract philosophies. Regardless of what legal principles we may believe govern courts, judicial decisionmaking in actuality will be driven by preferences and feelings that cannot be traced back to doctrine. Rational thinking leads to the production of principled systems, but reason does not fully explain or motivate human conduct.

According to Arnold, judges caught up in the articulation of legal principles will remain blind to the fact that that their reasoned arguments are disconnected from the process by which their decisions are actually reached. These judges are like the ancient Egyptian priests who never developed a rigorous understanding of medicine in spite of embalming thousands of cadavers because they “opened up the body in the light of their accepted principles [and] were unable to observe what was before their very eyes” (v). Arnold suggested that the legal realists recognize the limits of legal principle that

"the priests" do not. Indeed, it is "child's play for the realist to show that law is not what it pretends to be and that its theories are sonorous, rather than sound; that its definitions run in circles; that applied by skillful attorneys in the forum of the courts it can only be an argumentative technique; that it constantly seeks to escape from reality through alternate reliance on ceremony and verbal confusion" (44).

The legal realists are wrong, however, to extend their insight about the limits of principle into a claim that principles are entirely meaningless. Impartial, logically ordered principles do not wholly explain or motivate conduct, but that does not mean that these principles are dispensable window dressing. Ideals and doctrines give "purpose, beauty, and symmetry to the drab business of life" (iv). Law, like any human institution, cannot be concretely organized and implemented on the basis of consistent principles. Yet individuals nonetheless place the utmost importance on principled coherence. "In spite of all the irrefutable logic of the realists, men insist upon believing that there are fundamental principles of law which exist apart from any particular case, or any particular human activity; that these principles must be sought with a reverent attitude; that they are being improved constantly; and that our sacrifices of efficiency and humanitarianism in their honor are leading us to a better government" (32-3). People tenaciously cling to the importance of principle, even though the validity of such an understanding cannot be demonstrated. The truth is, Arnold claimed, that the belief "exists only because we seem unable to find comfort without it" (33).

In calling principles matters of "comfort," Arnold did not mean that they were luxuries. As a matter of basic emotional need and deeply ingrained habit, every individual imposes order and purpose on life by "constructing for himself a succession of little dramas in which he is the principal character" (iv). When conflicts emerge between the role a person has created and her actual behavior, the conflicts are not resolved so much as they are "escaped" either by generating a "maze" of obscuring rituals or jumping into an altogether "different and inconsistent role" (iv). People never arrive at some moment of clarity and directness where they are simply themselves; instead, they always live in a world of theories, systems, and performances that give shape and direction to their experience. "Those who are unable to construct a worthwhile character for themselves in any particular situation lose morale; they become discouraged, ineffective, confused" (iv).

Arnold argued that institutions operate like individuals writ large, giving meaning to their actions by constantly creating unifying ceremonies and symbols. It is this institutional process of elaborating "little dramas" about law and other official practices that "make up the story of government" (v). In actual fact, of course, law will be made to suit the agenda of interested parties and there will be no straight line of causation leading from legal principle to judicial decision. But that does not mean that only "dupes" or "unconscious hypocrites" will insist that legal principle still matters (7). The great mass of people are neither fools nor liars; yet they insist on the truth of "the story of government" in spite of evidence to the contrary because rational systems of

principle remain important ordering mechanisms even if no one can quite conform to their terms. According to Arnold, the legal realists fail to understand the enduring importance of such principles because they fail to understand the basic “personality” that individuals and institutions share: these “living organisms” are “molded by habit, shaken by emotional conflicts, turned this way and that by words, constantly making good resolutions which affect them but not in the way that the terminology of the resolutions might indicate, and never quite understanding themselves or the part they are actually playing because of the necessary illusions with which they must surround themselves to preserve prestige and self-respect” (25-6).

As a matter of logic, contradictions between the practical politics of judicial decisionmaking and the impartial principles of law are a source of frustration. But a contradictory system is the only one that will work given the way people and institutions are. Law is a tool that will be made to function in the interests of its users; and yet this tool will only be accepted by and have value for people if it is enveloped by overarching principles that convey a message of unity and impartiality, independent of the law’s diversity of partisan uses. Thus, as one might expect given his talk about “little dramas,” Arnold suggested that the best way to think about the judicial process was not from the vantage point of logic, but from the perspective of dramaturgy:

An admission by a judicial institution that it was moving in all directions at once in order to satisfy the conflicting emotional values of the people which it served would be unthinkable. It would have the same effect as if

an actor interrupted the most moving scene of a play in order to explain to the audience that his real name was John Jones. The success of the play requires that an idea be made real to the audience. The success of the law as a unifying force depends on making emotionally significant the idea of a government of law which is rational and scientific (49).

Arnold's Significance

The argument in *Symbols* suggests that it is a mistake to evaluate the judicial process on the basis of whether people succeed or fail in their search for criteria of judgment outside of their own will. The judicial process cannot be reduced to the rule of law or to the rule of men, for it is both at once. Arnold grounds this conclusion on a specific understanding of human nature. It is because individuals have a practical need to advance their own particular interests and an emotional need to feel that they are living up to impersonal, coherent standards that the law must operate on two conflicting planes at the same time.

The resulting system endures not in spite of the contradiction between instrumental action and impartial principle, but because this contradiction suits the law to the people who are governed by it. This arrangement is not necessarily connected justice. The judicial process is stable because it recognizes and responds to competing human needs, not because it ensures that we live in a fair society. As Arnold put it, "From a practical point of view [law] is the greatest instrument of social stability

because it recognizes every one of the yearnings of the underprivileged, and gives them a forum in which those yearnings can achieve official approval without involving any particular action which might joggle the existing pyramid of power" (35).

Arnold thus provides us with a place to start to think about how and why the tensions in the American judicial process persist. He locates unresolved contradictions within people themselves – contradictions that in turn are used as the raw materials for dramatizing public life, creating roles for both legal principle and political preference. Arnold's portrait of people as being attuned to high principle, yet being unable to practice what they preach suggests a connection to an old notion of human nature that stretches back to Machiavelli (e.g., Grant 1997). Arnold's dramaturgical understanding of the way in which the passions and interests of each individual are played out suggests a connection to more contemporary readings of social performance (e.g., Goffman 1959 and 1963). These two streams of thought are not central to current scholarly assessments in either the legal academy or political science, and Arnold's work gives us some reason to elevate their profile (Bybee forthcoming).

It is a thought-provoking beginning, but not one on which Arnold himself built. At the end of *Symbols*, Arnold unveiled a *dues ex machina* "philosophy for humanitarian politicians" to suggest that a truly unitary system of law might be created after all (232). Rather than living with a judicial process that is at once driven by specific interests and held up to standards of impartial principle, Arnold argued that officials ought to adopt the perspective of physicians running an insane asylum. The doctors in

such an institution do not argue with the patients about the validity of their delusions nor do they try to persuade patients about the soundness of medical therapies. Since the staff's sole "aim is to make the inmates of the asylum as comfortable as possible," they are free to experiment with different approaches without worrying about whether they are mutually consistent (233). There is no tension in the asylum between what the physicians actually do and how they talk about what they do because the physicians feel no need to dramatize their work as a principled system.

In order for this insane-asylum inspired spirit of unabashed experimentation to take hold, the "humanitarian philosophy for politicians" must be matched by a new set of attitudes among the public, otherwise people will continue to demand the comfort of believing that government is rational and moral. Borrowing from the legal realists that he otherwise scorned, Arnold claimed that ordinary people could in fact be transformed by a "new creed called psychiatry" (269). "A new conception of an adult personality is bringing a new sense of tolerance and common sense to replace the notion of the great man who lived and died for moral and rational purposes" (269). Arnold hoped that once this new understanding of adult personality took root and a new kind of citizen had emerged, then a new "competent, practical, opportunistic governing class may rise to power" (271).

The resolution that Arnold tacked onto the end of *Symbols* drew some critical fire when the book was published and has continued to irk the book's readers. Arnold's biographer, for example, closes his very favorable overview of *Symbols* by excoriating

the book's conclusion: "It was as if a brilliantly engaging and complex movie ends with a jarring, happy ending tying up all the impossible loose ends or just concluded because the studio refused to advance further funds to the director" (Waller 2005:58). The criticism is well-deserved. If we accept Arnold's basic argument, then the resolution he suggests at the end is almost impossible to achieve. Throughout his book, Arnold presents the desire for rational, principled order as a fundamental human need. As a result, the tolerance for uncertainty and experimentation that marks psychiatry's "adult personality" does not represent just another set of symbols; it represents a sea change in basic human behavior and an abandonment of the dramaturgical understanding of personal and public life on which Arnold depends. Rather than join Arnold in the impossible position where he concludes, I would suggest that we follow the promising direction in which the rest of his argument points.

Conclusion

As I have argued, surveys show that a significant proportion of the public considers judges to be political. This result holds whether Americans are asked about Supreme Court justices, federal judges, state judges, or judges in general. At the same time, a large majority of the public also believes that judges are fair and impartial arbiters, and this belief also applies across the board. The public is hardly alone in its

views: divisions among scholars indicate that when the academy looks at the judicial process it sees versions of the same tension that members of the general public do.

It would be intellectually cleaner if the judicial process were not beset by conflicting perceptions; indeed, many appear to hope that further research and study will lead to a single, consistent view of judicial activity. Yet, rather than joining the chorus of voices that are calling for the development of consistent view, I have outlined a way of thinking about how contradictory legal and political elements of the judicial process might cohere.

My source has been Thurman Arnold, a figure who accepted the legal realist position that judicial reasoning was driven by interests and nonetheless insisted that claims about the importance of legal principle have real significance. Arnold's argument is far from perfect, but it helps us begin to conceptualize how legal and political perceptions of the courts may co-exist by complicating our understanding of individual beliefs and motives. More specifically, Arnold's argument depends on the claim that individuals value moral principles and rational systems, and yet remain unable to conduct their lives in accordance with either one. Thus the law is made to serve different purposes: on one hand, the law is pressed into service by interested parties trying to solve their problems; and, on the other hand, the law is shaped into a rational structure in order to give "the story of government" meaning. The law operates in both registers at the same time, even though they point in incompatible directions.

As Judith Shklar noted over forty years ago, people insist that “the impartiality of judges and of the [legal] process as a whole requires a dispassionate, literal pursuit of rules carved in spiritual marble.” This insistence on legal principle “may seem ridiculous” because “most thoughtful citizens know that the courts act decisively in creating rules that promote political ends.” Yet Shklar warned against the conclusion that political claims should eclipse legal understandings. The mix of political and legal factors is “not at all socially or psychologically indefensible,” Shklar wrote. “Indeed, if we value flexibility and accept a degree of contradiction, this paradox may even seem highly functional and appropriate” (Shklar 1964:x). Arnold provides us with the elements necessary to build on Shklar’s old observation about the usefulness of contradictions in the legal process. The next step, I would argue, is to follow this lead and fashion a theory that accounts for the half-law-half-politics system that we have.

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Notes

¹ Carter and Burke draw the injunction to “look outside [their] own will for criteria of judgment” from Robert Cover.

² I offer a far more detailed survey in Bybee forthcoming.

³ My discussion of the Maxwell Poll draws on Bybee 2007. The Maxwell Poll was conducted in October 2005. The sample size was 609 and the margin of error was $\pm 5\%$. The sample was national in scope and the raw data were weighted so that the presence of age, sex, and race groups within the overall results was equivalent to that of the population in the continental United States. The codebook and datasets for the different iterations of the Maxwell Poll, 2004-2007, may be found at <http://www.maxwell.syr.edu/campbell/programs/maxwellpoll/data.htm>. Visited on January 29, 2009.

⁴ Here are the percentages of each group that agree the partisan background of judges influences court decisions either some or a lot: Liberals (88%), Conservatives (83%), Frequent Church Goers (84%), and Church Abstainers (88%).

⁵ Liberals (77%), Moderates (82%), Conservatives, (77%), Frequent Church Goers (78%), Non-church Goers (83%), Daily TV News Watchers (77%), Daily Newspaper Readers (80%), and “Distrusting” Respondents (73%).

⁶ People demand judicial involvement (47%), Elected officials fail to deal with the controversies themselves (21%), Activist judges (11%). The political ideology of respondents does play a role here. Conservatives (19%) are more likely than Liberals (8%) to say that many conflicts end up in court because judges actively involve themselves in controversies. Given the amount of conservative rhetoric about the errant ways of “activist judges,” it is not surprising to find a difference of opinion between Conservatives and Liberals on this question. Even so, it is worth noting that the most common response of both Conservatives (46%) and Liberals (52%) was to say that many conflicts end up in court because most people want to get the courts involved. Thus, in spite of the steady conservative criticism targeting judicial activism, a large plurality of conservatives nonetheless believe that crowded, controversial court dockets are the result of popular demand.

⁷ Averaging across all nine polls, 70% of those surveyed agreed that state judges were fair and impartial, while 75% thought that politics influenced judicial decisionmaking.

⁸ Specifically, thirteen polls conducted by Gallup from 2000-2007 show that Americans’ overall rating of the Court are clearly related to their party affiliation. See Gallup Poll News Service 2007.

⁹ Particular subsets in the population may come down a bit differently on this issue. The less educated are somewhat more likely to see the Supreme Court in political terms, while lawyers admitted to practice in federal appellate courts and the Supreme Court are somewhat more likely to see the high bench in legal terms (See McGuire 2007). For extended discussions of how opinion elites and African Americans evaluate

the Supreme Court in political terms, see Caldeira and Gibson 1992:655-58; Gibson and Caldeira 1992.

¹⁰ Ewick and Silbey examine popular understandings of law and the legal process as a whole. For a study that looks specifically at the popular understanding of the legal profession and reaches conclusions somewhat similar to those of Ewick and Silbey, see Galanter 2005.

¹¹ This is not to say that the general public is familiar with the various schools of law-and-courts scholarship. It is safe to say that ordinary people do not develop their views of the courts by drawing from the funds of specialized knowledge on which scholars rely.

¹² For recent evidence that the appearance of judicial bias actually reflects the reality of judicial bias, see Bonneau and Cann 2009.

¹³ It is possible for scholars to synthesize the conflicting perceptions into a seamless view of judicial decisionmaking. For example, Feldman (2005) argues that because politics is part and parcel of legal interpretation on the Supreme Court, it is inaccurate to say that the justices decide cases on the basis of either law or politics. The justices do both and “rarely experience overt conflicts between their political desires and their interpretive views” because such desires and views are parts of the same decisionmaking process (Feldman 2005:93). The justices themselves experience no contradiction: they can “sincerely tell themselves that they fulfill their institutional duty or obligation to follow the rule of law, even as they simultaneously follow their political preferences” (Feldman 2005:109). For my purposes, the key point is that scholarly reconciliations like Feldman’s do not consider the conflicting public perceptions engendered by judicial behavior. A judge may sincerely believe she has consistently discharged her duties, but that does not mean that the judge’s actions appear that way nor does it mean that this appearance is unimportant.

¹⁴ The challenge posed by realist thought is not only considered to be a challenge for commentators. Charles Geyh, for example, has argued that the realist critique today threatens norms and customs that have long underwritten judicial independence in the United States (Geyh 2006).

¹⁵ Arnold’s most famous (or at least best-selling) work is *The Folklore of Capitalism* (Arnold 1937). I nonetheless focus on *Symbols of Government*. I do so in part because *Symbols* more squarely addresses the rule-of-law questions that are at the center of my discussion. I also do so because *Folklore* simply repeats many of the basic claims from *Symbols* (Arnold himself “described *Folklore of Capitalism* as a repetition of *Symbols of Government* with different examples,” and throughout his life he continued to think *Symbols* was his best work. See Waller 2005:69,75).