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## ARTICLE

### **The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory**

MARK FENSTER†

I am chiefly interested in editorials, judicial decisions, *The Saturday Evening Post*, the movies, speeches by university professors, *The New Republic*, *The Nation*—in fact, that stream of current literature which I am trying to analyze to get attitudes of the time. I read them and clip them to the exclusion of almost everything else.

—Thurman Arnold<sup>1</sup>

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1. BOOKS THAT CHANGED OUR MINDS 7-8 (Malcolm Cowley & Bernard Smith eds., 1939).

## INTRODUCTION

Though rooted in the legal realism with which he is typically associated,<sup>2</sup> Thurman Arnold's mid-1930s monographs, *The Symbols of Government* and *The Folklore of Capitalism*,<sup>3</sup> in fact attempted to establish a new approach in American legal theory: the critical study of the symbolic domain of governance.<sup>4</sup> While the traditional legal realist critique revealed the historically constructed and contingent nature of the legal forms that legal formalists essentialized, *Symbols* and *Folklore* instead inquired into the importance of the cultural "symbols" and "folklore" of governance. Arnold thus aligned himself with legal formalists and traditional economists (whose work realists also critiqued) by arguing that certain assumptions regarding legal doctrine, political structure, and a capitalist economy seemed essential to the governing institutions of the United States, even as he agreed with legal realists that many of those assumptions were outdated, inefficient, and unjust. Unlike conventional realists, Arnold had little faith that mere reform would cure governing institutions and the public of their irrational investments in the symbols of government and capitalism. Such symbols, he argued, form the terrain upon which the struggle for political and legal

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2. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 34-35 (1986); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 67-69 (1973); Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 *STAN. L. REV.* 1049 (1971); Neil Duxbury, *Some Radicalism About Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 *OXFORD J. LEGAL STUD.* 11, 12 (1990); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459, 511-12, 568-70 & n.585, 589 (1979).

3. THURMAN ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) [hereinafter *FOLKLORE*]; THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) [hereinafter *SYMBOLS*].

4. By "governance" I refer to the expansion of the strategies of political rule beyond its traditional institutional confines within the political and legal apparatuses of the state. In Nikolas Rose's terms, this conception of governance "rejects the view that one must account for the political assemblages of rule *in terms of* the philosophical and constitutional language of the nineteenth century, or that one must underpin this misleading account with a theoretical infrastructure derived from nineteenth-century social and political theory." NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* 17-18 (1999). Governance includes "any program, discourse, or strategy that attempts to alter or shape the actions of others or oneself." BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* 4 (1999).

change takes place. Realists sought to debunk symbols; Arnold sought to understand and use them to reshape the public's beliefs. Reading and, as the epigraph notes, "clipping" the legal, political, and popular literature of his time, Arnold sought "[a]n emotional comprehension of a science *about* law" instead of a realist or formalist "science of law."<sup>5</sup>

*Symbols* and *Folklore* also departed from realism in their mocking criticism of elite and popular ideologies. Before Fred Rodell began making a career out of it,<sup>6</sup> Arnold served as the legal academy's court jester, tweaking the pretensions of legal formalism and the legal professoriate by likening the dominant "jurisprudence" of his time to a "shining but unfulfilled dream of a world governed by reason."<sup>7</sup> Working attorneys may appreciate the existence of the jurisprudential dream, he explained, but they hope their sons don't waste their time studying the subject in law school.<sup>8</sup> His irony extended to the pretensions of governing ideology generally. Whereas primitive cultures base their rational laws on irrational, "magical" premises, modern capitalist democracies suffer irrational legal and political regimes constructed through hyper-rational theories and deliberation:<sup>9</sup>

In our rational and sophisticated age the Devil and Hell become very complicated. The true faith is Capitalism. Its priests are lawyers and economists. The Devil consists of an abstract man called a demagogue. He is the kind of person who refuses to be moved by sound economists and lawyers and who is constantly misleading the people by making the worse appear the better reason.<sup>10</sup>

Arnold did not merely propose a theory distinct from realism; he combined a detached social scientific analysis of the symbols of governance with a detached, ironic voice. Together, his approach and voice suggested that the intellectually and functionally efficacious reformer must

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5. Thurman W. Arnold, Book Review, 36 COLUM. L. REV. 687, 690 (1936).

6. See FRED RODELL, *WOE UNTO YOU, LAWYERS!* (1939); Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 OXFORD J. LEGAL STUD. 354 (1991).

7. *SYMBOLS*, *supra* note 3, at 57-59.

8. *Id.* at 59.

9. *Id.* at 4.

10. *FOLKLORE*, *supra* note 3, at 5.

operate within the symbols of governance while remaining sufficiently removed to note those symbols' contingent construction and emptiness of meaning. He could speak to intellectual and popular audiences outside the traditional confines of legal academia and present himself and his ideas as the modern, humorous antidote to a stultifying legal, political, and economic common sense.

*Symbols* and *Folklore* are historically important efforts to consider the implications of legal realism and 1930s-era qualitative social sciences for the study of the symbols of law specifically and governance generally. In them, Arnold decentered law and traditional legal—and even traditionally legal realist—objects and methods in the study of governance, an effort that continues today in the "Law and" scholarship that proliferates throughout the legal academy and social sciences.<sup>11</sup> To the extent that "we are all legal realists now,"<sup>12</sup> *Symbols* and *Folklore* remain significant as early post-realist works that engaged in a wide-ranging interdisciplinary inquiry into law's place within a wider cultural, social, and political context than legal academia typically considered. As such, *Symbols* and *Folklore* ask many of the same questions regarding law's significance and signifying practices that scholars continue to consider.

This is not to say that Arnold's monographs were an unqualified success. Their ultimate failure to establish a coherent and recognizable field of inquiry with a replicable methodology demonstrates not only the limits of Arnold's approach, but also the limits of the social sciences from which he drew. This failure helps explain the waning of his reputation. Despite the prominence of his career—which included stints as a Yale Law School professor, a federal appeals court judge, a New Deal "trustbuster," and a co-founder of the Washington D.C. firm Arnold, Fortas & Porter (later renamed Arnold & Porter after one of its partners moved to the Supreme Court)<sup>13</sup>—his work has not

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11. See Arthur A. Leff, *Law and*, 87 YALE L. J. 989 (1978) (meditating on law's complex relationship with the webs of human culture, and on the inevitably proliferating human efforts to study the relationship).

12. Joseph William Singer, Review Essay, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

13. Accounts of Arnold's life appear in his autobiography, THURMAN ARNOLD, FAIR FIGHTS AND FOUL (1965), in Spencer Weber Waller, *The Short Unhappy Judgeship of Thurman Arnold*, 3 WYO. L. REV. 233 (2003) as well as in the

received the attention that other realists have garnered.<sup>14</sup> When they discuss him at all, contemporary legal commentators chide Arnold for his intolerance and arrogance,<sup>15</sup> his "abiding social conservatism,"<sup>16</sup> and his intellectual "attention span of a two-year-old."<sup>17</sup> As a legal theorist, he is considered an outlier, a representative of a "peripheral or radical strand" of the realist movement whose current relevance lies largely in its indirect influence on Critical Legal Studies.<sup>18</sup> More often, contemporary scholars quote instances of his caustic, amusing critique of the unquestioned assumptions of legal formalism without placing such quips within his larger academic and political project.<sup>19</sup> This Article is an effort to provide both the intellectual context of Arnold's work and, through his work, a better sense of where and how the study of law turned after realism.

The Article is in five parts. Part I describes Arnold's relationship with legal realism, looking at the earliest part of his academic career when, as a mainstream realist, he

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introduction to a collection of his letters, GENE M. GRESSLEY, *Introduction, VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 1-94* (Gene M. Gressley ed., 1977), and in EDWARD N. KEARNY, THURMAN ARNOLD, *SOCIAL CRITIC* 39-62 (1970).

14. Arnold has not been the subject of a full-length biography, while his work is generally marginalized within histories of legal realism and has not even been the principal subject of an article in an American law review in thirty years.

15. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 240-41 (1995).

16. Ayer, *supra* note 2, at 1052.

17. Schlegel, *supra* note 2, at 512 n.264 (1979). *But see* Laura Kalman, *Eating Spaghetti with a Spoon*, 49 *STAN. L. REV.* 1547, 1557 (1997) (reviewing DUXBURY, *supra* note 15) (praising Arnold's work as "provocative," his personality as "compelling," and his personal letters as "lively").

18. Duxbury, *supra* note 2, at 12, 39-41.

19. See, e.g., Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 *YALE L.J.* 573, 593 (1998) (quoting Arnold's sarcastic description of the negotiations surrounding corporate reorganizations); Anthony V. Baker, "So Extraordinary, So Unprecedented an Authority": A Conceptual Reconsideration of the Singular Doctrine of Judicial Review, 39 *DUQ. L. REV.* 729, 729 n.2 (2001) (citing Arnold's sarcastic description of the Supreme Court as a "great Delphic oracle"); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *YALE L.J.* 763, 805 (1995) (quoting Arnold's description of how, for New Deal opponents, the Constitution had become "a sort of abracadabra which would cure all disease"); Eric Talley, *Precedential Cascades: An Appraisal*, 73 *S. CAL. L. REV.* 87, 108 & n.68 (1999) (citing Arnold, among other realists, for his critique of the insincerity of judicial decision-making).

performed empirical studies of local and state court systems. It then traces his shift towards the theoretical wing of realism as he began to attack the contradictions and failings of classical legal formalism, and as he extended realism beyond its focus on private common law doctrines to a critique of formalist conceptions of public and constitutional law, with an emphasis on defending the constitutional authority of New Deal administrative agencies. It closes by explicating Arnold's critique of realism in *Symbols* and *Folklore*, where he condemned realists' inability to grasp the fundamental role that formal concepts play in modern society and governance.

The subject of Part II is Arnold's proposed field of "Political Dynamics," an interdisciplinary approach to the symbols of law, politics, and economics. I closely trace Arnold's promiscuous use of the social sciences prevalent during the interwar years, especially the study of political propaganda and ideologies, anthropology, and institutional economics. Part III considers Arnold's authorial voice in *Symbols* and *Folklore*, which established him as an ironic observer of the odd, self-destructive folkways of 1930s American governance. A pastiche of popular Menckenesque commentator, critical and qualitative social scientist, and New Deal proponent, the Arnold of *Symbols* and *Folklore* differed sharply from his realist contemporaries. Focusing on two areas of legal doctrine and practice that Arnold studied in *Symbols* and *Folklore*, Part IV explains how Arnold applied his theory to the criminal trial and to the emerging field of administrative law (or, more specifically, the judicial review of administrative agencies). In both instances, Arnold focused not merely on the functional and instrumental value of realist law reform and enforcement, but also considered the way governing institutions struggle over the meaning of the symbols that condition their very existence and operations.

While remarkably prescient in its self-reflexivity, Arnold's expansive critique of realism was distinguished by significant blindspots. I appraise these in Part V, concentrating on his anti-democratic tendencies and the limitations of his often ham-fisted critical approach. Arnold's weaknesses were symptomatic not only of his own shortcomings as a critic and scholar, but also of the legal realism and social sciences from which he drew. Throughout this Article and especially in the Conclusion, I

consider Arnold's value as an historical figure and make two claims. First, to the extent that Arnold both built on and broke from his realist colleagues, *Symbols* and *Folklore* force us to consider the limits of realism's continuing relevance as a foundation of contemporary scholarship. Second, in his ironic and accessible monographs, Arnold established a critical public voice for the legal academic; that voice remains a compelling, if limited, model for legal scholarship that hopes to intervene in the public sphere. Ultimately, the monographs' position within the narrative of American legal theory provides both an inspiring account of cross-disciplinary inquiry and a cautionary tale of interdisciplinarity's perils.

### I. ARNOLD AND REALISM

Despite his protestations to the contrary,<sup>20</sup> Arnold is generally considered a realist.<sup>21</sup> He arrived at Yale, one of realism's core strongholds, in 1930,<sup>22</sup> having already produced a coherent, social science-influenced series of studies of civil court procedure.<sup>23</sup> Soon after his arrival in New Haven, his work began to shift from the empirical realism of his pre-Yale articles to a mode of realism focused more on theoretical and doctrinal issues.<sup>24</sup> This shift was

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20. See *infra* Part I.C.

21. See sources cited *supra* note 2.

22. See GRESSLEY, *supra* note 13, at 29.

23. See generally Ayer, *supra* note 2, at 1058-64 (describing work from the early period of Arnold's career as adopting "the ideology of procedural reform Schlegel, *supra* note 2, at 511-12, 569-70 & n.589, 585 (describing Arnold's recruitment by Yale); see, e.g., Thurman Arnold, *The Collection of Judicial Statistics in West Virginia*, 36 W.VA. L.Q. 184 (1930) (describing project of collecting information on all cases coming before lower courts to aid in efforts in court reform); Thurman Arnold, *Judicial Councils*, 35 W.VA. L.Q. 193, 194 (1929) (describing as common goal of judges and the bar to administer justice "efficiently, speedily and economically"); Thurman Arnold et al., *Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Containing Suggestions Concerning Pleading and Practice in West Virginia*, 36 W.VA. L.Q. 1, 10 (1929) (promoting formation of judicial councils to study West Virginia courts "with a view of improving the administration of justice, and submit reform suggestions to the courts").

24. See KALMAN, *supra* note 2, at 34-35 (1986); Schlegel, *supra* note 2, at 511-12, 569-70 & n.589, 585; see also Duxbury, *supra* note 2, at 19 (attributing Arnold's shift to interdisciplinary theoretical work to his opportunism); TWINING, *supra* note 2, at 67-69 (1973) (using Arnold as a central example of the differences between Columbia Law School's empirical strain of realism in the



itself within the mainstream of realism, especially as it was practiced at Yale, where the leading realists moved away from social science and towards doctrinal theory and critique.<sup>25</sup>

Articles from his early (i.e., pre-monograph) Yale period included attacks upon the then-prevailing Langdellian legal formalism<sup>26</sup> as well as more specific critiques of prevailing doctrinal conceptions of trust law, criminal attempts, and the relationship between substantive and procedural law.<sup>27</sup>

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late 1920s and the strain of realism that Yale exemplified in the 1930s, which was more explicitly political, more interested in the rules of civil procedure, and more influenced by psychology and psychiatry). On the distinction between realism's empirical and theoretical tendencies, see *infra* notes 31, 35 and accompanying text.

25. See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 19 (1995) (noting that only Underhill Moore would undertake a major empirical research project after 1933); John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 462 (1989) (reviewing KALMAN, *supra* note 2) (noting the shift among the Yale realists).

26. I use the term "formalism" to refer to the "classical orthodox" theory of legal thought of the late-nineteenth and early-twentieth century most closely associated with Harvard Law School Dean Christopher Langdell. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). The classical orthodox theory aspired to a quasi-scientific, comprehensive, complete, formal, and conceptually ordered system based upon a small number of principles from which a large number of rules, found and utilized in established precedents, can be derived. See WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 70-78 (1994); Wai-Chee Dimock, *Rules of Law, Laws of Science*, 13 YALE J.L. & HUMAN. 203, 204-09 (2001); Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL. EDUC. 441, 442-43 (1986); Grey, *supra*, at 7-13. Despite the analytical distinction between "formalist" theories, which strive for highly predictive rule- or principle-bound decisions, and "conceptualist" theories, which strive for a legal system based upon a small number of principles and concepts (see Grey, *supra*, at 9-10), my use of the term "formalism" is intended to reflect the historic use of the term to represent the classical orthodox theory, and its continued use by diverse historians and legal theorists. See, e.g., BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 66-67 (1983) (describing realists' opposition to formalism, and decrying continuing resistance to all notions of formalism); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 24-25 (1995) (presenting history of "modern conceptual jurisprudence" as reaction to "formalism"); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 39-41 (1990) (describing competing definitions and uses of the term "formalism").

27. See Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932) [hereinafter Arnold, *Substantive Law and Procedure*]; Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, (1931) [hereinafter Arnold, *Trusts*]; Thurman Arnold,

Therefore, although Arnold was not among the most visible legal realists during the early 1930s and was not even among those named in Karl Llewellyn's legendary lists,<sup>28</sup> his 1930s work, including *Symbols* and *Folklore* and the articles leading up to those two monographs, must be understood as rooted in and reacting to legal realism.

### A. Arnold's Realism

The realism to which Arnold responded<sup>29</sup> was based on two core assertions: first, that formalism and "all dogmas

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*Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930) [hereinafter Arnold, *Criminal Attempts*].

28. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter Llewellyn, *Some Realism About Realism*]. The story behind Arnold's invisibility on these lists is telling. After Roscoe Pound's critique of realism appeared in 1931 (see Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931)), following Llewellyn's *A Realistic Jurisprudence* articles and the list included therein, Arnold was one of the recipients of an appeal sent by Llewellyn and Jerome Frank seeking assistance in developing a reply to Pound. At least one historian speculates that Arnold never responded. See Ayer, *supra* note 2, at 1065 & n.76. Nevertheless, following his correspondence with Pound, Llewellyn attempted to add Arnold's name to the list in the following year's *Some Realism About Realism* article. Arnold requested that he not be included in the later list, however, and Llewellyn complied. N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 211-12 (1997). In his private correspondence with Pound, Arnold continued to express discomfort with being identified as a realist, at least through 1935. See *id.* at 247. This apparent private ambivalence was consistent with Arnold's published work in the mid- and late-1930s, which claims to break with realism. See *infra* Part I.C. By the end of his life, however, Arnold was more than willing to describe himself as a member of Yale's group of realists from the time of his arrival in New Haven. See ARNOLD, FAIR FIGHTS AND FOUL, *supra* note 13, at 54-70.

29. My purpose here is not to summarize the diverse work of legal realism—a largely impossible project, as realists, opponents of realism, and contemporary historians have concluded and demonstrated. See, e.g., DUXBURY, *supra* note 15, at 65-71 (1995) (describing difficulty of defining realism, and failure of earlier attempts to do so); L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 430 (1934) (criticizing realism by focusing on Llewellyn's work because of the movement's heterogeneity); Llewellyn, *Some Realism About Realism*, *supra* note 28, at 1254 (1931) (denying existence of coherent realist "school"). Nor is it to accept or reject John Henry Schlegel's contention that realism must be understood in the institutional context of the interwar legal academy rather than as a school of jurisprudence. See SCHLEGEL, *supra* note 25, at 6-8. Rather, what follows is a description of those tendencies of the general intellectual project identified as realism to which Arnold's work contributed and

and devices that cannot be translated into terms of actual experience" must be rejected;<sup>30</sup> and second, that a functional approach must replace formalism to rebuild legal doctrines that would reflect and be relevant to the presumed "real" of law in practice or action.<sup>31</sup> As Robert Gordon has explained, the realist conception of "evolutionary functionalism" assumes both the inherent superiority of the modern liberal capitalism towards which Western societies had been "evolving," and "that the natural and proper function of a legal system is to facilitate such an evolution."<sup>32</sup> Realism's functionalist approach strove to understand law "in terms of [law's] factual context and economic and social consequences"; as such, it was an attempt to peer behind and ultimately discard formalism's abstractions in order to find, explain, and make law relevant to realities that lurked in the knowable world beyond the foggy mists of formal legal doctrines.<sup>33</sup> As with its critique of formalism, realism's functionalist agenda was an extension of similar tendencies in sociological jurisprudence towards a "pragmatic instrumentalism."<sup>34</sup> Realists understood this functionalist approach in part as the basis for a social scientific study of law that would "demand observation and study of the actual structure and functioning of modern social, economic, and political life."<sup>35</sup>

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from which Arnold claimed ultimately to break. In this sense, I do assume the existence of a discernible "realism," but am as interested in Arnold's understanding of what that realism was as I am in what it may, or may not, have actually been.

30. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822 (1935).

31. See generally DUXBURY, *supra* note 15, at 132-33 (arguing that not all realists were functionalists); KALMAN, *supra* note 2, at 3 (distinguishing between negative and positive sides of realism); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1220-26 (1985) (distinguishing between legal realism's "deconstructive, debunking strand" and its consequentialist or "constructive" strand).

32. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984).

33. KALMAN, *supra* note 2, at 3.

34. See generally ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982) (drawing connections between the realists and Gray, Holmes, and Pound, as well as John Dewey).

35. Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 308 (1927); see, e.g., William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673 (1929) (declaring that the study and reform of business organizations law should focus on "the organization and

In place of its formalist *bête noire*, realism claimed to offer a modern and progressive approach to legal forms and practices that was both epistemologically distinct from legal formalism and more engaged in the politics of its time.<sup>36</sup> As part of their reconstructive project of finding and studying the law in society, realists privileged the study of law as a part of society, rather than as an isolated phenomenon and intellectual pursuit. They focused on social and economic "facts" rather than on timeless concepts, and studied law's operations more than its forms.<sup>37</sup> More broadly, realists sought to abandon the formalist project of collecting and teaching a singular legal taxonomy in favor of scholarship and pedagogy that would be more relevant to legal practice.<sup>38</sup> Furthermore, realists generally allied themselves with the progressive liberalism of the 1930s—itsself historically related to the already-established Progressive tradition in legal thought associated with the work of Oliver Wendell Holmes and the early Roscoe Pound—which was poised in the mid-1930s to assume an intimate relationship with the New Deal.<sup>39</sup>

Two important conclusions that follow from realism's critical and reconstructive project are central to Arnold's work. First, the judicial and academic effort required to fill the inevitable gaps and indeterminacy of legal rules

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operation of a business [rather] than [on] the mere form itself of business"). On realism's difficult relationship with social science disciplines and methodologies, see generally SCHLEGEL, *supra* note 25. On the epistemological differences between the social science and theoretical wings of realism, see, for example, TWINING, *supra* note 2, at 195-96 (describing how Llewellyn, who was more closely identified with the theoretical wing of realism, was ambivalent towards social scientific approaches to law); Hessel E. Yntema, *The Implications of Legal Science*, 10 N.Y.U. L.Q. 279, 309 (1933) (describing split between social scientific and theoretical branches of realism, and dismissing the latter in favor of the former).

36. See AMERICAN LEGAL REALISM, at xiii-xiv (William W. Fisher et al. eds., 1993).

37. KALMAN, *supra* note 2, at 37-38. Because of its embrace of "facts" and "results" instead of absolute standards of judgment, realism has been characterized as relativistic. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 43 (1973). On similar, and worse, charges against Arnold, see *infra* Part V.

38. See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Roscoe Pound et al., *What Constitutes a Good Legal Education*, 7 AM. L. SCH. REV. 887, 894 (1933).

39. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-70 (1992).

revealed as false the presumption that a rule of law above men and without human intervention was possible, much less desirable.<sup>40</sup> Second, realists generally rejected the pervasive early twentieth-century "legal-economic myth" that distinguished the presumptively free, private realm of the marketplace from the inherent coercion of government intervention, and that sought to protect the former from the latter.<sup>41</sup> To Arnold and the realists, this observation led to the conclusion that law, and its private corollary, the market, are human institutions subject to uneven political and economic influence. In this regard, Arnold shared with other realists—and especially with Robert Hale—as well as with the institutionalist economists of the early twentieth-century (including Thorstein Veblen, John Commons, Adolph Berle, and Gardiner Means) a substantive intellectual and political agenda that assumed law to be subject to change and intervention, and capable of instrumental use for progressive ends.<sup>42</sup>

Arnold's earliest published articles from his tenure at Yale enacted the familiar realist trope of demonstrating the illogic and impracticality of legal conceptualism, and provided the typical realist call for a more functionalist approach to specific legal problems. In "The Restatement of

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40. PURCELL, *supra* note 37, at 88; see also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269, 277-78 (1997) (contrasting what he terms realism's "core claim," that "judges respond primarily to the stimulus of facts" when deciding cases, with the formalist commitment to "the descriptive claim that judges respond primarily—indeed, perhaps exclusively—to the rational demands of the applicable rules of law and modes of reasoning").

41. See DUXBURY, *supra* note 15, at 106-11; Kalman, *supra* note 17, at 1559 (reviewing DUXBURY, *supra* note 15); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 487-91 (1988) (book review); HORWITZ, *supra* note 39, at 207.

42. See BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 9-15, 210 (1998); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421 (1990). Hale, an economist by training and a professor at Columbia Law School from 1919-1949, was instrumental among the realists in developing this latter argument. See FRIED, *supra*, at 3, 210; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935). For a discussion of Hale's relevance for contemporary legal theory, see DUNCAN KENNEDY, SEXY DRESSING, ETC. 83-125 (1993). On institutional economics and its influence on Arnold, see *infra* notes 162-181 and accompanying text.

the Law of Trusts," Arnold condemned the recently issued Restatement of Trusts for its construction of a "system of abstractions" based upon complicated and inappropriate common law rules, and proposed in its stead a proper—and properly realist—approach that would entirely reconsider whether the "ancient language of trusts" was at all practical "in solving modern problems."<sup>43</sup> In "Criminal Attempts—The Rise and Fall of an Abstraction," he criticized the formalist tendency to "reformulate . . . rules," make broad and vague generalizations, and create "elaborate logical machinery for sorting . . . dissimilar situations."<sup>44</sup> He proposed a new approach to understanding and adjudicating criminal attempts based on the underlying substantive crime.<sup>45</sup> As he explained in "Law Enforcement—An Attempt at Social Dissection," his general project at this juncture of his career was to "unite the study of law in action with law in books" by enabling not only the production of functional legal forms and concepts, but also "the study of these very principles once they are formulated."<sup>46</sup>

Arnold continued to demonstrate these familiar realist tendencies in *Symbols*, in which he included revised versions of a number of his recent articles.<sup>47</sup> *Symbols* also extended the realist critique to attack a more abstract notion of formalist "jurisprudence"—a straw man Arnold constructed (largely without the benefit of examples) that served as a symbol of the general assumptions of classic legal formalism.<sup>48</sup> Arnold sardonically defined "jurispru-

43. Arnold, *Trusts*, *supra* note 27, at 803, 806. Arnold provided a more general critique of the Restatement project as a whole in *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811 (1936).

44. Arnold, *Criminal Attempts*, *supra* note 27.

45. *Id.*

46. See Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 23 (1932) [hereinafter Arnold, *Law Enforcement*]; see also Arnold, *Criminal Attempts*, *supra* note 27, at 58, 79-80 (decrying formalism's "useless and misleading" logic, and calling for courts "to get rid of useless abstractions and to reclassify the situations which come before them for judgment"). See generally Ayer, *supra* note 2, at 1066-68.

47. See, SYMBOLS, *supra* note 3, ch. 3 (revision of Arnold, *Apologia for Jurisprudence*, 44 YALE L. J. 729 (1935) [hereinafter Arnold, *Apologia*]); *id.* at ch. 7 (revision of Arnold, *Law Enforcement*, *supra* note 46); *id.* at ch. 8 (revision of Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934) [hereinafter Arnold, *Trial by Combat*]); *id.* at ch. 9 (included portions of Arnold, *Substantive Law and Procedure*, *supra* note 27).

48. Arnold, *Law Enforcement*, *supra* note 46, at 23.

dence" as "the science of that great symmetrical body of principles which is supposed to constitute the law, the description of its deepest sources, and the unifying element of the law throughout history."<sup>49</sup> Because "jurisprudence" claimed to perform the impossible function of reconciling the internal contradictions and indeterminacies of law within a grand system of human endeavor, Arnold dismissed it as largely wishful thinking.<sup>50</sup> And because it failed to admit what for Arnold was obvious—that legal doctrines cannot be made consistent, least of all in a complex modern world—jurisprudence was merely a series of "ceremonial observances" rather than a systematic project based upon "scientific observations."<sup>51</sup>

Arnold's acerbic anti-formalism faulted equally conservative and liberal practitioners of jurisprudence. Conservative legal theorists relied upon abstract principles to defend what he considered, during the Depression, to be an unjust, inefficient, and ultimately inoperative economic system, while liberal legal theorists relied upon equally abstract ideas to construct utopian images of a perfect society.<sup>52</sup> Placid conservatives and foolish liberals both considered the integrity of their outdated systems of legal thought to be more important than the practical solutions Arnold felt were necessary to solve the real problems of the Depression.<sup>53</sup> Thus, all law reform movements would fail, Arnold argued, if they remained based on "a general examination and restatement of general principles," rather than on a properly realist "constant attempt to formulate and clarify rules and directions."<sup>54</sup>

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49. SYMBOLS, *supra* note 3, at 46.

50. *See, e.g., id.* at 56 (describing jurisprudence as "the effort to construct a logical heaven behind the courts, wherein contradictory ideals are made to seem consistent").

51. *Id.* at 70; *see id.* at 46 (distinguishing jurisprudence "from another way of thinking which may be described as practical, or benevolent, which produces entirely different social results").

52. *See* FOLKLORE, *supra* note 3 at 224.

53. *See* SYMBOLS, *supra* note 3, at 2; *see also id.* at 19 (noting similar parallels between conservative and liberal economists).

54. *Id.* at 84.

### B. *Arnold's Extension of Realism*

In *Symbols* and *Folklore*, which extended realists' functionalist critique of formalism to advocacy on behalf of the New Deal, Arnold applied realism to legal doctrines and practices besides private substantive law and civil procedure, the main objects of realism's focus.<sup>55</sup> Both monographs specifically attacked formalistic dogmas that he considered to be in the way of necessary New Deal efforts, including legal formalist approaches to public law and to economists' inability to consider actual economic conditions that their theories were unable to predict or explain.<sup>56</sup> Arnold's critique of public law was not simply intended to enable a more functional legal practice, but to enable a more efficient economy and society.

Arnold's hard-core functionalism, which was fundamental to *Folklore* and *Symbols*, shaped his blithely utilitarian definition of a governing regime's efficiency:

[I]n order to make judgments as to whether any activity is a good or a bad thing, it is necessary to have standards. For the time being we are adopting the standard that it is a good thing to produce and distribute as much goods<sup>57</sup> as the inventive and organizing genius of man makes possible.

Although this seemed to him the common sense goal of governance, he recognized that not all governing

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55. *Symbols* and *Folklore* focused on administrative, see *infra* Part IV-B, tax, see *SYMBOLS*, *supra* note 3, at 116; *FOLKLORE*, *supra* note 3, ch. 12, and antitrust law, see *FOLKLORE*, *supra* note 3, ch. 9, which are bodies of public law that realists ignored or underplayed.

56. *SYMBOLS*, *supra* note 3, at 102-03.

57. *FOLKLORE*, *supra* note 3, at 177; see also *SYMBOLS*, *supra* note 3, at 266-67 (arguing that functional, temporal governance was the most important goal of government and the basis of a "new humanitarian creed" he hoped would sweep the U.S.); KEARNY, *supra* note 13, at 136 (noting efficient and fair production and distribution of goods as Arnold's explicit normative standard). Arnold's "standard" is closer to a utilitarian norm than it is to the classic definition of "wealth maximization" as maximizing the dollar (or dollar equivalent) value of "everything in society." Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Critiques of Posner's definition and use of the concept of wealth maximization include: Robin F. Grant, *Judge Richard Posner's Wealth Maximization Principle: Another Form of Utilitarianism?*, 10 CARDOZO L. REV. 815 (1989), Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980), and Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687 (1999).



institutions sought this end directly. In explaining this odd, but apparently common, irrationality, he distinguished between the "temporal" and "spiritual" planes of governance. For Arnold, the temporal constituted the privileged, practical realm where actors achieve mutual goals—"the stage on which the ideals of society are given concrete reality."<sup>58</sup> Opposed to the temporal, the "spiritual" approach was for Arnold the stage upon which a society's ideals remain in the misty universe of formalist principles, and where professional and armchair philosophers obsess over the future, debate logical principles, and wage "holy wars" between different economic and political models.<sup>59</sup> Because the "stage" on which it performed was largely outside of public view, temporal, practical government could be fluid and dynamic, and could "muddl[e] through" crises by experimentation without the pretense of consistency and devotion to regressive and limiting principles.<sup>60</sup>

Arnold concluded that an effective regime must perform efficiently on the temporal plane by mastering the technical and practical tasks of distributing goods to its citizens and increasing overall social wealth. As Douglas Ayer has explained, Arnold's quest for more functional legal doctrines in his early work, which was consistent with his later explicit advocacy on behalf of the New Deal, arose from his "efficiency-oriented reform effort . . . [that] sought to prevent the waste of natural and human resources by maximizing the production and distribution of goods."<sup>61</sup> Arnold predicted that Americans would ultimately embrace the New Deal's "new economic creed" and "social ideals," which were based "on the belief that there exists a huge reservoir of technical skill, capable of running a great productive machine with new energy and efficiency."<sup>62</sup> He explicitly promoted the New Deal's efforts to bring the "great productive machine" into being as a necessary

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58. FOLKLORE, *supra* note 3, at 127.

59. *Id.* at 14, 20, 42; SYMBOLS, *supra* note 3, at 126-27.

60. SYMBOLS, *supra* note 3, at 2, 123.

61. Ayer, *supra* note 2, at 1077. The New Deal was not the only regime he appreciated for its attention to his vision of efficiency; Arnold also celebrated what he claimed was the disreputable and *sub rosa* practical government that existed under the "spiritual government" of economic and legal formality, as well as certain aspects of fascist and totalitarian regimes in statements that would become standard parts of critiques of his work. *See infra* Part V.

62. SYMBOLS, *supra* note 3, at 266-67.

response to the Depression. He argued that a complex modern society of private institutions—or, as he called it, "an industrial feudalism"—had produced an economic crisis and then failed to respond to the plight of the legions of unemployed workers the crisis had produced.<sup>63</sup> Like the realists, he sought modern, practical solutions to the conservative, conceptual morass of formalism in all its instantiations.

### C. *The Break from Realism*

Arnold's break from realism and attempt to bring an interdisciplinary, interpretive approach to the study of law, politics, and economics ultimately distinguishes him from other realists and legal theorists of his time.<sup>64</sup> In *Symbols* and *Folklore*, he moved away from a legal-centric vision of anti-formalist realism that studied the gap between what courts say they do and what they actually do, and towards a more comprehensive critique of formalist rhetoric and practice in all political, social, and economic institutions.<sup>65</sup>

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63. *Id.* at 106-07; see also *id.* at 114 (predicting that as "[t]he new administrative machine . . . gradually acquir[es] competence," resistance to the New Deal would fade away).

64. Even late in life, his academic career long behind him, Arnold emphasized interdisciplinarity as realism's key innovation. In a review of Wilfrid Rumble's early history of legal realism written during the last year of Arnold's life, Arnold claimed that the realists' turn to other academic disciplines, including psychology, anthropology, and economics, was their most important response to the crisis of legal formalism's legitimacy. See Thurman W. Arnold, Book Review, 84 POL. SCI. Q. 668, 669 (1969) (reviewing WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968)).

65. See Felix Cohen, Book Review, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 442, 446 (Lucy Kramer Cohen ed. 1960) (reviewing FOLKLORE, *supra* note 3) (reprinting 1 NAT'L LAW. GUILD Q. 161 (1938)). Arnold's effort to conceptualize government and capitalism as driven by "symbols" and "folklore" appeared in his work before the publication of *Symbols*. See Arnold, *Law Enforcement*, *supra* note 46, at 24 (describing main purpose of courts as dramatizing law enforcement, rather than actually enforcing the law); Arnold, *Substantive Law and Procedure*, *supra* note 27, at 646 (describing operations of judicial institutions as similar to "the presentation of a play"). Nevertheless, these earlier articles focused mainly on particular issues or legal doctrines and included suggested reforms, while *Symbols* and *Folklore* operate at a higher level of abstraction by collecting individual studies and placing them within an overarching theoretical apparatus. See SYMBOLS, *supra* note 3, at 127 (introducing Chapters 6-9 as case studies detailing the functions of the civil and criminal trial). *Symbols*, for example, places a revised version of Arnold's 1934

Arnold cast himself in *Folklore* as a diagnostician seeking to understand and explain the context and pathologies of the political debates of the mid- to late-1930s, and, ultimately, to intervene on the side of the New Deal.<sup>66</sup> Indeed, he described his project in *Folklore* as an attempt to understand the crisis in capitalism and "to explain the ideological difficulties which prevent the creating of organizations which will give that protection."<sup>67</sup> If a regime wished to succeed on the temporal plane, he argued, it could not simply ignore the spiritual plane. A diagnosis of what he called "the taboos and customs of the tribe"—the symptoms of the dominant political culture that structure political discourse and extend into all of a society's institutions—was a necessary prerequisite to a properly functional, practical solution to the Depression or any other crisis or problem faced by modern society.<sup>68</sup> Arnold therefore proposed a shift from the mere critique of law's surface forms and practices, or its temporal inefficiencies, to an inquiry into the deeper spiritual, symbolic forms and practices that shape "Law" as a field of governance.

This shift led Arnold away from realism. Realism's reformist anti-formalism, he believed, blinded it to the pervasiveness of symbols in the discourse of law and governance generally. Although its debunking of formalism's most deeply held attachments to concepts and rules enabled a better understanding of law and other basic principles of governance and economics, realism unfairly assumed attorneys and ordinary laypeople to be "unconscious hypocrites" or "dupes,"<sup>69</sup> and therefore resulted

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article on the emerging New Deal, which itself considers the symbolic, institutional, and psychological causes of judicial resistance to the New Deal, in the context of his more extensive development of a cultural institutionalist approach in the monograph. See Arnold, *Trial by Combat*, *supra* note 47, at 931-34, 945-47; SYMBOLS, *supra* note 3, ch. 8. Similarly, *Symbols* places his critique of jurisprudence that originally appeared in Arnold, *Apologia*, *supra* note 47, within the monograph's broader arguments regarding government generally and alongside the monograph's narrower discussion of particular areas of law and governance. See SYMBOLS, *supra* note 3, ch. 3.

66. FOLKLORE, *supra* note 3, at 205.

67. *Id.*

68. *Id.*

69. SYMBOLS, *supra* note 3, at 7. Ironically, Arnold's critics would maintain that Arnold himself suffered from the same elitist assumptions about the malleability of the mass political will. See *infra* Part V.

in "making the world look unpleasant."<sup>70</sup> Arnold also tried to understand governance and economics as sets of symbolic constructions whose meaning opposing groups attempted to define to their respective advantages. Realists and their counterparts in other disciplines erroneously assumed the possibility of a new order devoid of formal, overarching "symbols," where accurate and workable methods of organizing and resolving factual problems would lead to a modern, functional, and transparent legal and political system.<sup>71</sup> But symbols were central to governance generally, and to law in particular. No matter how effective, reform could not eradicate folklore.<sup>72</sup>

To be disillusioned with the judicial, political, and popular attachment to foolish principles and symbols is "futile," Arnold argued.<sup>73</sup> "So long as our belief in rational moral government depends upon the law, it must continue to balance logically the contradictory ideals which that government must express."<sup>74</sup> Instead, the correct diagnostic approach is first to "recognize" the necessary frailty that leads humans to cling to folklore and second, to "utilize" that frailty for political ends.<sup>75</sup> Debunking was merely a first step towards a greater political goal. And Arnold specifically sought to utilize the spiritual plane to advocate in favor of the functional programs of the New Deal that operated on the temporal plane.<sup>76</sup> Arnold's break from realism therefore was based on his assumption that the effective "diagnostician" must understand the symbolic and institutional context of formalism's great and ongoing

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70. SYMBOLS, *supra* note 3, at 6. In a letter to Harold Laski dated January 9, 1936, Arnold associated the unpleasant, extreme "hardboiled" position with the realist Walter Wheeler Cook. See GRESSLEY, *supra* note 13, at 217 (reprinting letter from Arnold to Harold J. Laski, Jan. 9, 1936). Cook, who "alone among the Realists . . . had a well worked out understanding of what it was to apply scientific method to law," had left Yale before Arnold's arrival to help establish the Institute of Justice at Johns Hopkins, where he hoped to develop an emergent study of law that would be analytic, functional, and committed to social science. SCHLEGEL, *supra* note 25, at 228; *see also id.* at 158 (discussing Cook's hopes for the Institute of Law).

71. See FOLKLORE, *supra* note 3, at 131; SYMBOLS, *supra* note 3, at 15.

72. See SYMBOLS, *supra* note 3, at 69.

73. See FOLKLORE, *supra* note 3, at 131.

74. SYMBOLS, *supra* note 3, at 69.

75. See FOLKLORE, *supra* note 3, at 161, 343-44.

76. See SYMBOLS, *supra* note 3, at 252.

success, and must perform her critical and political work with an awareness of that context.

#### D. Conclusion

In his functionalist anti-formalism, Arnold drew from the realism of his contemporaries. But even when his realism was recognizable as such, Arnold was unconstrained by realism's traditional domain of private law. Although he shared his contemporaries' assumptions, *Symbols* and *Folklore* carried realism into new doctrinal areas of public law and into an anti-formalist critique of economics. This movement was clearly related to Arnold's commitment to the New Deal as a political response to the Depression, and his avowed belief that only through governmental intervention in the market as regulator and, possibly, as participant could the current economic and social crisis be successfully addressed.

Much was at stake. Legal and economic formalism, he argued in both *Symbols* and *Folklore*, did not merely impede law's functionality; its privileging of "word-symbols" over governmental responsibility was dangerous to the health of the republic.<sup>77</sup> At the same time that Arnold moved realism, he was also moving away from realism's relatively narrow focus on legal doctrines and practice and towards a broader critique of legal and economic formalism as symptomatic of a popular need for a symbolic domain of governance. Law was merely one part of the system of governance that stood in the way of a functional modernity. The Depression and New Deal led him to extend realism; resistance to the New Deal led him ultimately to break from realism's legal-centric, critical approach. Witnessing the success opponents to the New Deal enjoyed in frustrating the Roosevelt administration's efforts to address the economic and social crises of the Depression, Arnold recognized the limits of realism's anti-formalism. As political and social theory and as a reformist program, realism was too limited and limiting. To replace it, Arnold sought an approach that could counter formalism on its own terms by recognizing formalism's persuasive power. I discuss this approach in Part II.

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77. See *id.* at 118.

## II. POLITICAL DYNAMICS AND THE STUDY OF GOVERNANCE IN THE SYMBOLIC REALM

This Part summarizes Arnold's critical approach, developed in *Symbols* and *Folklore*, which focused on the symbols and institutions of governance. He intended his proposed field of "Political Dynamics" (which he introduced and described in *Folklore*) to be "a science *about* society that treats its ideals, its literature, its principles of religion, law, economics, political systems, creeds, and mythologies as part of a single whole and not as separate subjects, each with its own independent universe of principles."<sup>78</sup> Informed by new developments in the social sciences, Political Dynamics was a provocative, critical, and interdisciplinary conception of legal study as qualitative social science, and of law and governance as symbolic practice. Both the wide field he identified as his object of study and the tools he used to conduct that study were distinct from those of most realists.<sup>79</sup> I begin by discussing what Arnold meant by "symbols," and then describe how Arnold saw those symbols as situated within social and ideological institutions.

### A. *The Symbols of Governance*

The titles of *Symbols* and *Folklore* made plain Arnold's shift away from realism. In the notion of the "symbols of government," Arnold attempted to encapsulate "the ceremonies and the theories of social institutions," and to examine them "as symbolic thinking and conduct which condition the behavior of men in groups."<sup>80</sup> He sprinkled anecdotal examples of symbols throughout the monographs.

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78. FOLKLORE, *supra* note 3, at 349.

79. This distinction is clearest in the differences between *Symbols* and *Folklore*, and a contemporary volume by Huntington Cairns, titled LAW AND THE SOCIAL SCIENCES (1935). Cairns noted in his introduction both that interdisciplinary studies were "part of the recognized trend in all departments of knowledge" during this period, and that a "younger generation" of legal scholars were "turning with increasing frequency to the social sciences for aid." *Id.* at 1, 3. But his book merely catalogs how some social science disciplines might be applied to the study of law, and generally conceived of legal studies as a separate pursuit from the study of other subjects. *See, e.g., id.* at 122 (noting that economics "has some definite contributions to make to the law"); *id.* at 160 (noting mutual influences between law and political theory). As I explain *infra*, Arnold generally rejects the disciplinary separation on which Cairns relies.

80. SYMBOLS, *supra* note 3, at iv.

In *Symbols*, for example, he illustrated the concept with a brief discussion of the Tennessee Valley Authority, which had brought electrical power to rural populations through an elaborate and ultimately wasteful set of financial and organizational structures in order to avoid the appearance of affecting a direct redistribution of wealth.<sup>81</sup> These structures symbolized a private corporate entity and as such were necessary for the TVA's existence. Similarly, Arnold began *Folklore* with an extensive discussion of how newspapers, magazines, and other mainstream opinion-makers utilized the symbolic specters of "Capitalism, Communism, and Fascism" to limit public intervention in the market by defining the outer limits of a proper response to the Depression.<sup>82</sup> In both instances, the "dramatic spectacle" of "political government,"<sup>83</sup> the symbols that define the meaning of any private or public institution, organized the possibilities and interpretation of governance.

The symbols of governance thus constitute a dynamic symbolic language and practice by which legal and political claims made within the dominant legal and political regimes have meaning and effect.<sup>84</sup> As one specific component of governance, "Law" serves as a "reservoir of emotionally important social symbols."<sup>85</sup> Arnold's claim relied upon, and emerged from, two key disciplinary sources, the study of propaganda and anthropology. After presenting Arnold's approach, I discuss those sources—which Arnold himself only barely acknowledged in public—that undergird and also, ultimately, limited "Political Dynamics" as an historically specific expression of the assumptions and interests of 1930s social science.

1. *Political Dynamics and the Symbols of Governance.* He began by deflating law's pretensions of grandeur and distinction. Jurisprudence represented for Arnold the academic field that supported and policed the abstractions that dominated law, and that won the allegiance of politicians, jurists, attorneys, and laypeople alike. Jurisprudence's conception of "Law" as a formal, distinctive

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81. SYMBOLS, *supra* note 3, at 16-17.

82. FOLKLORE, *supra* note 3, at 1-20.

83. *Id.* at 343-44.

84. See SYMBOLS, *supra* note 3, at 34, 103-04.

85. SYMBOLS, *supra* note 3, at 34.

system removed from human action was a significant site of symbolic principles "represent[ing] the belief that there must be something behind and above government without which it cannot have permanence or respect."<sup>86</sup> As such, jurisprudence is an enormously productive enterprise because its practitioners must continually prove the rationality of "Law"'s consistencies, explain away its inconsistencies, and decry the fallen principles that have resulted or could result from the imposition of an opposition's challenge to a particular conception of "Law."<sup>87</sup> In times of crisis (like the Depression), "Law" becomes a fraught enterprise producing an endless, spiritual discourse that would uphold "Law"'s timeless principles for the stability and legitimacy of political and social order.<sup>88</sup>

Jurisprudence's hyperactive intellectual practice is not merely significant for the elite legal community; "Law"'s fantasy also "meets a deep-seated *popular* demand" for "a beautiful dream" of transcendent principles of governance.<sup>89</sup> To the "man on the street," elite legal academics represent a "priesthood whose duty it is to expound that science, unmoved by the irrelevancies of practical day-to-day governmental action."<sup>90</sup> "It is enough for the public to have faith in institutions of legal learning as guaranties that principles, forgotten in the wickedness of a political world, are being constantly refined and made more useful for the world of tomorrow."<sup>91</sup> In addition, Arnold argued, legal academics cultivate "Law"'s illusory perfection because it confers status on their institutions, distinguishing law school as an intellectual enterprise from mere vocational training.<sup>92</sup> Merely disavowing participation in the self-righteous world of "jurisprudence"—a move that was central to the realist's response to formalism—was inadequate for the properly Arnoldian diagnostician

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86. *Id.* at 44.

87. *See Id.* at 17; *see also* N.E. SIMMONDS, *THE DECLINE OF JURIDICAL REASON: DOCTRINE AND THEORY IN THE LEGAL ORDER* 91-93 (1984) (describing Arnold's conception of jurisprudence as emphasizing its presence rather than its content in maintaining the appearance of consistency in legal thought).

88. *See* FOLKLORE, *supra* note 3, at 8; 62-63; 78-79; 83-117; SYMBOLS, *supra* note 3, at 36-37.

89. SYMBOLS, *supra* note 3, at 33 (emphasis added).

90. SYMBOLS, *supra* note 3, at 49.

91. *Id.* at 52.

92. *See id.* at 57.



because of the role jurisprudence plays both inside and outside the halls of the legal priesthood.

The fantasy of economics is no different from that of "Law," Arnold asserted. Neoclassical economics' utopian images of a free, "unimpeded competitive" marketplace, a rational man "who would work only for profit," and an essential, biologically determined human selfishness, "supplements the law as one of our most important symbols of government."<sup>93</sup> Like "Law," with its assumption of an abstract "legal man" who requires a complex series of rules to guide behavior, economics assumes an equally abstract "economic man," the automaton who follows, and should be allowed to follow, his self-interest.<sup>94</sup> These abstractions hindered possible legal and political solutions to the Depression, when the assumptions upon which they are based no longer hold. If a specific instance of law-breaking or a private dispute requires a legal solution, Arnold argued, "it becomes our duty to formulate logical rules and systems"; but if a specific instance of market failure requires a regulatory solution, "it becomes our duty to let it alone" in order to protect the abstract notion of the "market" from interference.<sup>95</sup> As a result, the dominant symbols surrounding economics and law stymied practical governance and intervention into the market. Government could not participate in the market in the same innovative, experimental manner as private industry because any such legal innovations would contradict the established symbolic presence of government as "bureaucracy" and would be found unconstitutional under the formalist symbols of "Law."<sup>96</sup> Similarly, government could not interfere with the economic "laws" of supply and demand, the free market, and the natural efficiency of private enterprise without facing the wrath of dominant economic theories.<sup>97</sup> Nevertheless, just as he must work with the prevailing formalist legal theory, so the Arnoldian diagnostician must utilize the prevailing economic theories:<sup>98</sup> "His choice of theories cannot be made on any other ground than that of expediency in gaining the ends he desires. Legal and

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93. *Id.* at 74.

94. *Id.* at 78, 84.

95. *Id.* at 85-86.

96. *See id.* at 99-100.

97. *See id.* at 98-99.

98. *See id.* at 103.

economic theory, whether radical or conservative, can never make him a prophet. They may, however, make him a successful advocate."<sup>99</sup>

Arnold noted this necessity in the political and legal struggles for legitimation and implementation of the New Deal. He lamented the fact that "government," as a symbol opposed to "rugged individuals," was one of the most powerful negative symbols of his day, whereas the private corporation, as a symbol opposed to government and akin to the rugged individual in the marketplace, remained a remarkably durable and powerful symbol of efficiency and freedom even in the depths of the Depression.<sup>100</sup> As such, the "polar words," "government" (and similar symbols invoking a monolithic state), and its opposite the "rugged individual" (along with other symbols invoking the hero of a popularized and romantic classical liberalism) organized governance by establishing the conditions under which any legal, economic, or political theory or movement could describe or act upon the world. Within the historical context of the Depression, polar words served as ingenious, binary symbols. Opponents of the New Deal could conjure the shibboleths of "paternalism" or "bureaucracy" or, worse, "socialism" or "totalitarianism," to describe proposed government programs, thereby demonizing legislative and regulatory intervention in the market.<sup>101</sup> For example, in the early New Deal, "private investment" in industrial infrastructure by individuals and private corporations served as a privileged, celebrated term, while "government expenditure" into public infrastructure, although an "investment" by a government institution, had strong negative connotations as an artificial and destructive intrusion into the natural order.<sup>102</sup> Under the weight of such

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99. *Id.* at 104.

100. See FOLKLORE, *supra* note 3, at 107-08.

101. See *id.* at 167-70; see also SYMBOLS, *supra* note 3, at 127 (listing "the rule of law vs. bureaucracy, freedom vs. regimentation, [and] individualism vs. socialism" as central binaries in judicial resistance to the New Deal) (emphasis omitted).

102. SYMBOLS, *supra* note 3, at 112. See also *id.* at 116 (describing taxation as demonized term); *id.* at 120-22 (describing process by which Social Security bill of 1935 was successfully passed by redefining the program as "insurance"); *id.* at 152-53 (describing "law enforcement" as a privileged term for maintenance of moral order).

folklore, New Deal proponents could not present their own symbols in a positive context.<sup>103</sup>

Nevertheless, these seemingly immutable ideological barriers to change could be contested. From observing the struggles of the New Deal to establish itself in the symbolic realm, Arnold concluded that in the midst of a social crisis, a specific "social need" left unaddressed by a prevailing order will go unmet until "new abstractions" emerge to justify filling this need.<sup>104</sup> That is, emerging political movements and ideas will face a lag between their first appearance and their ultimate success. New or competing "creeds" or ideological formations, such as the New Deal, face the "obstacle" of existing, dominant creeds; but when the emergent creeds begin to dominate and older institutions fade, the residual symbols remain in circulation within the newly dominant regime,<sup>105</sup> and may even be used by believers in the displaced regime or by a newly emergent opposition.<sup>106</sup> He argued that the New Deal must adopt, or at least adapt, the prevailing theories of its time to be successful.<sup>107</sup> The symbols of governance thus insure against radical social and political change by providing an historically stable medium through which the demands of outsiders can achieve recognition and approval without upsetting the structures of power and the distribution of resources.<sup>108</sup>

2. *Political Dynamics and the Study of Ideology and Propaganda.* Other academics and intellectuals sought, like Arnold, to conceptualize "culture" and "ideology" as substances that were manipulable by propaganda experts to meet specific or general ends. The sociologist Karl Mannheim, whose book *Ideology and Utopia* was translated into English in 1936, sought to move the study of "how men actually think" from "how thinking appears in textbooks on logic" to "how it really functions in public life and in politics as an instrument of collective action."<sup>109</sup> To achieve this,

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103. See FOLKLORE, *supra* note 3, at 2.

104. *Id.* at 378-79.

105. See *id.* at 118-19.

106. See *id.* at 119-20.

107. SYMBOLS, *supra* note 3, at 235.

108. See *id.* at 35.

109. KARL MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* 1 (Louis Wirth & Edward Shils trans., 1936).

Mannheim promoted the study of "ideology" as a term of approbation of an opponent's views, as a form of false consciousness, and in the more totalizing conception of ideology as "the characteristics and composition of the total structure of the mind of [an] epoch or of [a] group."<sup>110</sup> Mannheim's "ideologies," like Arnold's symbols and folklore, provided a conceptual framework for analyzing both political battles and the terms with which these battles were engaged.

Whether Arnold knew of or read Mannheim is unclear.<sup>111</sup> By contrast, Arnold was clearly aware of the influential work on propaganda of the political scientist Harold Lasswell, and the parallels between Arnold's and Lasswell's work are certain.<sup>112</sup> Lasswell applied the

110. *Id.* at 55-56.

111. According to Duxbury and Schlegel, Arnold had no access to Mannheim's work, which was not translated into English until 1936. See Duxbury, *supra* note 2, at 21 n.64 (describing personal communication with John Henry Schlegel). As such, Arnold may have read the work while writing *Folklore*, which was not published until 1937, especially given Arnold's connections to scholars in the social sciences. My argument is less pointed than the notion that Arnold was influenced by Mannheim, however. Others—including Mannheim and his American translators, who were prominent sociologists—were raising many of the same issues that interested Arnold regarding the partiality of human knowledge and perspective. Indeed, one reviewer of both books in 1939 noted the similarities between Arnold's work and Mannheim's work on ideologies. See Max Rheinstein, *The Role of Reason in Politics—According to Thurman Arnold*, 49 *ETHICS* 212, 214 (1939).

112. Lasswell and Arnold corresponded; in one letter, Arnold praised Lasswell's work. See, e.g., GRESSLEY, *supra* note 13, at 204 (reprinting letter from Arnold to Harold D. Lasswell, Feb. 22, 1935) (praising Lasswell, *The Moral Vocation of the Middle-Income Skill Group*, 45 *INT'L J. ETHICS* 127 (1935)). Lasswell, in turn, admired Arnold's analysis of political symbols for his "think[ing] with unconventional freedom about government." See Harold D. Lasswell, Book Review, 2 *PUB. OP. Q.* 687, 689 (1938) (reviewing *SYMBOLS and FOLKLORE*). Furthermore, their work has long been compared. See, e.g., J. MICHAEL SPROULE, *PROPAGANDA AND DEMOCRACY: THE AMERICAN EXPERIENCE OF MEDIA AND MASS PERSUASION* 70, 102-06 (1997) (placing Arnold within field of political scientists like Lasswell and semanticists like S.I. Hayakawa studying manipulability of language and symbols in the 1930s and early 1940s); MARK C. SMITH, *SOCIAL SCIENCE IN THE CRUCIBLE* 215 (1994) (noting that Lasswell, like Arnold, "consciously used myths and untruths to manipulate the public in the service of an allegedly moral organization"); WARREN I. SUSMAN, *CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 161 (1984) (associating Arnold and Lasswell as similar contemporary analysts of "political life" during the 1930s); Lowell Dittmer, *Political Culture and Political Symbolism: Toward a Theoretical Synthesis*, 29 *WORLD POL.* 552, 559-60 (1977) (describing Arnold's work as "continu[ing] the Lasswellian

prevailing psychological and psychoanalytic theories of the time to conclude that the public could—and indeed must—be persuaded and controlled through the use of cultural symbols.<sup>113</sup> Thus for Lasswell, propaganda, "the management of collective attitudes by the manipulation of significant symbols," enables benign social control by presenting an issue "in such a manner that certain cultural attitudes will be organized toward it."<sup>114</sup> Arnold approved of Lasswell's focus on propaganda as a critical force in politics, and embraced Lasswell's methodological combination of quantitative studies of the effects of propaganda and textual interpretation of literature and newspapers.<sup>115</sup> Like the public intellectual and newspaper columnist Walter Lippmann, whose earlier, enormously influential book *Public Opinion* (1922) similarly argued that the public relied on largely irrational mental images and stereotyped symbols to form their opinions,<sup>116</sup> Lasswell attracted and

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tradition"). Long after Arnold had left Yale, Lasswell joined with Arnold's student Myres McDougal in establishing the first formal post-realist interdisciplinary school of legal theory and education, "policy science," which sought to combine legal and social scientific study to meet clearly articulated liberal ends. See DUXBURY, *supra* note 15, at 171-81; KALMAN, *supra* note 2, at 178-86.

113. See Harold D. Lasswell, *The Function of the Propagandist*, 38 INT'L J. ETHICS 258 (1928); Harold D. Lasswell, *The Theory of Political Propaganda*, 21 AM. POL. SCI. REV. 627 (1927) [hereinafter Lasswell, *Political Propaganda*]. The best summaries of Lasswell's work on propaganda are BRETT GARY, *THE NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR I TO THE COLD WAR* 55-84 (1999); MARK C. SMITH, *supra* note 112, at 212-52 (1994); SPROULE, *supra* note 112, at 67-71.

114. Lasswell, *Political Propaganda*, *supra* note 113, at 627, 629; see also HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 183-93 (1930) (describing "irrationality" in political movements, specifically in the "displacement" of private affects upon public objects such as political symbols).

115. In a 1935 letter to Lasswell, responding to a number of article reprints the political scientist had sent him, Arnold praised one article which argued that the American middle class—subject to constant propaganda organized by, and in the interest of, the "plutocracy"—was likely to become increasingly self-conscious about its economic and political vulnerability to the elites above them and the lower classes below them. See GRESSLEY, *supra* note 13, at 204 (reprinting letter from Arnold to Harold D. Lasswell, Feb. 22, 1935) (praising Lasswell, *The Moral Vocation of the Middle-Income Skill Group*, 45 INT'L J. ETHICS 127, 133-34, 137 (1935)). Although much of Lasswell's work relied upon quantitative methodologies, see SPROULE, *supra* note 112, at 71, in fact a significant amount of his propaganda analysis and theory did not rely upon quantitative study.

116. WALTER LIPPMANN, *PUBLIC OPINION* 365 (1922). To deal with the complexities of the modern "world beyond our reach," Lippmann argued,

influenced Arnold as a social critic who recognized propaganda's powerful role in mass society.

Lippmann was not the only important precursor to Arnold's and Lasswell's interest in symbolic governance. In *Symbols*, Arnold explicitly praised the Italian sociologist and economist Vilfredo Pareto. Pareto's sociological writings had become fashionable among intellectuals and academics at Harvard and Yale during the early 1930s,<sup>117</sup> when English translations and commentaries on Pareto's sociology first widely appeared in print.<sup>118</sup> Better known in legal academia today for his earlier career as an economist, Pareto the sociologist sought to supplement classical economic assumptions of individual behavior as the rational satisfaction of wants by stressing the non-logical, passionate aspects of beliefs and actions.<sup>119</sup> Pareto's sociological theory also posited elite leadership as a structural and necessary feature of political and social

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effective leaders must be protected from the vicissitudes of the public while employing the techniques of psychological research and the technology of mass communications to achieve "the manufacture of consent" through persuasion and propaganda. *Id.* at 238-39. On the relationship between Lippmann's and Arnold's work, see Louis Hartz, *The Coming of Age of America*, 51 AM. POL. SCI. REV. 474, 479 (1957); on the relationship between Lippmann's and Lasswell's work, see PURCELL, *supra* note 37, at 107. Good summaries of *Public Opinion* and its place within Lippmann's long and prominent career include D. STEVEN BLUM, WALTER LIPPMANN: COSMOPOLITANISM IN THE CENTURY OF TOTAL WAR 60-69, 80-84 (1984); LARRY L. ADAMS, WALTER LIPPMANN 94-122 (1977).

117. See Arthur Livingston, *Editor's Note*, in 1 VILFREDO PARETO, THE MIND AND SOCIETY at v, v-vi (Andrew Bongiorno & Arthur Livingston, trans., Livingston ed., 1935); Barbara S. Heyl, *The Harvard "Pareto Circle,"* 4 J. HIST. BEHAV. SCI. 316 (1968); Joseph Lopreato & Sandra Rusher, *Vilfredo Pareto's Influence on U.S.A. Sociology*, 65 REVUE EUROPOÉENNE DES SCIENCES SOCIALES 69, at 71-73 (1983); Bernard DeVoto, *Sentiment and the Social Order*, 167 HARPER'S MONTHLY MAGAZINE 569 (1933). More recent discussions of Pareto's sociology include Patrik Aspers, *Crossing the Boundary of Economics and Sociology: The Case of Vilfredo Pareto*, 60 AM. J. ECON. & SOC. 519 (2001); Joseph Femia, *Pareto's Concept of Demagogic Plutocracy*, 30 GOV'T & OPPOSITION 370 (1995); and N. S. Timasheff, *Law in Pareto's Sociology*, 46 AM. J. SOC. 139 (1940).

118. In 1934, Knopf published *An Introduction to Pareto*, a popularizing summary of Pareto's sociology by two leaders of the Harvard Pareto seminar. GEORGE C. HOMANS & CHARLES P. CURTIS, JR., *Preface to AN INTRODUCTION TO PARETO: HIS SOCIOLOGY* (1934). A year later, Pareto's *Trattato di Sociologia generale* appeared in four volumes as *The Mind and Society*. See PARETO, *supra* note 117.

119. See DONALD N. LEVINE, VISIONS OF THE SOCIOLOGICAL TRADITION 238-39 (1995).

systems.<sup>120</sup> Arnold reveled in what he saw as Pareto's role as a "prophet[] of the hard-boiled use of power" who made "the humanitarian ideals, which [popular] slogans called up in the minds of masses of people, . . . disappear."<sup>121</sup> "With pitiless logic," Arnold proclaimed, Pareto had discovered "that there is no reality behind political and economic theories."<sup>122</sup> This exuberance, as well as the prominence of both the symbolic realm of governance and the role of elites in Arnold's work, suggests that Pareto's work served as an important influence on Arnold's approach. Consideration of Pareto's sociology helps fill in some of the theoretical gaps in Arnold's work.<sup>123</sup>

Pareto based his theory of human behavior on the distinction he saw between "logical actions," which "logically conjoin means to ends" from an objective, scientific standpoint,<sup>124</sup> and "non-logical" actions, which seem logical to the persons performing them but are "mere manifestations of instincts."<sup>125</sup> "Human beings," Pareto wrote, "have a very conspicuous tendency to paint a varnish of logic over their conduct,"<sup>126</sup> and he considered his work an effort to study and strip away the "disfigure[ment]" of reality at work in rationalizing theories that make non-logical conduct appear logical to human actors.<sup>127</sup> Pareto's

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120. *See id.* at 239-40.

121. SYMBOLS, *supra* note 3, at 250.

122. *Id.*

123. Arnold's recognition of a kindred spirit in Pareto is clear in a letter he wrote to *The New Republic*, which solicited from him while he was still at Yale a contribution to a series called "Books That Changed Our Minds." In response to the letter, Arnold wrote that "Pareto seemed to me an elaboration of the obvious, so I dropped it after a very cursory examination." BOOKS THAT CHANGED OUR MINDS, *supra* note 1, at 8. My elaboration of Pareto's work, then, is to elucidate what for Arnold was "the obvious," in order better to understand Arnold's work. The connection between the two was certainly obvious to some careful readers. One contemporary reviewer of *Symbols* found Pareto's influence on Arnold to be so profound as to approach plagiarism. *See* Peter H. Odegard, *Symbols of Government By Thomas Arnold*, 21 CORNELL L. Q. 686 (1936) (book review). A more recent commentator has noted the similarities between Pareto's sociology and Harold Lasswell's work during this period. *See* John E. Tashjean, *Politics: Lasswell and Pareto*, CAHIERS VILFREDO PARETO No. 22-23, at 267 (1970).

124. 1 PARETO, *supra* note 117, § 150, at 77.

125. 4 PARETO, *supra* note 117, app. at 1915.

126. 1 PARETO, *supra* note 117, § 154, at 79.

127. *Id.* §§ 249, 253, at 171, 172-73. For Pareto, the manifestations of sentiments in non-logical actions are "residues"; while the rationalizations constructed to legitimize a particular line of conduct, making more acceptable

theory of non-logical actions was not psychological, because he had no interest in the causes or internal workings of "psychic states."<sup>128</sup> Nor was it historical or materialist, because unlike Marxist theories of ideology that situate false consciousness within a specific historical context, Pareto asserted that derivations and non-logical actions originate from "innate tendencies of an unchanging human nature" rather than an historically situated "false consciousness."<sup>129</sup> For Pareto, non-logical behavior and post hoc rationalizations were simply essential attributes of human action.

They were also central to Pareto's theory of elites and political and social order. Like Machiavelli, Pareto stressed that to obtain and hold political power, elites must successfully persuade their subjects by utilizing the symbols of moral and political doctrines, rather than objective, scientific truth.<sup>130</sup> And it was imperative that elites do so; for Pareto, "the art of government lies in finding ways to take advantage of . . . sentiments, not in wasting one's energies in futile efforts to destroy them, the sole effect of which, frequently, is simply to strengthen them."<sup>131</sup> Elites must engage in a beneficial form of manipulation by clothing the real interests of the masses in fictional forms to appeal to the masses' base sentiments.<sup>132</sup>

Pareto's ultimate normative end was a stable, wealth-maximizing political order run by competent elites who maintain their authority through persuasive techniques

narrow and destructive interests, are "derivations." S.E. Finer, *Introduction to VILFREDO PARETO: SOCIOLOGICAL WRITINGS* 3, 14 (S.E. Finer ed. & Derick Mirfin trans., 1966). The relationship between residues and sentiments in Pareto's work is unclear, and at times nonexistent; at minimum, sentiments are the religious, moral, legal, and customary norms that result from the combination of human nature, individual circumstances, and historical context. See 2 RONALD FLETCHER, *THE MAKING OF SOCIOLOGY: A STUDY OF SOCIOLOGICAL THEORY* 596-97 (1971).

128. 1 PARETO, *supra* note 117, § 161, at 87-88.

129. INO ROSSI, *FROM THE SOCIOLOGY OF SYMBOLS TO THE SOCIOLOGY OF SIGNS: TOWARD A DIALECTICAL SOCIOLOGY* 92 (1983). On the relationship between Pareto and Marxist theories of ideology, see NORBERTO BOBBIO, *IDEOLOGICAL PROFILE OF TWENTIETH-CENTURY ITALY* 38 (Lydia G. Cochrane trans., 1995); Finer, *supra* note 127, at 77-78.

130. See JOSEPH V. FEMIA, *THE MACHIAVELLIAN LEGACY: ESSAYS IN ITALIAN POLITICAL THOUGHT* 51 (1998); LEVINE, *supra* note 119, at 241; TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 178-79 (1937).

131. 3 PARETO, *supra* note 117, § 1843, at 1281.

132. See 4 PARETO, *supra* note 117, § 2250, at 1572.



and, ultimately, the real threat of force.<sup>133</sup> His utilitarianism posited a clear distinction between the "experiential 'truth' of certain theories" and their "social 'utility'"—these being "two things [that] are not only one and the same but may, and often do, stand in flat contradiction."<sup>134</sup> Rulers' identities and approaches may change continually, with occasional "sudden and violent disturbances" leading to leadership changes among political and economic elites.<sup>135</sup> What mattered more than the precise composition, or even approach, of a particular ruling elite was less significant than that elite's ability to maximize wealth and hold power. At bottom, Pareto had little interest in offering therapeutic approaches to purge the non-logical from political and public life; instead, he attempted to remove considerations of the moral and normative from his political analysis.<sup>136</sup> In the words of one of his American mid-1930s admirers, Pareto "write[s] what men do and not what they ought to do."<sup>137</sup> The statement encapsulates Arnold's own "hard-boiled" approach: an emergent political order, specifically the New Deal, should put aside both the formalists' impossible desire and the realists' debunking and reformist efforts in favor of articulating reform in the form of popular symbols and desire.

3. *Political Dynamics, Anthropology, and the Study of Symbols.* Arnold also conceived of this symbolic struggle in anthropological terms.<sup>138</sup> Although he cited no anthropologists in either of his mid-1930s monographs, the words *folklore* and *symbols* in his titles clearly evoke the anthropological approach. In addition, he ironically and with great delight applied anthropological concepts of "primitive" cultures to the thoroughly modern institutions

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133. See RICHARD BELLAMY, *MODERN ITALIAN SOCIAL THEORY: IDEOLOGY AND POLITICS FROM PARETO TO THE PRESENT* 30 (1987); LEVINE, *supra* note 119, at 240-41.

134. 2 PARETO, *supra* note 117, § 843, at 500.

135. 3 PARETO, *supra* note 117, § 2056, at 1431; see also Finer, *supra* note 127, at 55-62 (summarizing Pareto's conceptualization of governing classes, economic forces, and their relationship).

136. See 4 PARETO, *supra* note 117, §§ 2239, 2394, at 1567, 1726-27.

137. See LAWRENCE J. HENDERSON, *PARETO'S GENERAL SOCIOLOGY: A PHYSIOLOGIST'S INTERPRETATION* 57 (1937).

138. On the relevance of Arnold's work for anthropologists, see Laura Nader's important article *The Anthropological Study of Law*, 67 *AM. ANTHROPOLOGIST* 3, 19 (1965).

of "government" and "capitalism." In *Symbols*, for example, he compared primitive societies' rational laws based on irrational premises to modern societies' irrational laws based on seemingly rational bases,<sup>139</sup> and he associated the modern ritual of the criminal trial with the taboos and magic of "primitive societies."<sup>140</sup> At the same time, in private correspondence, he compared his perspective in *Folklore* to that of an anthropologist studying Filipino "customs and taboos."<sup>141</sup>

Arnold thus utilized the idea of anthropology to illuminate some universal generalities of human culture, and appropriated the anthropological notion of culture as an integrated whole that was widely shared during the 1920s and 1930s.<sup>142</sup> He shared the central assumptions of the Americanist anthropological tradition, established in the early twentieth century. These included the notions that culture is not merely behavior but the set of symbols people use to explain their behaviors; that culture is a constructed, symbolic world of habits and customs that structure human thought and action; and that language, thought, and reality combine in ways that can be studied, understood, and analyzed by social scientists.<sup>143</sup>

Arnold's choice of the term "folklore" is especially telling. For Franz Boas, the most significant American anthropologist of the late nineteenth and early twentieth

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139. See SYMBOLS, *supra* note 3, at 4.

140. *Id.* at 131. Arnold, like his fellow realists, was apparently not drawn to, or perhaps was unaware of, the historical and sociological scholarship of Henry Maine or Max Weber which also sought to understand the present in its relationship to the past. See SCHLEGEL, *supra* note 25, at 235.

141. GRESSLEY, *supra* note 13, at 231 (reprinting letter from Arnold to Epaphroditus Peck, attorney, Bristol, Conn., July 13, 1936).

142. See John S. Gilkeson, Jr., *The Domestication of "Culture" in Interwar America 1919-1941*, in THE ESTATE OF SOCIAL KNOWLEDGE 153 (JoAnne Brown & David K. van Keuren eds., 1991). The fact that Arnold used anthropology to demonstrate the foibles of modernity is consistent not only with how the anthropologists of the 1930s occasionally wielded their work, but also with Veblen's stance towards the "leisure class" and modernity generally. See *id.* at 161, 168; see also Anne Mayhew, *Veblen and the Anthropological Perspective*, in THE FOUNDING OF INSTITUTIONAL ECONOMICS 234, 241-42 (Warren J. Samuels ed., 1998) (describing the influence of anthropology on Veblen and institutional economics).

143. See REGNA DARNELL, INVISIBLE GENEALOGIES: A HISTORY OF AMERICANIST ANTHROPOLOGY 12-14 (2001); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 144 (1988).

centuries, "folklore" was "the total mass of traditional matter present in the mind of a given people at any given time,"<sup>144</sup> and "the science of all of the manifestations of popular life."<sup>145</sup> Folkloric beliefs and practices that had begun in the unconscious became central to a specific culture because they rationalized, and therefore maintained, traditional forms of behavior, and because they remained relevant to more advanced cultures through modern reinterpretation and use.<sup>146</sup> If folklore was the study of everything, everywhere, no matter how banal and "popular," and if, for Arnold, capitalism and government were defined by their symbols, then the study of governance could not be limited to the study of rational actor models or the legal forms that emerge from appellate opinions or legislation—or, for that matter, the debunking of such models and forms. The study of governance must consider everything from the propaganda of mass culture (in, for example, *The Saturday Evening Post* and the movies) to the inner workings and self-important discourse of the academy, the courts, and the legislature (in, for example, judicial decisions and the public pronouncements of professors and intellectuals).<sup>147</sup>

Notwithstanding the centrality of Boasian anthropology in the American academy in the mid-1930s, Arnold and other realists seemed especially drawn to the more functionalist social anthropology associated at the time with Bronislaw Malinowski, whose monograph *Crime and Custom in Savage Society* had been published in 1926.<sup>148</sup> The attraction is not surprising,<sup>149</sup> given the realists' own commitment to functionalism. Functionalist social

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144. Frank Boas, *The Mind of Primitive Man*, 14 J. AM. FOLKLORE 1, 2-3 (1901).

145. Franz Boas, *The History of Anthropology*, 20 SCI. 512, 519 (1904).

146. See GEORGE W. STOCKING, JR., *Franz Boas and the Culture Concept in Historical Perspective*, in RACE, CULTURE, AND EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY 195, 225-27 (1968). Indeed, anthropologist Edward Sapir, whose tenure at Yale overlapped with Arnold's, applied conceptions of culture and personality from the anthropology of simpler cultures to those of modern industrial society. See DARNELL, *supra* note 143, at 127.

147. See *supra* text accompanying note 1.

148. See Francis G. Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 BRIT. J. L. & SOC. 141, 142-43 (1981) (noting Malinowski's emphasis on function over form in *Crime and Custom in Savage Society*).

149. See *supra* Part I.A.

anthropology assumed a culture to be a dynamic, organic whole whose parts, including its laws, relate to each other by meeting social interests and needs.<sup>150</sup> To study natives, one considered their symbolic forms and practices as supporting the culture and society of which they were an integral part. The functionalists' insight served practical goals for early twentieth century colonial states as an important tool of colonial administration. They enabled colonial powers to understand better, and administer more efficiently and peaceably, "the peculiarities of the particular territory . . . [and] the principles of social organization which obtain in other primitive communities."<sup>151</sup> Arnold's conception of law as one aspect of the larger symbols of governance thus shared with the prevailing anthropology that drifted into the legal academy he inhabited the notion that law was a necessary and functional part of a larger cultural symbolic system. Those who hoped to impose social order must understand and follow the specific doctrines and rituals of the population they wished to persuade or conquer.<sup>152</sup>

4. *Conclusion.* The New Deal represented for Arnold the paradigmatic example of an emergent constellation of symbols.<sup>153</sup> Indeed, the New Deal's most popular symbol was President Roosevelt himself, who "expresses for a majority of the public the current distrust of old myths and the belief that the Government has a new role to play in providing for security of individuals in their jobs and in the distribution of goods."<sup>154</sup> The New Deal was an elite, managed political movement that successfully deployed symbols for a functional end to replace what Arnold saw as the outmoded ideals of an older creed with a modern and capitalist economic, political, and legal order. Its ultimate success on the spiritual plane of symbols as well as on the temporal plane of objective results came not simply from a rational

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150. See Huntington Cairns, *Law and Anthropology*, 31 COLUM. L. REV. 32, 35 (1931).

151. *Id.* at 53.

152. Arnold's willingness to consider law within a larger socio-cultural context distinguishes him from Llewellyn's anthropological monograph, co-authored with Hoebel and published several years after *Symbols and Folklore*, which isolated law from other social control systems. See Nader, *supra* note 138, at 18 (discussing KARL N. LLEWELLYN & E.A. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941)).

debunking of its opposition, but also, and equally importantly, from its credible adaptation and manipulation of prevailing symbols. The tools Arnold adopted to understand how these symbols worked, and how these symbols could be manipulated, were readily available in the sociological, psychological, and anthropological study of the culture and control of modern and primitive societies.

B. *The Symbols of Institutions: The Dynamics of Collective Symbolic Action*

If symbols constituted for Arnold the cultural tools and meanings of governance, then the organization or institution,<sup>155</sup> rather than the individual, was the central agent and locus of meaning, production and social change.<sup>156</sup> The shift from what Arnold called the "individualistic era" of pre- and early-Industrial America to the "interdependence" of modernity required that the diagnostician focus on the institution as producer of the individual, and therefore, on the individual subject as a mere reflection of the institution or institutions to which she belongs.<sup>157</sup> He urged that, "we must consider institutions and the mass psychology surrounding them as living organisms, not dissimilar to human personalities, . . . never quite understanding themselves or the part they are actually playing because of the necessary illusions with which they must surround themselves to preserve their prestige and self-respect."<sup>158</sup> The study of group behavior

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153. See FOLKLORE, *supra* note 3, at 390.

154. See *id.* at 390-91.

155. Arnold failed to provide a clear distinction between, or definitions of, "institution" and "organization," and instead seemed to confuse them. At times, he used "organizations" to refer to formally organized, voluntary groups and "institutions" to refer to their internal habits and customs. See *id.* at 24-26. At other times, however, he used the terms interchangeably. See, e.g., *id.* at 351, 355 (using both "organization" and "institution" to refer to formal groups); SYMBOLS, *supra* note 3, at iv (using "institution" to refer to formal organizations and entities like "courts, commercial banks, or governmental bureaus"). Because the field of institutional economics, with which Arnold was quite familiar, used the term "institution" to refer to both interchangeably, I will simply use the term "institution." See *infra* notes 162-181 and accompanying text.

156. See FOLKLORE, *supra* note 3, at 10, 23, 25-26, 350-88.

157. See *id.* at 349.

158. SYMBOLS, *supra* note 3, at 25-26.

therefore must focus upon the "habits, disciplines, and morale" that unify institutions, and the symbolic "personality or character" institutions develop.<sup>159</sup>

He presented in *Folklore* an entire hierarchy of the salient institutions of mid-1930s America, from the largest national institutions, such as the nation-state and the federal government, to smaller and less powerful national institutions like the Rotary Club and national associations of academics. Even the smallest institutions, Arnold argued, resembled the largest in structures and habits.<sup>160</sup> He proposed studying the symptoms of the social pathologies produced in the economic and political crisis of the Depression, pathologies that marked what he saw as the death throes of an old era. Research would focus on the internal dynamics of institutions, as well as on the struggle between emergent and residual institutions for symbolic control.<sup>161</sup>

Arnold borrowed his conception of institutions and their place in symbols and governance from the field of institutional economics,<sup>162</sup> which thrived in the late nineteenth and early twentieth centuries in the influential work of such diverse figures as Thorstein Veblen,<sup>163</sup> John R.

159. FOLKLORE, *supra* note 3, at 350.

160. *Id.* at 24.

161. *Id.* at 364.

162. On institutionalism generally, see HEATH PEARSON, ORIGINS OF LAW AND ECONOMICS: THE ECONOMISTS' NEW SCIENCE OF LAW, 1830-1930, 154-57 (1997); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 207 (1991); Paul T. Homan, *The Institutional School [of Economics]* 5 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 387 (Edwin R. A. Seligman ed., 1932). On the intellectual and academic relationship between institutionalism and legal realism, see DUXBURY, *supra* note 15, at 98-106; FRIED, *supra* note 42, 10-15; SCHLEGEL, *supra* note 25, at 63; Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1013-31 (1990); Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805, 850-60 (2000).

163. Veblen's major works include: THE PLACE OF SCIENCE IN MODERN CIVILISATION AND OTHER ESSAYS (1919) [hereinafter VEBLER, THE PLACE OF SCIENCE]; THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (Modern Library 1934) (1898) [hereinafter VEBLER, THEORY OF THE LEISURE CLASS]; THE VESTED INTERESTS AND THE COMMON MAN (Viking Press 1964) (1919) [hereinafter VEBLER, THE VESTED INTERESTS]; and Thorstein Veblen, *Why Is Economics Not an Evolutionary Science?* 12 Q. J. ECON. 373 (1898). The secondary literature on Veblen is immense; some commentaries and summaries are cited in the notes *infra*. For a well-respected intellectual and personal biography, see JOSEPH DORFMAN, THORSTEIN VEBLER AND HIS AMERICA (1934).

Commons,<sup>164</sup> and Walton Hamilton,<sup>165</sup> the latter of whom was Arnold's colleague at Yale.<sup>166</sup> Institutionalists defined "institution" broadly not only to include the formal organization but as "a way of thought or action of some prevalence and permanence, which is embedded in the habits of a group or the customs of a people . . . [and which] fix[es] the confines of and impose[s] form upon the activities of human beings."<sup>167</sup> Within this amorphous conception, widely recognized organizational arrangements—from types of financial transactions to the models of educational institutions, and from democracy to religious beliefs—are "institutions."<sup>168</sup>

In institutional economics, Arnold found a model for his interdisciplinary project of studying the institutional

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164. Commons's major works include: INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY (1934); LEGAL FOUNDATIONS OF CAPITALISM (1924); and A SOCIOLOGICAL VIEW OF SOVEREIGNTY (Augustus M. Kelley 1965). For a general introduction to Commons, see Joseph Dorfman, *John R. Commons' General Theory of Institutions, Introduction* to COMMONS, A SOCIOLOGICAL VIEW OF SOVEREIGNTY (Augustus M. Kelley 1965). A recent collection compares the major early works of Veblen and Commons and their role in establishing institutional economics. See THE FOUNDING OF INSTITUTIONAL ECONOMICS: THE LEISURE CLASS AND SOVEREIGNTY (Warren J. Samuels ed., 1998).

165. Hamilton's major works include: HAMILTON, INDUSTRIAL POLICY AND INSTITUTIONALISM: SELECTED ESSAYS (Joseph Dorfman ed., 1974); Hamilton, *Institution*, in 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 84 (Edwin R. A. Seligman ed., 1932); WALTON HALE HAMILTON & HELEN R. WRIGHT, A WAY OF ORDER FOR BITUMINOUS COAL (1928). For a general introduction to Hamilton's work, see Laurence Shute, *Walton Hale Hamilton*, in THE ELGAR COMPANION TO INSTITUTIONAL AND EVOLUTIONARY ECONOMICS 310-14 (Geoffrey M. Hodgson et al. eds., 1994); Joseph Dorfman, *Walton Hale Hamilton and Industrial Policy*, in INDUSTRIAL POLICY AND INSTITUTIONALISM, *supra*.

166. Arnold was close to Hamilton at Yale and throughout his professional life. See Thurman Arnold, *Walton Hale Hamilton*, 68 YALE L. J. 399, 399 (1959).

167. Hamilton, *supra* note 165, at 84; see also John R. Commons, *Institutional Economics*, 21 AM. ECON. REV. 648, 650 (1931) (defining institution as "collective action in control, liberation, and expansion of individual action"). Veblen's definition was similarly inclusive. See, e.g., VEBLEN, THE PLACE OF SCIENCE, *supra* note 163, at 239 (defining institutions as "settled habits of thought common to the generality of men"); VEBLEN, THEORY OF THE LEISURE CLASS, *supra* note 163, at 119 (defining institutions as "prevalent habits of thought with respect to particular relations and particular functions of the individual and of the community"); see generally STANLEY MATTHEW DAUGERT, THE PHILOSOPHY OF THORSTEIN VEBLEN 49 (1950) (explaining that Veblen's notion of institution described more widely prevalent habits of thought, including principles, customs, laws, and ideologies, as well as the products or results of these principles, customs, laws, and ideologies).

168. Hamilton, *supra* note 165, at 84.

structure and context within which the symbols of governance have meaning.<sup>169</sup> For institutional economists, the aggregate of the distinct human institutions of a given place and time constitute a society's culture, and the interplay between collective institutions and the actions of individuals actions is at the core of "the drama of the social process."<sup>170</sup> Thus, historical, cultural, and symbolic contexts, as well as the prevailing contemporary common sense and "the practical commitments of the moment," affect institutional behavior.<sup>171</sup>

Arnold's break from traditional legal study paralleled institutionalism's break from traditional economics. Institutionalism rejected the narrow study of individual economic behavior and the concept of the self-regulating market. Veblen despised the latter for its abstract models that "t[ook] for granted, denied, or explained away" the collective and social institutions of modern capitalism;<sup>172</sup> he championed instead a more broadly conceived project that considered economics within a wider conception of culture.<sup>173</sup> Institutional economists explicitly considered individuals as social beings located within specific historical contexts, rather than as isolated rational actors.<sup>174</sup>

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169. In 1938, Arnold identified Veblen's "analysis of American business" as a key influence on his work. See BOOKS THAT CHANGED OUR MINDS, *supra* note 1, at 8; see also DAVID RIESMAN, THORSTEIN VEBLER: A CRITICAL INTERPRETATION iii, 94 (1960) (noting that Arnold knew of Veblen's work while he was at Yale). In addition, there was a well-established social and intellectual relationship between institutional economists and legal realists, see FOLKLORE, *supra* note 3, at 161, and Veblen was well-known to New Deal intellectuals. See Max Lerner, *Editor's Introduction*, THE PORTABLE VEBLER 31-32 (Max Lerner ed., 1948). Arnold's work did not, however, make clear the influences on his thinking; neither *Symbols* nor *Folklore*, nor his earlier work, provided ample notation of his sources, although he did cite Hamilton in *Symbols*, and Dorfman's biography of Veblen in *Folklore*. See FOLKLORE, *supra* note 3, at 186-87, 218-20 (quoting DORFMAN, *supra* note 163); SYMBOLS, *supra* note 3, at 74-75 (quoting WALTON HAMILTON, THE CASE OF BITUMINOUS COAL (1925)).

170. Hamilton, *supra* note 165, at 84.

171. *Id.* at 84-85.

172. VEBLER, THE PLACE OF SCIENCE, *supra* note 163, at 233.

173. See Homan, *supra* note 162, at 388 (describing the complex range of economic determinants, including "human nature, changes in technology and the general development of knowledge and ideas").

174. See Edythe S. Miller, *Veblen and Commons and the Concept of Community*, in THE FOUNDING OF INSTITUTIONAL ECONOMICS, *supra* note 164, at 14, 18 (explaining that both Veblen and Commons saw individuals' behavior as influenced by working rules of institutions, "as driven by custom, convention, habits of 'use and wont,' legal standards, the common sense of the community—



Arnold was also undoubtedly attracted to institutionalists' tendency to critique the current status quo and to call for, as well as occasionally participate in, economic reform. Institutions, institutionalists agreed, adapt over time and their precise development could be affected by intervention necessary to change an unsatisfactory status quo.<sup>175</sup> For Veblen, men's habits of thoughts evolve through evolutionary change in individual and collective economic activity,<sup>176</sup> a process he sought to understand through evolutionary economics, "the theory of a process of cultural growth as determined by the economic interest, a theory of a cumulative sequence of economic institutions stated in terms of the process itself."<sup>177</sup>

Accordingly, institutionalists were generally progressive reformers whose work on labor, money and business cycles, and the nature of corporate management and capitalism influenced the New Deal.<sup>178</sup> As one leading historian of early twentieth century social sciences has argued, institutionalism helped to pave the way for Keynes's governmentalist solution, while Keynesian economics was a "proof—by the extension of neoclassical technique itself—of the institutionalists' claim that the market was not an optimum self-equilibrating process and that the intervention of government was necessary to achieve democratic social goals."<sup>179</sup> Like Arnold, institutionalists did not call for a radical restructuring of the market; rather, they hoped to retain those parts of the market where competition functioned properly, and to utilize state action only where it could increase competition,

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all social—in addition to anticipations of pleasure and pain"); ROSS, *supra* note 162, at 210; *see, e.g.*, COMMONS, INSTITUTIONAL ECONOMICS *supra* note 164, at 44-45 (insisting on "social habit" as "the most elementary fact of living creatures"); VEBLÉN, THE PLACE OF SCIENCE, *supra* note 163, at 324-25 (insisting on communities, rather than on self-sufficient individuals, as the focus of life history); Clarence E. Ayers, *The Co-ordinates of Institutionalism*, 41 AM. ECON. REV. 47, 49 (1951) (dismissing classical economics' conception of atomistic human behavior because "[h]uman beings are social phenomena").

175. *See* FRIED, *supra* note 42, at 11.

176. VEBLÉN, THE PLACE OF SCIENCE, *supra* note 163, at 74-75.

177. Veblen, *supra* note 163, at 393.

178. *See* FRIED, *supra* note 42, at 11.

179. ROSS, *supra* note 162, at 419. *Contra* DUXBURY, *supra* note 15, at 101 (arguing that institutional economics was "preoccupied] with critique at the expense of pragmatic proposals for economic reform").

regulate monopoly, and protect the rights of labor.<sup>180</sup> Their goal was a utilitarian mix of equity and increased productivity; in Veblen's words, "[t]he common good, so far as it is a question of material welfare, is evidently best served by an unhampered working of the industrial system at its full capacity, without interruption or dislocation."<sup>181</sup>

Although Arnold referred more explicitly to formal organizations when he used the term "institution" than institutionalists did, he shared institutionalists' emphasis on collective social activity and beliefs, and especially on the evolutionary development of institutions.<sup>182</sup> He called for studying institutions within their historical and symbolic context from their initial organization, through their growth, and into their reification and personification in a legally cognizable organizational form with ownership of capital assets.<sup>183</sup> As their membership, influence, and material and legal existence expand, Arnold observed, institutions develop contradictory roles that arise from their increasing complexity and interaction with other institutions.<sup>184</sup> Thus, for example, the responsible private business corporation acts simultaneously as a profit-driven enterprise, a representative of moral, ethical, and legal principles, a caring employer of its executives and managers and stern employer of its low waged workers, and a philanthropic and concerned public citizen.<sup>185</sup> Accordingly, Arnold proposed that a focus of Political Dynamics should be upon the symptoms produced by the conflicted,

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180. See ROSS, *supra* note 162, at 412-13; Dorothy Ross, *Socialism and American Liberalism: Academic Social Thought in the 1930s*, in 11 PERSPECTIVES IN AM. HIST. 5, 78-79 (1977-78); see also THEODOR ADORNO, *Veblen's Attack on Culture*, in PRISMS 75, 91 (Samuel & Shierry Weber trans., 1981) (criticizing Veblen's inability to provide more than "a barbaric denunciation" of "barbarian culture"); RIESMAN, *supra* note 169, at x-xi (1960) (noting relationship between Veblen's work and the populist movements of the late-18th and early-19th centuries, particularly in his criticism of conspicuous consumption and the "pecuniary" and "vested interests"); Max Lerner, *Editor's Introduction*, in THE PORTABLE VEBLER 36 (1949) (claiming Veblen was no revolutionary and that his work was an "assault . . . on the mythology of business civilization, rather than on the theme of exploitation").

181. VEBLER, THE VESTED INTERESTS, *supra* note 163, at 90-93.

182. See FOLKLORE, *supra* note 3, at 23-40, 349-93.

183. See *id.* at 350-53.

184. *Id.* at 355.

185. *Id.* at 34, 355, 360-62.

contradictory dynamic of the modern evolutionary institution.<sup>186</sup>

Arnold's study of symbols was therefore a study of the symbol within institutions, and, more broadly, of the relationships among symbols, institutions, and governance. Symbolism and language, Arnold observed, are at the core of institutions, affecting and "crystallizing" group and individual attitudes and serving as the "cement which binds the organization together."<sup>187</sup> Institutions and their symbols also provoke legal, governmental, and economic change. Emerging institutions develop their own language in order to express themselves, thereby infusing the wider existing folklore with new possibilities. They compete with existing institutions by representing a "new class" able to develop "a creed of its own and a set of heroes."<sup>188</sup> Thus as new institutions emerge, the meanings of "Law"'s "great reservoir of emotionally important social symbols" begins to change.<sup>189</sup> Even in *Symbols*, when he was more pessimistic about the possibility of political change, Arnold noted that such change could happen "in spite of, and not because of the grammarians" of jurisprudence.<sup>190</sup>

### C. Conclusion

For Arnold, "Law" was an historical construction subject to institutional struggle over its dominant meanings at any particular moment. It did not exist, and therefore could not be studied, in isolation. Nor could it be debunked; nor could it be reformed out of existence. His commitment to interdisciplinary study and to the reconceptualization of law within broader fields of governance was distinct among legal academics of the time and was tied to his political and institutional commitments. As Part III discusses, so was his polemical, ironic style, which enabled his work both to reach a broader audience and to retain a force that remains for contemporary readers.

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186. *Id.* at 349.

187. *Id.* at 148.

188. FOLKLORE, *supra* note 3, at 39, 148.

189. SYMBOLS, *supra* note 3, at 34.

190. *Id.*

## III. THE IRONY OF SYMBOLS: ARNOLD'S CRITICAL VOICE

Arnold possessed extraordinary abilities as an ironist. He could identify, describe, destroy, and then reconstruct as necessary the foibles of modernity. Consider a few examples. He described the hypocrisy of the Prohibition, in which politicians drank in private but proclaimed the importance of law enforcement in public, not merely as emblematic of a "religious" ideal of legal order that covers a "wide conflict between practice and utterance" but as essential to the operation of judicial institutions that rely on the mechanical operation of the rule of law.<sup>191</sup> The disparity between ideal and practice, through which law enforcement appears to have merely emotional value akin to "Santa Claus or football in college," helps explain the fact that "the ceremonies which attend [law enforcement's] observance . . . become very elaborate indeed."<sup>192</sup> Arnold also embraced the municipal political machine over its Progressive opponents. He did so not to embrace corruption, but to praise the machine's functionalism over the Progressives' fetishization of clean, apolitical government. "[R]espectable people could not think politically,"<sup>193</sup> Arnold chided, and they longed to "remov[e] politics from politics";<sup>194</sup> machines, by contrast, could "do the practical tasks of government."<sup>195</sup>

His identification of Prohibition as a symptomatic symbol of the hidden but necessary hypocrisy of law enforcement and his embrace of the local political machine as the better model of practical government demonstrate Arnold's contrarian, ironic detachment from the prevalent academic political and ethical beliefs of his time. Arnold's style—and, frankly, his mode of argument—was based upon anecdotal observations of the odd, self-contradictory beliefs of the world surrounding him, and especially of the strange beliefs of legal formalists, conservative economists, and New Deal opponents (as well as of the nay-saying realists themselves). The position he constructed for himself—distinct among legal academics who addressed each other in law reviews and academic journals to propose legal reform

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191. *Id.* at 152.

192. *Id.* at 151.

193. FOLKLORE, *supra* note 3, at 43.

194. *Id.* at 209.

195. *Id.* at 114.

or debate doctrinal or jurisprudential principle—resembles those of two of his influences: the sociologist Thorstein Veblen and, perhaps more prominently and obviously, the journalist, editor, and public figure H.L. Mencken.<sup>196</sup> Like those of Mencken and Veblen, Arnold's ironic voice at once appealed to a general reader<sup>197</sup> and departed from the presumed rigors of either the formalist or social scientific pretensions of the legal academy. He humorously deflated the pretentious idiosyncrasies of conventional wisdom and habit, and assumed a neutral, detached position that could authoritatively describe the objects of his study.<sup>198</sup>

This vocal duality—popular *and* detached, vaguely populist *and* authoritatively elitist—was part of his effort to reach beyond the legal academy. Arnold knew Mencken and enjoyed his work,<sup>199</sup> which had reached its apex in popularity and sarcastic style in the 1920s,<sup>200</sup> and invited the journalist to visit his law school seminar.<sup>201</sup> In listing Mencken first in his preface to *Folklore* as one of the manuscript's pre-publication readers, Arnold at least in part recognized Mencken's commercial value.<sup>202</sup> For Arnold,

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196. A third ironist who may have inspired Arnold's voice was the sociologist Vilfredo Pareto, whose theory of non-logical actions was briefly but immensely popular during the mid-1930s and seemed to have some influence on Arnold. As Italian sociologist Noberto Bobbio wrote, in his sociological writings Pareto assumed a stance "apart, immobile, suspended between amusement and horror, to contemplate the raging flood of unreason that the meager ranks of irrational men were too few to contain." BOBBIO, *supra* note 129, at 38. On Pareto's cynical irony, see HUGH DALZIEL DUNCAN, *SYMBOLS AND SOCIAL THEORY* 101-02 (1969); on Pareto and his influence on Arnold, see *infra* text accompanying notes 116-17.

197. Indeed, Arnold clearly intended his irony both to imply victims of his gaze and to build a "community of believers" who grasped his irony. See WAYNE C. BOOTH, *A RHETORIC OF IRONY* 28-29 (1974).

198. The detachment of Arnold's voice, as well as those of his influences, is in fact a voice and view from a specific social position—the authoritative, powerful white male intellectual. This is no reason to dismiss Arnold's detachment, but to situate its "practice of detachment" historically within the discourse and subject position of its speaker. See AMANDA ANDERSON, *THE POWERS OF DISTANCE: COSMOPOLITANISM AND THE CULTIVATION OF DETACHMENT* 5 (2001).

199. See GRESSLEY, *supra* note 13, at 44, 240-41. He specifically identified Mencken's work as influential in his response to *The New Republic's* solicitation for books that were important to his intellectual development. See *BOOKS THAT CHANGED OUR MINDS*, *supra* note 1, at 8-9.

200. See EDWARD A. MARTIN, *H.L. MENCKEN AND THE DEBUNKERS* 3 (1984).

201. See GRESSLEY, *supra* note 13, at 32.

202. See *FOLKLORE*, *supra* note 3, at iii *preface*; see also *id.* at 146-48

Mencken's irony offered an alternative to the banal, stultifying, and ultimately ridiculous attitudes and opinions it described by addressing a reader who, like the author, could see the appalling lack of common sense in conventional wisdom.<sup>203</sup> Like Mencken, Arnold described a world in which retrograde assumptions about principles and human behavior—whether by legal scholars, economists, or politicians—were at once destructive and preposterous, and as such the necessary objects of critique and humor.

Although Arnold appropriated Mencken's voice and position as detached ironist, their politics and the extent of their elitism were quite different.<sup>204</sup> Mencken combined a commitment to civil liberties with a snobbish contempt for democracy, demonstrated a fear and loathing of the masses and of the political process that manipulated them, and evidenced respect only for a small, educated, and rational elite.<sup>205</sup> He detested both the foolish in power and the foolish

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(analogizing his conception of symbols and folklore to Mencken's work *The American Language*). Arnold's commercial concerns about his books and Mencken's influence on these concerns is especially clear in a letter Arnold wrote to his editor at Yale University Press prior to *Folklore's* publication noting Mencken's embrace of *Symbols*, complaining about the Press's poor efforts at promoting and distributing the earlier book, and passing along Mencken's criticisms of the Press's performance in typesetting *Symbols*. He boasted of being pursued by other publishers for his follow-up to *Symbols*, and implicitly warned that he would abandon the Press unless it treated his next book as the work of the important public intellectual he aspired to be. GRESSLEY, *supra* note 13, at 247-48 (reprinting letter from Arnold to Eugene Davidson, Yale University Press, Apr. 30, 1937). Commercial success and public recognition were important within the culture of the Yale Law School of the 1930s, when, for example, Arnold and his colleagues William Douglas and Wesley Sturges participated in friendly competitions like the "publicity game," which awarded players points for prominent mentions in local and national periodicals. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 91-92 (2003).

203. See MARTIN, *supra* note 200, at 12.

204. See GRESSLEY, *supra* note 13, at 231 (reprinting letter from Arnold to Epaphroditus Peck, attorney, Bristol, Conn., July 13, 1936).

205. See, e.g., H.L. MENCKEN, *NOTES ON DEMOCRACY* 14, 103 (1926) (claiming that democracy disposes of "uncomfortable facts" "by appeals to the highest sentiments of the human heart," and is composed solely of cynical, manipulative demagogues and the "demaslaves" they exploit); *Id.* at 21, 78 (claiming that the American masses, which he characterized as "sheep," "donkeys," and "goats," cannot understand complicated words; instead, "all their thinking is done on the level of a few primitive appetites and emotions"); *Id.* at 59 (celebrating elites by noting that "most of the finer fruits of human progress, like all of the nobler virtues of man, are the exclusive possession of small minorities, chiefly

masses. Arnold, by contrast, seemed most annoyed and frustrated by regressive elites and seemed honestly to care about the masses he thought required manipulation. In private correspondence, Arnold distinguished himself from Mencken, who he claimed "assum[es] that the human race are boobs"; instead, his own work took the position of the "naturalist observing a bunch of sheep" who neither criticizes nor defends sheep but instead "simply observes them." Boobs and sheep may resemble each other in their ignorant passivity, but Arnold's fascination with the masses diverged from Mencken's absolute dismissal of them. The irony that Mencken and similar writers of the time employed was politically conservative. It borrowed from the style of contemporary muckraking journalism for its rhetorical flourish but demonstrated little interest in intervening directly in politics to affect change in the society they debunked.<sup>206</sup> While Mencken had little but contempt for Roosevelt,<sup>207</sup> Arnold leapt into the New Deal with gusto.

As a progressive academic who wrote monographs filled with acerbic wit that reached a popular audience, Veblen offered an alternate role model to Mencken for Arnold's irony and for his stylistic break from the conventions of legal realists.<sup>208</sup> Veblen's caustic criticism of the formalist tendencies of neoclassical economics was well known.<sup>209</sup> He dismissed these assumptions with caustic hyperbole, rejecting, for example, classical economists' "hedonistic conception of man [a]s that of a lightning calculator of

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unpopular and disreputable"); see also CHARLES A. FECHER, *MENCKEN: A STUDY OF HIS THOUGHT* 148-207 (1978) (on Mencken "the political theorist"); DOUGLAS C. STENERSON, *H.L. MENCKEN: ICONOCLAST FROM BALTIMORE* 171-72 (1971) (quoting similar anti-democratic sentiments from Mencken's earlier *Baltimore Sun* columns). *Notes on Democracy* was Mencken's most explicit, extended statement on American politics, and was published at the height of his popularity in the mid-1920s. See WILLIAM MANCHESTER, *H.L. MENCKEN: DISTURBER OF THE PEACE* 243-45 (1950); Walter Lippmann, *Review Essay on Notes on Democracy*, *SATURDAY REV. LIT.*, Dec. 11, 1926, at 413 (reprinted in *CRITICAL ESSAYS ON H.L. MENCKEN* 72 (Douglas C. Stenerson ed., 1987)).

206. MARTIN, *supra* note 200, at 27.

207. See FECHER, *supra* note 205, at 200-07.

208. See David Riesman, *Toward an Anthropological Science of Law*, 57 *AM. J. SOC.* 121, 123 (1951). I discussed Veblen's influence on Arnold's substantive approach in Part II.B, *supra*.

209. See MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM*, 76-93 (1949).

pleasures and pains, who oscillates like a homogeneous globule of desire of happiness under the impulse of stimuli that shift him about the area, but leave him intact."<sup>210</sup>

Veblen also demonstrated that a social scientist whose detached expertise enabled him to comment on the world around him could be a public intellectual and social critic without writing dull, staid prose—indeed, he demonstrated that satire and irony could be enhanced precisely because of the author's detachment from the world he describes.<sup>211</sup>

Arnold's voice in *Symbols* and *Folklore* had two clear impacts on his work and its reception. First, it helped gain a wider audience for his work. His books were humorous, entertaining, non-technical interventions into intellectual and political events. They neatly invoked what Wayne Booth has called "amiable communities" of kindred spirits, inviting the reader to conclude that Arnold is "my kind of man, because he enjoys playing with irony, because he assumes *my* capacity for dealing with and—most important—because he grants me a kind of wisdom."<sup>212</sup> Arnold accomplished this with a mixture of detachment and harsh critique, simultaneously demonstrating indifference to normative judgment, a "refusal to be pinned down" to any singular political or philosophical commitment, and an aggressive and destructive condemnation of those who would disagree with him.<sup>213</sup> His ability to construct an amiable community of fellow traveling ironists and sympathizers, as well as to exclude the humorless formalists and conservatives who simply didn't get it, served him well not only in his capacity as a public intellectual, but also during his tenure in the Justice

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210. VEBLEN, *THE PLACE OF SCIENCE*, *supra* note 163, at 73-74 (1919); *see also id.* at 65-66 (inveighing against the "higher or definitive syntheses and generalizations" of classical economists, whose "standpoint of ceremonial adequacy . . . imputes to things a tendency to work out what the instructed common sense of the time accepts as the adequate or worthy end of human effort").

211. *See* ROSS, *supra* note 162, at 214-15. Arnold also shared at least one of Veblen's flaws: an embrace of critique at the expense of development of a clear, systemic core. *See* Joseph Dorfman, *The Source of Veblen's Thought*, in THORSTEIN VEBLEN: A CRITICAL REAPPRAISAL 2 (Douglas F. Dowd ed., 1958); *see also* Douglas F. Dowd, *Preface to id.* at vii.

212. BOOTH, *supra* note 197, at 28 (1974).

213. *See* LINDA HUTCHEON, *IRONY'S EDGE: THE THEORY AND POLITICS OF IRONY* 49-50, 53-54 (1994).



Department when he explicitly sought public support for his enforcement of antitrust law.

Second, his ironic voice also served as a stylistic counterpart to his substantive departure from the realism of his legal academic colleagues. It shared social science's claims to objective detachment from the world it sought to describe, and it departed from the norms of legal academic discourse. Although he continued to be a progressive functionalist seeking efficient solutions to the crises of the Depression in opposition to legal formalists, his monographs aspired to be general interest social criticism that appropriated and popularized ideas and concerns from within law schools and from across the academy. He created something new: the witty, accessible, well-read lawyer-critic.

#### IV. POLITICAL DYNAMICS, AS APPLIED: THE SYMBOLS OF ADMINISTRATIVE LAW AND THE CRIMINAL TRIAL

Arnold's application of Political Dynamics was haphazard at best, consisting mainly of anecdotal accounts of legal doctrines and academic fields either in individual chapters of *Folklore* and *Symbols* that focused on specific doctrinal areas, or scattered as brief, anecdotal discussions throughout one or both books.<sup>214</sup> Nevertheless, Arnold's use of his critical approach in the fields of criminal procedure and administrative law demonstrates how he analyzed the symbolic operation of governing institutions. His chapter in *Symbols* on the symbolic basis and value of the criminal trial analyzed a particular practice of governance, the jury trial of an accused. Combining a critique of formalism's embrace of the symbolic with a similar critique of realism's claim to purify itself of all but functional reform, Arnold described the functional role of the ritualistic criminal trial in the maintenance of social order. His similarly

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214. Arnold claimed that his anecdotal style in *Symbols* was consistent with his rejection of "systems," and that only by producing "a series of observations, mostly concerning details," could a "complete anatomy of the human organization" be composed. SYMBOLS, *supra* note 3, at 30. As explained below, Arnold's claim that his approach entirely rejected abstractions and systems was little more than a false and foolish boast. *See infra* Part V. *See also* Simon N. Verdun-Jones, *Jurisprudence Washed with Cynical Acid: Thurman Arnold and the Psychological Bases of Scientific Jurisprudence*, 3 DALHOUSIE L. J. 470, 481 (1977).

symptomatic critique of prevailing conceptions of the judicial review of federal administrative agencies also identified the symbolic basis for judicial supremacy and the relationship between governing institutions and the Depression-era economy.

#### A. *The Symbols of the Criminal Trial*

If, for Arnold, the judicial system was "[t]he center of ideals of every Western government," then few of that system's institutional practices were as important and symbolic as the criminal trial.<sup>215</sup> Utilizing fairly crude methods from comparative law, legal history, and anthropology, Arnold posited the criminal justice system, and especially the criminal trial, as essential to stable primitive and developed societies from China to England, and from medieval times to the present.<sup>216</sup> Its symbolic value, he argued, lies in the ceremonies of its procedures, which the public and elites consider more important than the fact that the process may end in an incorrect result. A "nonceremonial injustice" in which the innocent is found guilty after a properly conducted, formally fair trial is a less troubling consequence of a functional criminal justice system than a departure from the conventional ceremonies of the trial that nevertheless results in an objectively correct verdict.<sup>217</sup>

It is this irony, and its component internal conflict, that Arnold analyzed in his chapter on the criminal trial in *Symbols*. To provide an illustrative study of the trial's functions in a civilized society, Arnold employed the heresy trial of Joan of Arc, the transcript of which had recently appeared in an English translation.<sup>218</sup> The example especially demonstrates Arnold's ironic approach: he declared his respect for a clearly "political" trial in which the accused is presumed by her judges, the faculty of the University of Paris sitting as a secular appellate body in the Castle of Rouen, to be guilty of a substantive crime even as the trial began.<sup>219</sup> Surely such a trial represents the relative

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215. *SYMBOLS*, *supra* note 3, at 128.

216. *See id.* at 128, 131-33.

217. *Id.* at 142.

218. *See THE TRIAL OF JEANNE D'ARC*, at ix (W.P. Barrett trans., 1932).

219. *Id.* at viii-xi.

savagery and ignorance of pre-modern conceptions of justice. But Arnold analogized the medieval show trial to the contemporary political trial, noting that like modern courts that outlaw obscene materials or punish vocal political dissent, the court considering Joan of Arc's prosecution could do nothing but "represent the prevailing ideals and phobias of its era."<sup>220</sup> The court protected its own prestige by applying the prevailing doctrines of heresy, belief, and ecclesiastical hierarchy. This substantive conservatism, in which the medieval court applied the prevailing moral code, operated alongside a fairly modern procedural apparatus. Arnold praised the court for developing "a record of dignity and impartiality," despite the political pressures placed upon it, and for providing many of the parallel requirements of modern due process.<sup>221</sup> The court even demonstrated its formal independence from the popular and political controversy surrounding the accused in imposing its inevitable final sentence, by refusing to celebrate its verdict as a political victory, but instead by making plain that it passed judgment against Joan of Arc with "real regret, because of judicial necessity."<sup>222</sup>

In short, the medieval court served its role as a mechanical "judicial machine" that did not, and indeed could not, "question the underlying assumptions of the government which it supports, however regrettable those assumptions may be."<sup>223</sup> At the same time, the court activated those assumptions in a procedure that was open, had the appearance of fairness, and that produced a record which could enable future generations to judge its actions.<sup>224</sup> It was savage and mechanical, a perpetrator of ideological injustice and a symbol of great fairness.

Arnold's ironic retelling of the Joan of Arc trial parallels his analysis of the conflicts at the heart of the modern criminal trial. For Arnold, the modern criminal justice system fails to provide a rational solution to the

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220. SYMBOLS, *supra* note 3, at 136-37.

221. *Id.* at 135-37. The due process rights afforded included medieval analogs to the preliminary hearing, the indictment, the presentation of evidence and the right to be heard, appellate review of a conviction, and a permanent written record. *See id.* at 136-37.

222. *Id.* at 138.

223. *Id.* at 140.

224. *See id.* at 140.

contradictions within which it works, or to resolve the inadequacy and inequity of the larger society whose values it represents. The criminal trial is inefficient as a means of law enforcement, especially in comparison to the dispute resolution available through arbitration and the enforcement of federal laws and regulations by administrative agencies.<sup>225</sup> Its procedural and evidentiary rules make it more closely resemble a game than an efficient technique of investigation; its reliance on a conception of individual criminal responsibility ignores the insights of modern psychology and psychoanalysis. The criminal sentences it hands down neither promise the reform of the guilty nor the permanent safety of society by the permanent incarceration of potentially dangerous recidivists.<sup>226</sup> Nevertheless, the criminal trial contains such ideological conflicts among procedural norms, contested conceptions of justice, and contemporary theories of criminal behavior within elaborate rituals and dramatic figures. The symbols of the modern criminal trial mask its ideological and functional limits.

Arnold focused especially on the roles of defense attorneys and juries in the criminal trial's symbolic order. If, by their alleged actions, criminal defendants imperil the forces of law, then their attorneys threaten to disrupt the moral order by providing them a vigorous defense. At the same time, if defense attorneys fail to exploit any technical or procedural opening in the trial proceedings, they threaten to disrupt a system of advocacy that positions them as agents of their clients.<sup>227</sup> An aggressive criminal defense is essential to the trial's drama and assumption of fairness that the defendant receive a fair hearing in which he is represented fully and fairly. Strategic representation of alleged wrongdoers within the game of the criminal trial, then, at least throws into doubt the attorney's role as an officer of the court and agent of legal order. The costs of this representation to the efficiency of criminal justice are merely the price of the "great humanitarian ideal" of the fair trial.<sup>228</sup>

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225. *Id.* at 128-29.

226. *SYMBOLS*, *supra* note 3, at 145-46.

227. *See id.* at 142-44.

228. *Id.* at 143.

The jury plays a role parallel to that of the defense attorney. On the one hand, the jury is "an unpredictable body, moved by emotional considerations, and not careful of the fundamental principles of the law because of ignorance, prejudice, etc."<sup>229</sup> Yet, the jury is also "the great symbol of justice," a deliberative assemblage of peers able to pass judgment on the defendant and thereby give dignity to the proceedings and the rights of the accused.<sup>230</sup> As such, the jury functions as the romantic, colorful symbol best able to withstand the inevitable criticism arising from unsatisfactory results in individual cases and inconsistent results across cases. The jury may be human, unpredictable, and subject to irrational prejudice, but its very weaknesses and independence from the State and judiciary make it a valuable scapegoat or "shock absorber" for systemic criticisms of the criminal justice system.<sup>231</sup>

Ultimately, the administration of criminal justice is not a method of controlling crime but a popular drama of public morality, meant to provide "a series of parables which are a guide to the honest and a terror to the outlaw."<sup>232</sup> The criminal trial symbolizes the morality and rationality of governance, Arnold argued, offering "the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world."<sup>233</sup> It may not provide an efficient and satisfactory resolution of the conflicts and contradictions between the individual and the state, but it validates both the dignity of the state's power and the dignity of the individual within the dramatic spectacle that pits one against the other in a formally equal setting.<sup>234</sup> As such, Arnold argued, the criminal trial serves as an essential ideological symbol of a rational judicial system within a stable government and society.<sup>235</sup>

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229. *Id.* at 144.

230. *Id.* at 144-45.

231. SYMBOLS, *supra* note 3, at 144-45.

232. *Id.* at 147-48.

233. *Id.* at 129.

234. *Id.* at 130.

235. *Id.* To Arnold, substantive criminal law was no different. The Securities Act of 1934, which Arnold considered a political compromise that failed adequately to protect investors or serve the needs of the modern economy, included unnecessary criminal penalties to provide a merely symbolic demonstration of the moral rectitude of legislators, regulators, rational investors, and Wall Street. *See id.* at 133-34.

### B. *The Symbols of Administrative Law*

Arnold concluded that the powerful spectacle of the criminal trial provides a certain degree of comfort and satisfaction for political subjects in its procedural format and seemingly impartial application of substantive law. The administrative tribunal, by contrast, never seems satisfying, failing to provide the necessary symbolic assurance that the underlying philosophical disputes about the relationship between the State and the individual have been fairly considered and resolved.<sup>236</sup> The administrative agency is unable to garner the symbolic status of the criminal court when it sits as a tribunal or crafts regulatory schemes; this symbolic deficiency masks the modern agency's expert ability to gather data and experiment with regulatory programs necessary to rescue the economy from the Depression. Although he was not alone in considering the practice and teaching of administrative law during the mid-1930s or in his advocacy on behalf of the New Deal, Arnold's approach was distinct in that he situated administrative law within the cultural symbols of governance as well as within the context of competing arguments regarding legal doctrine and the functionality of administrative agencies.

Arnold's overriding legal focus in *Symbols and Folklore* was on the judicial review of administrative agencies. Arnold was convinced that agencies enjoyed relative advantages in investigating and attacking the largest economic and social problems of the day.<sup>237</sup> He rejected the traditional schema that juxtaposed administrative agencies—the looming, demonic symbols of bureaucracy—against the privileged judiciary—the supposedly neutral institution with sacred powers to interpret the Constitution and scrutinize legislative and administrative actions.<sup>238</sup> The

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236. See SYMBOLS, *supra* note 3, at 133.

237. See, e.g., SYMBOLS, *supra* note 3, at 266-67 (claiming an approach empowering administrative agencies would enable the country to benefit from their "huge reservoir of technical skill, capable of running a great productive machine with new energy and efficiency").

238. SYMBOLS, *supra* note 3, at 205-06. See also RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 99-100 (1995) (placing Arnold in the context of other elite lawyers and legal academics who championed administrative agencies over the judiciary as state actors most likely to respond effectively to the Depression).

widespread judicial fetish, combined with the prevailing (though by no means uncontradicted<sup>239</sup>) negative conception of administrative law, assumed an inherent value in maintaining a strict separation of the tri-partite branches of government.<sup>240</sup> It was this assumption, Arnold believed, that enabled a formalist, conservative judiciary to thwart the New Deal's efforts to promote the production and distribution of the "comforts" necessary to relieve the Depression.<sup>241</sup>

The problem, Arnold argued, was symbolic. Formalism's legal distinction between courts and agencies, which in his more conventional realist mode he happily debunked, was in fact constituted by the prevailing symbolic duality between courts and agencies. The *legal*, in other words, was epiphenomenal of a *symbolic* base. He argued that the romantic legal vision of a powerful judiciary that is fair, impartial, and necessarily protective of individual freedoms, and that is therefore opposed to the dangerous "bureaucracy" of administrative agencies, follows from two highly symbolic aspects of the judiciary's role as official arbiter of official disputes. First, courts profit from their position as institutions that merely apply legal authority, in

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239. See generally G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 103-08 (Harvard University Press 2000) (describing challenges to essentialist conception of separation of powers in late-nineteenth and early-twentieth century prior to Supreme Court's reinvigoration of nondelegation doctrine in 1935); see also *id.* at 98-103 (describing how administrative agencies such as the Interstate Commerce Commission had grown in power and achieved some measure of popular and judicial acceptance during the early part of the twentieth century, in part because of the implicit assumption that Arnold, his contemporaries, and earlier proponents of state intervention put forth regarding the necessity for administrative agencies to regulate the complexities of a modern industrial economy).

240. Arnold was specifically reacting to the Court's reinvigoration of the nondelegation doctrine in the mid-1930s. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935 for unconstitutional delegation of legislative power to fix hours and wages to certain coal producers and miners); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring National Industrial Recovery Act unconstitutional because its codes of fair competition lacked enforcement standards); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (declaring section 9(c) of National Industrial Recovery Act unconstitutional for granting the President authority to determine and enforce policies regarding production and transportation of petroleum). These cases marked what G. Edward White calls the "unexpected" and temporary shift by the Court back to a "traditional separation of powers theory" in the mid-1930s. WHITE, *supra* note 239, at 108.

241. SYMBOLS, *supra* note 3, at 252-53.

the form of neutral rules of procedure and substantive common and statutory law that is external to them. Even when the results of their decisions are troubling, courts could never be at fault (unless, of course, they misapplied the law they are bound to uphold).<sup>242</sup> Second, the judiciary also appears to be a neutral, apolitical institution because of its apparent physical and political removal from the disputes it settles.<sup>243</sup> Within this formalist vision, bureaucracies symbolize the inverse of the judiciary because they establish their own substantive rules and procedures, "that particularly silly form of rule and precedent known as red tape," which they apply to their subjects.<sup>244</sup> As creatures of the executive branch, they seem less attached to the "Law" and more directly connected to the political hurly-burly.

This symbolic structure of administrative law produced the peculiar pathologies of legal resistance to the New Deal. Formalism's enduring symbolic construction of courts and administrative agencies perpetuated the folkloric belief that courts protect individual freedom while administrative agencies are demonic forces of inefficiency and collectivity, and that courts represent a "rule of law above men" while administrative tribunals "apply practical considerations to court decisions."<sup>245</sup> The symbolic assumptions of the formalist approach to administrative law granted conservative courts—already predisposed to strike down new regulatory regimes and rules under the false assumption that they were thereby protecting freedom—too much discretion to reverse agency decisions and the legislative authorization of regulation. Agencies were therefore relegated to secondary status behind the judiciary, especially when their specific actions or general legal authority faced a legal challenge. Under the "trial by combat" model, legal challenges to administrative action that arose from the false duality between courts and agencies provided little more than

a series of miracle plays to give [the individual dispute and its judicial resolution] a theatrical development. In the memory of the present generation the moral lesson of the judicial miracle play

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242. *See id.* at 205-06.

243. *See id.*

244. *Id.*

245. FOLKLORE, *supra* note 3, at 372.



has been that rugged individuals are not regulated. Instead, they fight for their rights. In this battle they expect government to let them alone.<sup>246</sup>

The litigation, trial-by-combat model of judicial review, which requires courts to evaluate a challenge to an entire regulatory regime through the prism of a dispute between one or more individuals and the agency and/or federal government, was a foolishly inefficient and indeterminate means for evaluating the legality and wisdom of an agency's actions.<sup>247</sup>

Even when agencies defeated a challenge to a regulation or an action, they lost the larger war. In victory, they assumed the symbolic role of the bureaucratic giant that had successfully infringed upon the "individual freedom" of the "rugged individuals," whom the giant met in a battle whose outcome was determined by the judiciary's higher, neutral authority.<sup>248</sup> Judicial supremacy, and concomitant administrative inferiority, emanated from the formalist symbolic hierarchy that privileged the judiciary and law over agencies and policy. To oppose this duality, in which agencies always occupy the lesser of the two available positions, one must deploy propaganda and folklore.

### C. Conclusion

Analyzing specific sets of legal doctrines and practices, Arnold applied a critical approach that combined insights from legal realism with those of social sciences to criticize, ironize, and affect change in prevailing governing institutions. He had no prescription for the conflicts at the heart of the criminal justice system; he seemed to accept as inevitable and necessary the criminal trial's function as a set of contentious, dramatic rituals necessary for the system's continuing operation. His analysis of the judicial review of administrative agencies, by contrast, was largely

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246. SYMBOLS, *supra* note 3, at 187-88.

247. See generally *id.* at 172-98 (criticizing "trial by combat" model of judicial review). For a more detailed discussion of Arnold's proposed revision of administrative law, see Mark Fenster, *A Folklore for Bureaucracy: Thurman Arnold's Symbolic Legal Practice and Competing Vision of Administrative Law for the New Deal* (draft on file with author).

248. SYMBOLS, *supra* note 3, at 187-88.

critical, although he failed to offer specific prescriptions to remedy the spiritual regime of judicial supremacy he deplored. He was clearly more troubled by the effects of administrative law's symbolic terrain than by the inefficient and occasionally unjust effects of the ritualistic criminal trial.

In both analyses, Arnold attempted to match an institution's temporal effectivity with its spiritual power. The criminal justice system, as flawed and ritualistic as it might be, met modernity's symbolic needs reasonably well, and at least as well as analogous institutions in more "primitive" societies (from Melanesian tribes to medieval ecclesiastic courts). Improving the system at the risk of its symbolic structures would be a dangerous undertaking, given the symbolic importance of the appearance of fairness and the functions of punishment for the guilty. The crisis of the Depression in the midst of technological possibility, available labor, and plentiful natural resources that could be successfully coordinated by a vigorous federal regulatory regime, however, was a temporal crisis caused by symbolic, or ideological, limits. Although he clearly doubted the extent to which the prevailing symbols of governance could be changed, he advocated utilizing them for temporal change.

#### V. THE FOLKLORE OF ARNOLD: THE LIMITS OF "POLITICAL DYNAMICS"

Arnold's inquiry into the symbolic realm of governance was an important approach to the study of political and legal rule. It was methodologically, conceptually, and politically flawed, however. He tended towards simplistic, anecdotal explanations of culture and politics (in, for example, his nearly essentialist distinction between the "temporal" and "spiritual"); and he was blind to the troubling political implications of his willingness to sacrifice democratic political structures and processes for functional solutions that he maintained would maximize industrial production and make more efficient the distribution of needed consumer goods. These flaws demonstrate the limits of the functionalism that prevailed in pre-war legal theory and mainstream social science generally.

Arnold's work so excessively attacked formalism and abstract thought, and so privileged pragmatic action by

insulated leaders, that it often lapsed into anti-intellectual, seemingly nihilistic pronouncements on the essential meaninglessness of popular politics.<sup>249</sup> Although he claimed that his wholly temporal approach was free of the "spiritual" bias of normative, conceptual principles,<sup>250</sup> his theory of "symbols" and his commitment to maximizing social wealth through the instrumental application of "temporal" policies depended upon conceptual and normative commitments to abstract concepts external to the objective world he observed.<sup>251</sup> His embrace of the functional and distaste for the spiritual also rendered him unable to make normative distinctions between competing political regimes, leading him to support, or to fail to reject sufficiently, fascism, totalitarianism, and corruption for their temporal achievements.<sup>252</sup> Although he conceded that

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249. See DUXBURY, *supra* note 2, at 30-34; see also Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 48-50 (1984) (summarizing criticism of realists as nihilists).

250. See Thurman Arnold, *The Folklore of Mr. Hook—A Reply*, 5 U. CHI. L. REV. 349, 349, 352-53 (1938) (responding to Sidney Hook, *The Politician's Handbook—A Review*, 5 U. CHI. L. REV. 341 (1938)) [hereinafter Arnold, *Hook*] (claiming to eschew the prescription of ideal "beautiful portraits" and "ethical formulas" for society, and refusing to discuss the values upon which his work relied); see also *id.* at 353 (rejecting abstract definitions of philosophical "values" because they create confusion by relying on words (such as "fascism," "communism," or "bureaucracy") "which impede practical methods of distributing goods"). Arnold blithely, and far too easily, dismissed the "vice of definition." See FOLKLORE, *supra* note 3, at 33 (refusing to "delay our exposition" providing definitions of key terms like "habits" and "creeds" because, as a lawyer, he had "indulged too long in the vice of definition to have any illusions that it leads to understanding"). Arnold's embrace of the ideal of practicality and direct experience over principle and theory was a classically American type of anti-intellectualism. See RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 236-37 (1963).

251. See EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 15-16 (1941); Arnold, *Hook*, *supra* note 250, at 348; see also Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 688, 694, 702 (1938); Edward H. Levi, *The Natural Law, Precedent, and Thurman Arnold*, 24 VA. L. REV. 587, 610-11 (1938). In addition, although Arnold's first and foremost normative commitment was to wealth maximization, he praised, largely in passing, such abstract virtues as working for one's fellow man rather than solely for oneself (see SYMBOLS, *supra* note 3, at 263-66), and the rights of criminal defendants to a fair trial. See SYMBOLS, *supra* note 3, at 134-35. Arnold failed to develop these additional commitments at all, however. *But see* KEARNY, *supra* note 13, at 56-60 (claiming Arnold was committed to some basic humanitarian principles and human rights, though such commitments became more apparent later in his life).

both the Soviet and German regimes were intolerant and cruel,<sup>253</sup> he saw these as possible, but not certain, results of a more efficient form of governance at a time of political and social crisis.<sup>254</sup> Because the U.S. political tradition was not susceptible to fascism and totalitarianism, such would not be the byproduct of a governing American regime that was truly effective on the temporal plane.<sup>255</sup>

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252. See, e.g., FOLKLORE, *supra* note 3, at 41-42 (remarking that Hitler's "strength" lay in his increasing employment and "national pride," and conceding merely that "[h]is weakness lay in his persecutions" which, Arnold asserted, were not necessary to a command economy or to "the development of national morale"); see also SYMBOLS, *supra* note 3, at 169, 227 (praising American municipal political machines for doing "the work of our Government" despite the fact that they must operate "sub rosa" because they conflict with political ideals). Many of Arnold's contemporary critics criticized such statements. See Edward S. Corwin, *Thurman Arnold's Folklore of Capitalism*, 32 AM. POL. SCI. REV. 745, 746 (1938) (book review); Arnold, *Hook*, *supra* note 250, at 346-49; Lerner, *supra* note 251, at 687; Philip Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 690, 692 (1936); see also Charles W. Smith, *The Intelligence Factor in Public Opinion: A Comment on Some Recent Publications*, 1 J. POL. 301, 303-04 (1939) (comparing Arnold's analysis of propaganda to the "disturbing" and similar analyses written by Hitler and Machiavelli). More recent critics along these lines include DUXBURY, *supra* note 2, at 30-34; and Warren P. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377, 378-79 (1955).

253. See SYMBOLS, *supra* note 3, at 243, 245-46; see also FOLKLORE, *supra* note 3, at 172 (noting the "cruelty," "intolerance," "repression," and "blood and terror" of the Nazis and Fascists, as well, he predicted, the Soviets in the future).

254. SYMBOLS, *supra* note 3, at 241-42; but see Arnold, *Hook*, *supra* note 250, at 345-46 (characterizing Arnold's thought as operating "in the pre-reflective pupa stage" in making the distinction between the means and ends of national unification and economic recovery under Hitler).

255. See SYMBOLS, *supra* note 3, at 243, 247-48. Arnold conceded that the U.S. was susceptible to political corruption, such as that of municipal political machine, but he perversely reveled in describing the city machines as functional regimes that could achieve practical ends that more "ethical," Progressive local governmental regimes failed to meet because the latter were limited by their adherence to principles while the former were concerned solely with the "practical tasks of government." See, e.g., FOLKLORE, *supra* note 3, at 43, 114; SYMBOLS, *supra* note 3, at 169, 270-71. Most contemporary historians disagree. On machine politics, see JOHN M. ALLSWANG, *BOSSSES, MACHINES, AND URBAN VOTERS* (rev. ed. 1986); THE CITY BOSS IN AMERICAN (Alexander B. Callow ed., 1976); Harvey Boulay & Alan DiGaetano, *Why Did Political Machines Disappear?*, 12 J. URB. HIST. 25 (1985). On municipal reform movements, see RAYMOND A. MOHL, *THE NEW CITY: URBAN AMERICA AND THE INDUSTRIAL AGE, 1860-1920* (1985); BRADLEY RICE, *PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-20* (1977); MARTIN SCHEISL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1800-920* (1977).

Ultimately, Arnold was a relativist willing to consider the advantages of any regime that could meet his specific technocratic conception of efficiency.<sup>256</sup> He assumed that his goal of efficiency required the management of governing private and public institutions by insulated, practical leaders supported by a citizenry that had been either persuaded or manipulated into trusting its leaders.<sup>257</sup> Under the logic of technocratic efficiency, for example, Arnold blithely and naively embraced the United States' colonial occupation of the Philippines in the late-nineteenth and early-twentieth centuries as a triumphant infusion of modern technocracy that brought "humanitarian imperialism" to a thankful native population, and he suggested that this approach could be profitably used to govern American cities.<sup>258</sup> Similarly, Arnold's belief in the role omniscient experts could play in managing the masses led him to propose as a model of governance the insane asylum, in which physicians seeking to make inmates "as comfortable as possible" assume their subjects' irrationality in attempting to treat their pathologies.<sup>259</sup> Arnold blithely dismissed democratic values and process as necessarily and solely "a dramatic spectacle" that can and should be "controlled" in the same way as the "emotional maladjustments of individuals."<sup>260</sup> Like other intellectuals of his day (including, to an extent, legal realists), Arnold rejected traditional democratic theory, cast doubt on traditional notions of participatory democracy (and the

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256. On the "technocratic bargain" between social science and managerial capitalism of the 1920s, the tradition that Arnold carried forward, see GUY ALCHON, *THE INVISIBLE HAND OF PLANNING: CAPITALISM, SOCIAL SCIENCE, AND THE STATE IN THE 1920S* 67-70, 175 n.1 (1985). In this regard, he was consistent with both the realists and the institutional economists. On the relativism and functionalism of realists, see KALMAN, *supra* note 2, at 3; PURCELL, *supra* note 37, at 86-87. On the functionalism of institutional economists, see NICHOLAS MERCURO & STEVEN C. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM* 107 (1997).

257. See Ayer, *supra* note 2, at 1085.

258. See SYMBOLS, *supra* note 3, at 111-12. On the troubling history of the American colonial occupation of the Philippines, see generally H. W. BRANDS, *BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES* 53-103 (1992); VINCENTE L. RAFAEL, *WHITE LOVE AND OTHER EVENTS IN FILIPINO HISTORY 19-75* (2000); *THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE* 35-55 (Daniel B. Schirmer & Stephen Rosskamm Shalom eds., 1987).

259. SYMBOLS, *supra* note 3, at 232-33.

260. FOLKLORE, *supra* note 3, at 344.

possibility of their implementation), emphasized the irrationality of the masses, and accepted the need for a dominant elite.<sup>261</sup> As a political project, Political Dynamics was marked by, and perhaps even surpassed, the troubling tendencies of its intellectual period.

Nor did Political Dynamics lack defects as an intellectual project. Arnold's conceptualization of the symbols and institutions of governance was static and simplistic. He failed to differentiate among symbols and assumed their meaning to be plain and unitary, and thereby failed to recognize that symbols have different and conflicting evocative, emotional, and ideological effects, and are themselves part of a wider cultural context.<sup>262</sup> For Arnold, a symbol was merely an emotionally charged word or image that referred only to a false system of belief rather than to the real conditions of governance; it could gain no purchase on the "temporal" plane where, presumably, practical managers communicated in forms that corresponded directly with the "true" reality of efficiency.<sup>263</sup> He provided a crude conception of meaning and power by assuming that symbols, though essential to human behavior and governance, are merely conservative and obfuscatory and that symbolic messages have direct effects upon the individual.<sup>264</sup> Although he rejected the abstract rationality of "economic man" (whose sole purpose is to maximize his wealth) and the abstract sinfulness of "legal man" (whose sole purpose is to misbehave),<sup>265</sup> his own work assumed a similarly abstract "symbolic man" whose sole

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261. See, e.g., CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 432-37 (1991) (characterizing Arnold as "[t]he 'Machiavelli' of the Managerial Revolution," a technocrat who promoted elite governance of the public and private); PURCELL, *supra* note 37, at 113-14 (criticizing Arnold's emphasis on the irrational and his rejection of democracy in favor of a ruling, manipulative elite); ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 207 (1995) (noting that FOLKLORE, "often cited as the New Deal's most significant commentary on government, derisively dismissed the very thought of popular rule"); Lerner, *supra* note 251, at 697 (criticizing Arnold's "anti-massism" and belief in the malleability of the masses).

262. See GARLAN, *supra* note 251, at 108; Lerner, *supra* note 251, at 696-97.

263. See, e.g., FOLKLORE, *supra* note 3, at 150-51, 168.

264. See Lerner, *supra* note 251, at 695-97. Arnold's inadequate assumptions regarding the psychology of individuals is attributable at least in part to his alliance with Edward Robinson, whose work was even less sophisticated than his own. *Id.* at 695.

265. SYMBOLS, *supra* note 3, at 77-78.

purpose, it seems, is to be manipulated. This simplistic assumption, derived from Lasswell, Lippmann, Pareto, and his minimal appropriation of some of the basic concepts of anthropology, coupled with his commitment to government by expert, resulted in an impoverished vision of democracy and of social interaction.<sup>266</sup>

Arnold's approach to the study of institutions was often as simplistic as his approach to symbols. Relying on an unproblematized, anthropomorphized vision of institutions as individuals with coherent personalities, his approach merely reproduced the same error that he made in his behavioralist conception of the individual's response to symbolic communication.<sup>267</sup> His study of institutions was largely the seriatim analysis of official statements and news reports made at a particular historical moment; he neither studied, nor proposed, a more systematic methodology that would analyze the use of symbols in different historical periods, or that acknowledged the use of competing symbols by a range of individuals and institutions.<sup>268</sup> Like the institutionalist economists upon whose theories of the institution in modern industrial society he relied, Arnold demonstrated no interest in the sociological study of actual institutions;<sup>269</sup> his interest seemed to end with the presumption that they reproduced the structure and dynamics of dominant institutions and incorporated the subject within the symbolic realm.

These flaws represent, to a degree, the limits of Arnold's time and position: despite breaking from realism, he was still bound to realism's functionalism, and despite his interest in the true and the expert, he was, like many of

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266. John Dewey's critique of Walter Lippmann serves as an apt critique to Lasswell's and Arnold's theories of propaganda and the manufacture of consent. Dewey condemned such approaches for failing to conceptualize the public as an engaged participant in governance requiring sufficient information to make rational collective decisions, and for failing to recognize that government by expert elites is doomed to failure because it would lack legitimacy and responsiveness to the public's needs. See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 148-49, 167-71, 203-19 (1927); MATTHEW FESTENSTEIN, *PRAGMATISM AND POLITICAL THEORY: FROM DEWEY TO RORTY* 82-99 (1997).

267. See *FOLKLORE*, *supra* note 3, at 350-52.

268. See Verdun-Jones, *supra* note 214, at 481.

269. See DUXBURY, *supra* note 15, at 101. Walton Hamilton—Arnold's colleague and friend, and the institutionalist with whom Arnold was best acquainted—actively opposed empirical legal research. See SCHLEGEL, *supra* note 25, at 311 n.259.

his fellow realists, undisciplined as an analyst and nascent social scientist. These flaws did not render his work useless in his own time, however. As Max Lerner—one of Arnold's contemporaries and author of one of the most critical reviews of *Folklore*<sup>270</sup>—demonstrated, one could recognize the limitations of Arnold's work while still utilizing some of its insights.<sup>271</sup> Moreover, as I argue in the Conclusion, the significant questions he posed about law's relation to governance, and his act of seeking answers in the emerging social sciences of the interwar years, make his project analogous to similar intellectual projects in contemporary legal studies.

### CONCLUSION

Arnold's career as a legal theorist largely ended with the publication of *Folklore* and *Symbols*, leaving entirely undeveloped his proposed field of "Political Dynamics."<sup>272</sup> He

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270. See Lerner, *supra* note 251.

271. See Max Lerner, *Constitution and Court As Symbols*, 46 YALE L.J. 1290, 1290 note (1937) (citing SYMBOLS as one of several works of which essay was a "gloss"); *id.* at 1319 (describing symbol-making of "the common man" as engine of progressive social change). Lerner's essay was, however, published before his critical review of *Folklore*, and was probably written before *Folklore*'s publication. See GRESSLEY, *supra* note 13, at 263 (reprinting letter from Thurman Arnold to Porter Sargent, Aug. 6, 1937) (noting that by August 1937 he still had not submitted a final draft of *Folklore*).

The essay criticized the dead weight of residual symbols of the constitution as protector of property rights, and praised the emergent symbol-making of an energized working class. Lerner, *supra*. A public intellectual during the 1930s who was further to the political left than Arnold, Lerner had attended Yale Law School briefly and worked with Walton Hamilton at the short-lived Brookings Graduate School in Washington. See SANFORD LAKOFF, MAX LERNER: PILGRIM IN THE PROMISED LAND 40-46, 90 (1998). As Lakoff summarizes, at the time Lerner thought that "[t]he special task for radical intellectuals . . . was to think through the character of the transition [from the New Deal to socialism] and formulate the principles with which political leaders could mobilize a following." *Id.* at 92.

272. Following his tenure in the Antitrust Division (during which he wrote *The Bottlenecks of Business*—which was more of an intervention into a specific political issue than a statement of legal theory), Arnold served for two years on the District of Columbia Circuit of the U.S. Court of Appeals before entering private practice, where he spent the remainder of his career until his death in 1969. See generally GRESSLEY, *supra* note 13, at 51-94. In those years he published only one important article, in which he both dismissed and lampooned Henry Hart's criticism of the U.S. Supreme Court for failing to provide adequate reasoning in support of their recent decisions. *Id.* at 88-90. Utilizing his familiar tendencies of puncturing formalist arrogance, the article



entered the Roosevelt administration as head of the Antitrust Division in the Justice Department in 1938, and enjoyed a relatively successful five-year period as the country's leading antitrust enforcer.<sup>273</sup> Following a brief, frustrating stint as a federal appellate judge on the D.C. Circuit, he entered private practice, where he remained as a prominent and well-connected attorney for the remainder of his life.<sup>274</sup> But in his important mid-1930s monographs, Arnold had combined realism's functionalist critique of formalism with emergent fields of social scientific inquiry in a compelling and entertaining, if idiosyncratic, critique and pragmatic utilization of the symbols of governance. His post-realist reconsideration of formalism as a symbolic discourse whose invocation is necessary for governance recognized that symbols constitute the conditions of possibility of governance.

As a legal theorist and social scientist, Arnold's strengths lay in rejecting the provincial methods and focus of legal academia, in extending legal realism beyond the disciplinary and conceptual limits of its anti-formalism, and in recognizing the symbolic realm of governance; his flaws lay in pushing realism's functionalism even further towards a technocratic managerialism and in failing to provide sufficiently complex theories of the production and reception of symbols. Although they may be flawed as cultural criticism and as excessively functionalist, antidemocratic political practice, *Symbols* and *Folklore* included insights into the relationship between governance and meaning that distinguished him from his contemporaries in legal academia. They represented a creative effort to construct an interdisciplinary approach out of critical concepts appropriated from legal realism, political science and sociology, anthropology, and

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largely reiterated familiar realist themes regarding the fallible human elements of the deliberative process and the indeterminacy of judicial opinions. See Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1310-14 (1960) (responding to Henry Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959)).

273. See, e.g., ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 431-55 (1966); WYATT WELLS, *ANTITRUST & THE FORMATION OF THE POSTWAR WORLD* 43-83 (2002); Alan Brinkley, *The Antimonopoly Idea and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557 (1993).

274. See Waller, *supra* note 13.

economics. Accordingly, Arnold was the first post-realist scholar, presaging the varied post-war movements in legal theory that place law within broader systems of governance and society, and that bring to the study of law methods and theoretical approaches from other disciplines. Although his work was not essential to the development of, for example, policy science, law and society, law and economics, and critical legal studies, Arnold considered in productive and compelling ways many of the issues these approaches have raised regarding the functional purpose and symbolic structures of law.<sup>275</sup> The theoretical insights and empirical research resulting from these developments in legal theory and legal studies may have surpassed what Arnold himself produced and envisioned. Nevertheless, his early critique of realism's limits makes him an important transitional figure between realism and its aftermath.

In addition to his historical importance, Arnold's contemporary relevance and his ongoing popularity also emanates from his ironic authorial voice. Besides his initial insights into realism's limits and law's position within wider symbols of governance, his ultimate success has been as a social and cultural critic whose value lies in the telling anecdote rather than in careful study, in humor rather than in solemn exegesis, and in polemic rather than in objective disinterest. He could shatter the pretensions of criminal procedure and unquestioned faith in judicial review with a savage irony that maintains its relevance and bite. This may best explain why Arnold is best remembered for his voice than for the field of "Political Dynamics," which, thanks to its lack of methodological and conceptual clarity, was forgotten soon after *Folklore's* publication.

Considered this way, the Arnold of *Folklore* and *Symbols* emerges as the Mencken of pre-war legal academia who, like Veblen, provided a trenchant, well-circulated, and entertaining critique of the reigning pretensions and common sense of his time. Arnold smartly developed and exploited this figure for political ends by bringing attention to the political effects of "Law," "Government," and "Capitalism" during the crisis of the Depression. As such, he presents an engaged and engaging figure of the legal

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275. The precise connection between Arnold's work and the ever-proliferating schools of post-realist thought are beyond the scope of this Article, but I plan to trace these relationships in a later essay.

academic as public intellectual, a figure that has long proven its usefulness—at least to Arnold's career and prominence during his lifetime. Arnold's willingness to employ his critical skills and figure proved politically useful during the New Deal and ultimately for the enforcement of the antitrust policies of the Roosevelt administration. Being the celebrated critic of law and governance helped, or at least did not impede, Arnold's career as a public lawyer who reached the heights of academia, government, the judiciary, and private practice.<sup>276</sup> And today, although no contemporary school of legal scholarship relies on Arnold's work, his ironic, detached stance and critical voice continue to fascinate and attract those exposed to him.

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276. In this regard, Arnold's popular success as a social critic served a similar role as the empirical social science work of William O. Douglas and Charles Clark, both of whom utilized early success in their research to launch careers in government and then in the judiciary. See Bryant G. Garth, Book Review, 45 J. LEG. EDUC. 606, 606-07 (1995) (reviewing SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE, *supra* note 25).