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# THE DRAMAS OF CRIMINAL LAW: THURMAN ARNOLD'S POST-REALIST CRITIQUE OF LAW ENFORCEMENT

Mark Fenster\*

*The high legal realist period of the 1930s was not known for its criminal law scholarship, while until fairly recently, criminal law theory was not as well-developed as those fields that had faced a realist and post-realist critique. This Essay attempts to address these issues by describing in detail the criminal law scholarship of Thurman Arnold, a prominent realist whose best known academic writings were his mid-1930s monographs on the New Deal and resistance to it. Arnold's criminal law scholarship serves as a forgotten link between the classical doctrinal work that dominated midcentury legal academic work on criminal law and the more socially and culturally-focused scholarship of recent decades. Reconsidering Arnold's sociological, doctrinal, and cultural analysis of criminal law, law enforcement, and the criminal trial informs our understanding of the history of criminal law scholarship, legal realism, and post-realist legal theory.*

Only if we recognize that the chief function of the criminal court is not to enforce law but to dramatize law enforcement do we have a sensible basis for understanding or reform.<sup>1</sup>

– Thurman Arnold (1932)

## INTRODUCTION

In a symposium commentary published twenty-five years ago, Robert Weisberg observed that criminal law scholarship remained stuck in a pre-modern phase, having failed to suffer the realist and positivist critiques that other fields of legal scholarship had faced.<sup>2</sup> Focused largely on doctrinal analysis that resisted both theory and empirics, Weisberg complained, the field was a dull backwater in the legal academy because it had, among other things, failed to confront the implications of legal realism's insights.<sup>3</sup> The generation since Weisberg's pronouncement—including but by no means defined by the

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\* Cone, Wagner, Nugent, Hazouri & Roth Tort Professor and University Term Professor, Frederic G. Levin College of Law, University of Florida. Many thanks to Jack Schlegel and Bob Gordon for conversations and encouragement; thanks also to Chris Slobogin, Jerry Israel, and Bob Weisberg.

1. Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 24 (1932).

2. Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 522 (1992).

3. *Id.*

works of Paul Butler,<sup>4</sup> Bernard Harcourt,<sup>5</sup> and Tracey Meares<sup>6</sup>—has more thoroughly rethought criminal law’s place within a larger social context and produced more compelling and contemporary theoretical works. Their social and cultural analysis of crime, law enforcement, and punishment hearkens back to a small, but during its time, well-read body of criminal law scholarship from legal realism’s heyday in the 1930s: Thurman Arnold’s cultural legal realist work on criminal law.<sup>7</sup>

Arnold’s criminal law scholarship imported insights from the emerging qualitative social sciences of the early twentieth century, an enormously influential period of intellectual ferment,<sup>8</sup> to supplement legal realism’s nascent critical method. Arnold was not considered a criminal law scholar—his greatest fame as an academic was as a realist who defended the New Deal’s administrative practices, while he is now best-remembered as head of antitrust enforcement in the Justice Department in the late 1930s and as a named, founding partner of one of Washington’s most prominent private firms.<sup>9</sup> Nevertheless, he authored or co-authored law review articles, books, and government-sponsored studies that reconsidered a subject that was dominated during the pre-World War II era by staid doctrinal scholarship. Viewed broadly, Arnold’s work on criminal law sheds light not only

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4. See PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

5. See BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

6. See TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (1999); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015); Tracey L. Meares & Bernard E. Harcourt, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

7. Arnold’s criminal law scholarship only gets occasional mention in recent scholarship. See, e.g., Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1168 (1997) (quoting Arnold and relying upon his analogy of the criminal trial to drama); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 520 n.210 (2006) (characterizing *The Symbols of Government* as a “celebrated essay” while borrowing Arnold’s notion of the criminal trial as a dramatization); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 761 n.90 (1995) (praising Arnold’s “brilliant work outside of the critical tradition”). As Weisberg notes, contemporary scholars who follow in Arnold’s culturalist tradition are either ignorant of his work or fail to cite him. See Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 558 (2003) (criticizing Dan Kahan for this omission in his article, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999)).

8. See DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 303–469 (1991); Dorothy Ross, *Modernist Social Science in the Land of the New/Old*, in MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870–1930, at 171 (Dorothy Ross ed., 1994).

9. The lone biography of Arnold is SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY (2005), which covers his life and career; Arnold’s autobiography, which is not terribly revealing, is FAIR FIGHTS AND FOUL: A DISSENTING LAWYER’S LIFE (1965). Additional sources of biographical information focused on his academic career and his academic work include LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); 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 (1990); Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 BUFF. L. REV. 1053 (2003) [hereinafter Fenster, *Symbols of Governance*]; Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 75, 86–87, 108–10 (Anthony T. Kronman ed., 2004). See also Mark Fenster, *The Folklore of Legal Biography*, 105 MICH. L. REV. 1265 (2007) (reviewing WALLER, *supra*, and discussing additional sources of information about Arnold).

on the possibility of criminal law scholarship beyond doctrinal analysis—possibilities that the current generation has more thoroughly realized—but on an important strain of post-realist legal theory.

Like most other realists, Arnold focused on how law functioned within society and its consequences on systems of state and private governance, but he distinguished himself from his colleagues by emphasizing law's symbolic functions as well as its instrumental consequences.<sup>10</sup> As public law that defines and enforces substantive prohibitions, criminal law and procedure represented for Arnold core subjects for his inquiry into law, politics, and the state. And although it is doctrinally, procedurally, and administratively complex, criminal law and the criminal justice system are the areas of law to which the public and press pay the greatest attention. As a result, they served as an especially good means for Arnold to think through the relationship between popular sentiment on the one hand and law and the state that enforces it on the other. Writing in the midst of and after Prohibition, Arnold examined how the public sought to understand and affect criminal justice through political and moral debate. Arnold was not uninterested in the doctrinal and administrative complexity of criminal law and procedure—his first major law review article, written during his initial year-long visit to Yale, waded into the morass that was (and remains) the law of criminal attempt. But he sought to understand why the law and the legal system appeared convoluted, how the public responded to the state's legal opacity, and how legal and political institutions sought to maintain their legitimacy while balancing the need for protecting individual rights, administering an overburdened criminal justice system, and enforcing—or appearing to enforce—the law.

Arnold's criminal law scholarship is presently worthy of reconsideration for several reasons. First, it helps complete our understanding of criminal law scholarship's past, filling a gap in its history by establishing a link between legal realism and contemporary interdisciplinary work engaged in the social and cultural study of criminal law. Second, Arnold's heterodox version of realist scholarship helps complicate our understanding of legal realism—arguably the most important and influential movement in twentieth century legal theory. But Arnold was as interested in thinking about law's broader relationship to the social world as he was in the jurisprudential questions that have come to define contemporary debates about realism.<sup>11</sup> As I have argued elsewhere, he simultaneously offered a distinct type of realism, a critique of realism, and the first effort to use legal realism's insights for a broader understanding of law's place in modern governance.<sup>12</sup> Third, Arnold's criminal law scholarship furthers our understanding of Arnold's work—

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10. On realism's functionalism, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822 (1935); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984). On Arnold's relationship to realism's functionalism, see Fenster, *Symbols of Governance*, *supra* note 9, at 1061–66.

11. See Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1073 (1993) (book review) (noting how Arnold's work “confounds” received understandings of legal realism). For examples of recent prominent work that emphasizes realism's jurisprudential strain, see BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009). For a critique of the latter work, see Mark Fenster, *Mr. Peabody's Improbable Legal Intellectual History*, 64 BUFF. L. REV. 101 (2016).

12. See Fenster, *Symbols of Governance*, *supra* note 9, at 1067–72.

work that continues to influence scholarship in fields as diverse as antitrust,<sup>13</sup> corporate law,<sup>14</sup> and administrative law.<sup>15</sup>

This Essay begins in Part I with an introduction to Arnold and to his relatively brief academic career and post-academic success, before proceeding through the various stages of his criminal law scholarship: from his empirical work at West Virginia and Yale (Part II), through his realist doctrinal scholarship (Part III) and his institutional critique of law enforcement (Part IV), into his broader cultural critique of the criminal trial (Part V), and then, as a conclusion and postscript, to how he applied his theoretical work to his period serving as a federal appellate judge on the D.C. Circuit (Part VI). In the latter part, I note that Judge Arnold served in the role that Professor Arnold prescribed—and ultimately found it so unsatisfying that he fled the bench for the more interesting and open world of high-level private practice.

### I. THURMAN ARNOLD'S ACADEMIC CAREER

Arnold entered the academy after several years of private practice in Chicago and his hometown of Laramie, Wyoming.<sup>16</sup> He quickly rose to prominence as an academic, starting as dean of West Virginia's law school, where he led the bar and faculty in a thorough, quantitative study of legal procedure in the local and state courts.<sup>17</sup> He arrived at Yale, initially in the summer of 1928 and then for a year-long visit in 1930, in great part to join its dean, Charles Clark, and young faculty recruit from Columbia, William O. Douglas, in their empirical study of the criminal docket in the Connecticut federal courts, as part of the National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission).<sup>18</sup> Around the same time, Harvard's Dean Roscoe Pound attempted to woo Arnold away from New Haven to initiate a quantitative project on criminal law at Harvard.<sup>19</sup> Looking to fill gaps in their faculty and compete for empirical researchers at the moment that quantitative methodologies' stock was high, talent-spotting administrators were coming after Arnold.

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13. See, e.g., Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569 (2004) (arguing that Arnold "revitalized antitrust law and enforcement and changed the entire focus of the New Deal from corporatist planning to competition as the fundamental economic policy of the Roosevelt administration"); Tony A. Freyer, *What Was Warren Court Antitrust?*, 2009 SUP. CT. REV. 347, 359–69 (noting Arnold's continuing relevance).

14. See, e.g., Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2028 (2014) (characterizing Arnold as "one of the great figures in American law" and using his work on law as folklore and symbol as the basis of their analysis).

15. See, e.g., Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69 (2005) (arguing that Arnold's work represents a key tradition in administrative law scholarship); Michael Taggart, *The Province of Administrative Law Determined?*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 1, 2–3 (Michael Taggart ed., 1997) (using Arnold's work to help explain contemporary administrative law).

16. See WALLER, *supra* note 9, at 22–38.

17. See *id.* at 39–43. For his account of the work he did at West Virginia, see Thurman Arnold, *Review of the Work of the College of Law*, 36 W. VA. L.Q. 319 (1930); T. W. Arnold, *The Collection of Judicial Statistics in West Virginia*, 36 W. VA. L.Q. 184 (1930).

18. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 82–90 (1995).

19. Letter from Thurman Arnold to Roscoe Pound, Dean, Harvard Law School (Jan. 23, 1931), reprinted in *VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 176–78* (Gene M. Gressley ed., 1977).

But what we would now recognize as the naïve quantitative methodologies of the early twentieth century did not hold Arnold's attention for long, and within a few years he would begin to mock the meaningless "mass of statistics" that he had collected, developing a set of stock jokes about nerdy bean counters and their work that he would continue to deploy throughout his career.<sup>20</sup> His published works during his academic career varied, and he did not concentrate on any one field of substantive law early in his career. In the seven-year period between his first major law review article and the publication of his second book, *The Folklore of Capitalism*, in 1937, he wrote about criminal law, criminal procedure, civil procedure, trusts, administrative law, and jurisprudence, among other things. As Spencer Waller has characterized it, Arnold's earliest reputation was that of an "academic entrepreneur," energetic and desirous of attention for West Virginia's law school, for which he had high intellectual and educational aspirations as the flagship (and only) law school in the state.<sup>21</sup> He abandoned West Virginia for Yale, and he abandoned quantitative research for doctrinal criticism as he moved along a trajectory toward the broader social criticism for which he would gain a popular audience. To extend Waller's apt entrepreneur metaphor, Arnold always tried to gain market share to stay ahead of his competition.<sup>22</sup>

Although he may have abandoned systematic empirical research, he used the results of his earlier quantitative work in some of his new, more impressionistic work, and the objects of his earlier study, as well as the notion that some empirical reality about crime and society lurked beneath the doctrinal gloss of criminal law, remained important to his writings. Two of his first four major academic articles concerned criminal law and procedure (while a third considered procedure more broadly in its relationship to substantive law);<sup>23</sup> and one of his criminal law articles made reference to the "law in action" that he and his collaborators found in their work for the Wickersham Commission.<sup>24</sup> The criminal justice system—which was not one of realism's major foci, although it was one of Dean Pound's<sup>25</sup>—would remain one of Arnold's interests throughout his academic career. He returned to it in new material in *The Symbols of Government*<sup>26</sup> and even during his brief period on the federal bench, when he was forced to consider the issue of criminal insanity and *mens rea* about which he had written a decade

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20. In his autobiography, for example, Arnold mocked his own work on the Connecticut courts: "The result was the most fascinating body of legal statistics that has been collected in this century. They had only one flaw. Nobody then and nobody yet has ever been able to think of what to do with them." ARNOLD, *supra* note 9, at 63. Arnold was not the only one; Karl Llewellyn would later characterize Underhill Moore's study of parking patterns as "the nadir of idiocy." Karl N. Llewellyn, *On What Makes Legal Research Worthwhile*, 8 J. LEGAL EDUC. 399, 401 (1956).

21. WALLER, *supra* note 9, at 39–44.

22. One could go so far as to say that Arnold's continually shifting gaze manifested "the attention span of a two-year-old." John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 512 n.264 (1979).

23. These include Arnold, *Law Enforcement*, *supra* note 1, and Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930); the other two articles were Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932), and Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

24. Arnold, *Law Enforcement*, *supra* note 1, at 17.

25. See ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930).

26. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

earlier.

But his academic career was brief, lasting only a decade before he permanently abandoned New Haven for Washington, D.C.<sup>27</sup> Appointed head of antitrust enforcement at the Department of Justice during the period before the nation's entry into World War II,<sup>28</sup> he reached nearly celebrity status as a trustbuster.<sup>29</sup> He was pushed from that position to a judgeship on the D.C. Circuit, which he in turn resigned to become a founding partner of Arnold, Fortas & Porter (later, and still today, Arnold & Porter when Abe Fortas entered the judiciary).<sup>30</sup> He spent the final decades of his career in private practice as a prominent D.C. lawyer with strong ties to the Democratic Party.

## II. CRIMINAL PROCEDURE IN ACTION

In their Wickersham Commission study, Clark, Douglas, Arnold, and a battery of assistants investigated the work of the federal courts in Connecticut,<sup>31</sup> while coordinating with academics in other law schools (including the one in West Virginia whose deanship Arnold had forsaken) who were conducting similar studies in other states.<sup>32</sup> Arnold promoted his group's work in a "progress report" published in a 1931 issue of the *American Bar Association Journal* that described the project in explicitly realist terms, emphasizing its study of the "law in action" through "that which happens in law suits" while rejecting the formalist study of the "formation of principles."<sup>33</sup> His group, Arnold claimed, did not simply aggregate cases within empty concepts, but instead obtained "mass statistics" of the actual procedures that courts used, and then "counted and tabulated" these statistics with the fabulously newfangled technology of the "Hollerith Punch Card Systems."<sup>34</sup> Real results and insights into the state of the law would surely follow, as would the opportunity for reform.

The preliminary results of their study of criminal cases in Connecticut, Arnold reported, offered some "rather surprising" data that "raise[d] interesting queries for future examination."<sup>35</sup> The investigators, as well as those who sponsored the study, shared certain assumptions about how federal courts were performing in response to the deluge of prosecutions under the federal Volstead Act prohibiting the production, sale, and possession of alcohol. They all assumed that the courts were suffering from "the widely advertised results of what is generally called 'the sporting theory of justice'"—foolishly complicated procedural considerations and delays, irrational juries, and cutthroat fights between prosecution and defense that called into question the justice and correctness of

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27. See Gordon, *supra* note 9, at 108.

28. WALLER, *supra* note 9, at 78–83.

29. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 431–55 (1966); WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* 43–83 (2002).

30. WALLER, *supra* note 9, at 111–50.

31. SCHLEGEL, *supra* note 18, at 88.

32. ARNOLD, *supra* note 9, at 62–63; SCHLEGEL, *supra* note 18, at 86–88.

33. Thurman W. Arnold, *Progress Report on Study of the Federal Courts—No. 7*, 17 A.B.A. J. 799, 799–800 (1931).

34. *Id.* at 799.

35. *Id.* at 800–01.

the result in individual cases.<sup>36</sup> Instead, Arnold and his co-authors found that the federal criminal docket, at least in the District of Connecticut, constituted a system that seemed “almost too efficient”: courts resolved a large percentage of cases expeditiously, without technical arguments or delay, and held only nine criminal jury trials in a three-year period.<sup>37</sup> They achieved this “efficiency” because the prosecution and defense frequently bargained to achieve a mutually acceptable plea agreement that the assigned judge would in turn accept.

What the study had discovered—what Arnold found so “surprising” and “interesting”—was modern criminal procedure, in all its unromantic glory.<sup>38</sup> This process might have seemed at odds with traditional conceptions of mechanical law enforcement, and it certainly suffered from being “executed sub rosa where the merits of the prosecutor’s action cannot be examined.”<sup>39</sup> For Arnold, however, such bargaining was an essential element of the discretion vested in the prosecuting attorney. It constituted a necessary means to provide justice in individual cases and manage the prosecution of “unenforceable laws” that required prosecution of more defendants than the criminal justice system could effectively administer.<sup>40</sup> The Connecticut federal courts study was one of a burgeoning group of empirical studies of local criminal courts being undertaken throughout the country,<sup>41</sup> and the results Arnold and his collaborators found corresponded with those of other surveys, which also revealed the surprising extent of prosecutorial discretion and negotiated compromise between the state and defendants.<sup>42</sup> Academics quickly began to comment on the relationship between substantive criminal law’s aims and criminal procedure’s administrative peculiarities. In the first edition of his landmark book *Theft, Law and Society*, Jerome Hall, a rising star in the study of criminal law and a student of the leading realist Karl Llewellyn, compared what the crime studies revealed about prosecutorial discretion with that of previous centuries and found that the legally sanctioned area of prosecutorial discretion had increased “considerably” in modern criminal law, particularly in its application by prosecutors to individual defendants.<sup>43</sup>

Notwithstanding the apparent excitement of this discovery—and perhaps because of the boredom and hard work that comes from creating a large data set—the courts study

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36. *Id.* at 801.

37. *Id.*

38. SCHLEGEL, *supra* note 18, at 89. The renewed interest in plea bargaining over the past several decades demonstrates that the issue remains at the center of criminal procedure and academic literature. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

39. Arnold, *Progress Report*, *supra* note 33, at 802.

40. *Id.* at 801–02.

41. ALLEN HENDERSHOTT EATON & SHELBY MILLARD HARRISON, A BIBLIOGRAPHY OF SOCIAL SURVEYS 79–81 (1930) (listing sixteen empirical studies of local, state, and federal criminal justice issues published between 1904 and 1927, with the majority published in the 1920s). The most prominent study was the Cleveland Crime Survey, which was overseen by Felix Frankfurter and Roscoe Pound and published as *Criminal Justice in Cleveland*. See CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds., 1922).

42. See Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 73, 80–81 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

43. JEROME HALL, THEFT, LAW, AND SOCIETY 111–17 (1935).



would mark the end of Arnold the empiricist. But his writings would soon consider the implications of the modern criminal procedure he had discovered. Before then, however, he began his sole-authored academic work with a more traditional foray into realist doctrinal criticism.

### III. DOCTRINAL REALISM: THE CRIMINAL ATTEMPTS DOCTRINE

Arnold's first major law review article sought to radically reconsider the criminal attempts doctrine from a prototypically realist approach, one that trusted the intuitive ability of judges to identify criminally culpable attempts and that thoroughly distrusted efforts to formulate broadly applicable, formal definitions of a trans-substantive concept of attempt. At common law, a defendant's attempt to commit a crime was an indictable offense.<sup>44</sup> The requisite act for the crime of attempt was "more than mere preparation," but less than "actual commission . . . except for failure to consummate all elements of the substantive crime."<sup>45</sup> Cases and commentaries had long lamented the doctrine's complex, if not incoherent, distinction between those uncompleted criminal offenses that warrant punishment and those that do not.<sup>46</sup> The inchoate nature of the offense and the difficulty of line-drawing across failed efforts to complete different substantive offenses—should the test for attempted *murder*, for example, be the same as that for attempted *forgery*?—seemed to make the doctrine both impossible to figure in the abstract and, for that very reason, enormously attractive to scholars seeking to prove their analytical mettle.

Several prominent early twentieth-century academics attempted to solve the riddle through careful parsing of the doctrine, offering various, and often contradictory, efforts to end the inconsistency found in caselaw. A generation earlier, Joseph Beale, the ardent Harvard formalist who would later become the realists' *bête noire*, had asserted the doctrine's coherence.<sup>47</sup> Beale's 1903 *Harvard Law Review* article conceded the dichotomous nature of attempt by noting that the doctrine simultaneously concerns "a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary" and a distinct offense that has "the qualities and characteristics of other crimes."<sup>48</sup> Ignoring the complications that might arise from this insight, Beale confidently identified four elements of the attempt crime, emphasizing its distinctiveness and ignoring the specificity of the substantive crime attempted. Thus, an attempt was simply an act ("a step toward a punishable offense"), the intent to "adapt[]" that step toward a purpose to complete the offense, nearness of success, and failure.<sup>49</sup> Elements, clearly defined, could bring principled order to a difficult doctrine.<sup>50</sup>

44. See *State v. Addor*, 110 S.E. 650 (N.C. 1922).

45. *Id.* at 650–51.

46. See, e.g., *Hicks v. Commonwealth*, 9 S.E. 1024, 1025 (Va. 1889) (complaining that attempt is "more intricate and difficult of comprehension than any branch of the criminal law"); 1 JOEL PRENTISS BISHOP, *BISHOP ON CRIMINAL LAW* ¶ 725, at 517 (John M. Zane & Carl Zollmann eds., 9th ed. 1923) (describing attempt as an "intricate and important" doctrine that is "imperfectly understood by the courts").

47. For a summary of the realists' war on Beale, see KALMAN, *supra* note 9, at 25–28.

48. J. H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 491–92 (1903).

49. *Id.* at 492.

50. The Bishop treatise agreed with Beale that the doctrine could be distilled to essential elements, although it restated only three—intent, performance, and failure—and suggested that all authorities seemed to be in general agreement "as to the essentials of the crime though they differ in their forms of expression." 1 BISHOP ON

But even Beale's assured analysis of attempt could not tame criminal attempt, and the terms of the debate he sought to end remained just as alive among the next generation of law professors. Arnold's contemporaries tried novel analytical and historical approaches to sort and resolve criminal attempt's riddle. For Francis Sayre of Harvard, a prominent criminal law professor and casebook author, attempt constituted a thoroughly modern doctrine, one first articulated in a brilliant 1784 decision by Lord Mansfield that generalized previous, scattered common law approaches to uncompleted offenses.<sup>51</sup> Sayre consolidated Beale's four elements into three: act, intent, and consequences, with intent playing the dominant role and the consequences of an attempt the least significant one (since by definition they could not include the consequences of a *successful* criminal offense).<sup>52</sup> Sayre's intent inquiry focused on whether the intended consequences constituted a crime, and, if the defendant's failure to complete the crime was based on a mistake of fact, whether that mistake was one that a "reasonable man" in similar circumstances with criminal intent would make. If the intent requirement was met, the defendant would be liable for a criminal attempt so long as the act was sufficiently advanced.<sup>53</sup>

Sayre's confident parsing of the doctrine faced competition, however. In the *University of Pennsylvania Law Review*, Professor John Strahorn peered into the doctrinal abyss and found that criminal attempt's riddle could be solved by focusing not on act and intent but on the question of whether an attempt creates "a substantial impairment of some interest protected by the involved prohibitions against the crime or its related attempt."<sup>54</sup> Strahorn focused on the prohibition's purpose rather than the defendant's intent after engaging in a complicated effort to divide the issue of impossibility—defendants whose failure to complete a criminal act was caused by its impossibility as a matter of fact or law—into multiple types of impossibility ("extrinsic," "intrinsic," and "legal" impossibility<sup>55</sup>) and multiple types of attempts ("relative" and "direct" attempts<sup>56</sup>). This effort at analytic distinction could offer greater clarity in explaining past cases and guiding future decisions—but it could not, alas, offer perfect predictability. John Curran, another of Sayre's competitors, argued in a two-part series published in the *Georgetown Law Journal* that an attempt merited criminal punishment to the extent that it breached the peace and thereby challenged and harmed the state's authority. Curran challenged Sayre on doctrinal history, claiming that attempt was not a modern invention but had always been consistently understood in Anglo-American law as distinct from a completed crime.

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CRIMINAL LAW, *supra* note 46, § 729, ¶ 1, at 519.

51. Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 834, 836–37 (1928) (citing *Rex v. Scofield*, Cald. 397 (1784)).

52. *Id.* at 838–39.

53. *Id.* at 839, 859.

54. John S. Strahorn, Jr., *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 971 (1930).

55. "Intrinsic impossibility" refers to the defendant's ineffectual effort to engage in a substantive offense; "extrinsic impossibility" occurs when a normally effective attempt is frustrated by some occurrence outside of his control; and "legal impossibility" refers to instances when the attempted act is not prohibited by law. *Id.* at 962–63.

56. "Relative attempts" are those that fail to complete a substantive criminal prohibition; "direct attempts" are acts that are themselves punishable by statute or, at the time of Strahorn's article, common law crimes. *Id.* at 963–64.

He also challenged Sayre's conceptual understanding, arguing that the underlying criminal nature of the act was in the attempt's threat to public order and the state rather than the defendant's criminal intent.<sup>57</sup>

To understand the varied approaches each of these confident scholars proposed, consider their disparate comments on *People v. Lee Kong*, a then-canonical case in which the California Supreme Court upheld a trial court's conviction for assault with intent to kill.<sup>58</sup> The defendant, keeper of a gambling hall, had learned that the police had put his premises under surveillance and that an officer had bored a hole in the roof to observe the illegal proceedings therein. Lee Kong shot a pistol at the peephole, mistakenly thinking the officer was in position at a moment when the officer was in fact perched elsewhere on the roof. The defendant was tried and convicted of assault with intent to murder on the ground that the officer would likely have been killed had he been at the location where the defendant had aimed and shot. The issue on appeal was whether the defendant had a "present ability to commit a violent injury upon the person of another," as required by California's statutory definition of assault, despite his mistake regarding the officer's location.<sup>59</sup> The California Supreme Court reasoned that because Lee Kong knew the officer was on the roof when he fired with the intent to kill him, he manifested both the intent and the ability sufficient to meet the statutory requirement for an unlawful attempt.<sup>60</sup>

Most early twentieth-century commentators on criminal attempt agreed with the result, but for different reasons. Beale, the outlying über-formalist, supported the decision to the extent the facts showed the defendant intended to shoot his bullet "into contact" with the policeman and therefore attempted to kill the officer.<sup>61</sup> If, on the other hand, he took the hole with the light shining through it for a human eye, and shot to put his bullet into the eye, since the supposed eye was only a lighted hole, the intended contact was not criminal and he was not guilty of a criminal attempt.<sup>62</sup> This absurd distinction apparently needed no explanation for Beale, and so he failed to provide one. Sayre's explanation, again focusing on the defendant's intent and also a bit mystifying, was at least a little more comprehensible: insofar as Lee Kong had intended to shoot *at the peephole*, he appeared to have no intent to murder (since he mistakenly thought the police officer was in that position); but because he *also* intended to *hit the body of the officer* with his bullet, he clearly intended to murder and his mistake as to the officer's location was a "reasonable" one warranting criminal punishment.<sup>63</sup> Strahorn supported the decision because the intended victim's fear of death or bodily harm "was a substantial impairment of [the officer's] interest to be free from the fear of death";<sup>64</sup> Curran, too, viewed the decision through the prism of his own particular theory, finding that the defendant's malicious act

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57. John Curran, *Criminal and Non-Criminal Attempts, Part II*, 19 GEO. L.J. 316, 337 (1931) [hereinafter Curran, *Attempts Part II*]; see also John Curran, *Criminal and Non-Criminal Attempts, Part I*, 19 GEO. L.J. 185 (1930) (offering history of the early common law of attempt).

58. *People v. Lee Kong*, 30 P. 800 (1892).

59. *Id.* at 800-01.

60. *Id.* at 801.

61. Beale, *supra* note 48, at 495.

62. *Id.* No later commentators could understand the distinction Beale made.

63. Sayre, *supra* note 51, at 839, 852 & n.99.

64. Strahorn, *supra* note 54, at 982.

deserved punishment because it directly threatened “the order of things.”<sup>65</sup> In *Lee Kong*, as in the doctrine of criminal attempt generally, commentators found evidence of the doctrine’s coherence by reference to their own efforts to form a conceptual frame that could explain it. Viewed together, however, their disparate explanations merely suggested collective confusion about a doctrine in search of a purpose and coherence.

Arnold would have none of this. He offered a prototypically realist take on the criminal attempt doctrine, one so bold as to proclaim in the article’s title that what had come before him established little more than an empty, incoherent “abstraction.”<sup>66</sup> Yes, the doctrine was confused, he proclaimed, but the confusion emanated not from judges’ inability to parse the doctrine’s elements correctly or to conceptualize the doctrine’s purpose correctly; rather, the doctrine was confused because it assumed that “attempt” existed in the abstract, apart from the underlying crime attempted, and could be identified as such. Put more simply, the law of criminal attempts did not suffer from poor reasoning; criminal law suffered because of the existence of the criminal attempts doctrine. Indeed, by establishing the doctrine and thereby initiating the modern law of criminal attempts, Lord Mansfield—Professor Sayre’s hero for having established attempt as a distinct, independent doctrine—precipitated precisely the formalist parade of “analytical thinking” and “search for abstractions” that would confuse scholars and jurists for a century and a half.<sup>67</sup>

Arnold offered a number of reasons to abandon the criminal attempts doctrine as confused and confusing besides his distaste for formalist reasoning. Because some attempts to engage in criminal activity are not criminal acts—it would make no sense, for example, to prosecute someone for attempting to drive while intoxicated—the concept of attempt inevitably requires some context to define criminal culpability.<sup>68</sup> It also makes no sense to prosecute someone for attempting to engage in a criminal attempt or an attempt to engage in a similarly inchoate offense like assault. Many crimes *already* seem like attempts, insofar as they seek to prohibit certain acts that are assumed to be precursors to other, more blameworthy acts—violation of the Mann Act, for example, or indecent solicitation, or shooting dangerous firearms, or assault with intent to kill.<sup>69</sup> Indeed, the very idea of prosecuting an attempt to engage in inchoate-like criminal behavior suggests either of two absurd results: an infinite regress in which all incipient behavior becomes punishable—though at what point is the attempt to attempt to attempt too attenuated to prosecute?—or a doctrine that refuses to punish attempts at inchoate offenses and thus turns a blind eye to well-developed plans to engage in aggressively threatening behavior.<sup>70</sup>

Most important of all, viewing attempt as a separate crime leads to the foolish effort to define the intent to attempt as a general matter. Does someone who makes a mistake of

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65. Curran, *Attempts Part II*, *supra* note 57, at 333–34.

66. Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930) [hereinafter Arnold, *Criminal Attempts*]. A year after its publication, the prominent realist Jerome Frank praised the article as “brilliant.” See Jerome Frank, *Book Review*, 40 YALE L.J. 1120, 1124 n.11 (1931).

67. Arnold, *Criminal Attempts*, *supra* note 66, at 59–60.

68. *Id.* at 63–64.

69. *Id.* at 64.

70. Arnold mocked one effort to sort different kinds of attempts to attempt. *Id.* at 65 (summarizing and critiquing Strahorn, *supra* note 54, at 963 (distinguishing between “direct” and “relative” attempts)).

fact—thinking the officer is perched at the peephole, for example—have the requisite “intent” to attempt to murder?<sup>71</sup> Presumably so, unless the mistake was so absurd as to throw the idea of intent into doubt—in which case is intent truly the issue? Even more telling in this context was a hypothetical fact pattern over which Arnold’s contemporaries obsessed, in which a hypothetical shooter fires at a tree stump confusing the stump with a person he intends to kill. Arnold mocked the various commentators on this scenario who disagreed with each other over culpability—one criminal law treatise suggested that there is guilty intent but no overt act,<sup>72</sup> Beale claimed the shooter lacks intent to murder because he was shooting at a stump rather than at a person,<sup>73</sup> while Sayre would have considered whether the act was a “reasonable” mistake.<sup>74</sup> Their efforts merely demonstrated for Arnold that attempt and the element of intent, viewed in the abstract, were beside the point.

Arnold found a safe haven in the midst of all this foolishness—in the courts, where judges understood these issues better than formalist commentators. They correctly punished especially blameworthy attempts and related crimes (such as aggravated assault) without engaging in analytical somersaults to sort and create a pure, consistent, trans-substantive doctrine of attempt.<sup>75</sup> Courts resolved the issue before them in individual, concrete cases without recourse to highly abstract concepts of “criminal attempt” writ large. Doing so, the courts intuitively developed a distinct mode of analysis that promised a solution to the dilemma with which his contemporaries struggled. Following his reading of the case law and his suspicion of formalist concepts, Arnold proposed that attempts did not constitute a separate crime, but should be viewed within the ambit of the substantive offense the defendant allegedly failed to complete. Viewed this way, attempt to murder is merely a subsidiary of the statutory prohibition against murder, attempt to commit forgery should be evaluated under the forgery statute, and so on. Rather than create a separate crime, the prohibition against attempt should serve “as a power or discretion that has been given to the courts either by the legislature or by common law precedent to extend the limits of prohibitions against certain kinds of conduct which does not quite fall within the terms of those prohibitions.”<sup>76</sup> The criminal attempt doctrine constituted for Arnold a gap-filling device that allowed courts to punish criminally culpable conduct not included within a statute’s specific language and not serious enough to warrant the full penalty for violating said statute.<sup>77</sup> It was akin to a lesser included offense in those instances when the defendant’s conduct approached but did not quite meet the elements required to prove violation of the prohibited criminal act. Better, Arnold reasoned, to view attempted murder in its relationship to murder than in its relationship to attempts at other crimes.

The payoff of his approach, he claimed, would be a more pragmatic means of deciding disparate cases, one sensitive and deferential to the trial courts’ conclusions about

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71. *Id.* at 68–70.

72. *Id.* at 69 n.46 (citing 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 225 (11th ed. 1912)).

73. Beale, *supra* note 48, at 494.

74. Sayre, *supra* note 51, at 853.

75. Arnold, *Criminal Attempts*, *supra* note 66, at 64–65. Arnold also argued that all of the inchoate offenses, including attempt, assault, and solicitation, are sufficiently similar that classifying them as distinct makes little sense. *Id.* at 66–67.

76. *Id.* at 74.

77. *Id.* at 75–76.

the context in which the allegedly criminal act occurred. He rejected efforts to articulate clear doctrinal definitions and boundaries for criminal attempt and wished that scholars would abandon the effort to establish formal elements and abstract concepts. In the process, he also dispensed with the search for legal clarity and predictability in favor of granting triers of fact the authority to evaluate a given attempt in light of the underlying though uncompleted substantive offense and statute.<sup>78</sup> For example, although Arnold did not directly address the *Lee Kong* decision described above, his approach would support the court's conclusion for reasons other than its consistency with the idiosyncratic, complex readings of the doctrine his contemporaries offered. Instead, the trial record demonstrated that the defendant fired a deadly weapon at where he thought a policeman was located. The trial court had decided that this act was sufficiently dangerous that it fell within the policy of the substantive crime—prohibiting the intentional, unprovoked exercise of deadly force.<sup>79</sup> In his brief application of his approach to other fact patterns, Arnold showed a concern above all with factual context: the danger of the defendant's conduct and intent, as well as the defendant's personal character as found by the trier of facts.<sup>80</sup> The legal focus should either be on the crime itself—comparing and evaluating an incomplete attempt with a completed offense—or on other attempts to accomplish the same crime, when comparing the facts and the dangerousness of the defendants would actually have relevance. Far-flung analogies may give the appearance of logic and analytical rigor and predictability, but as Arnold's realist critique demonstrated, they failed either to find consistency in the law or to articulate principles that could create it from abstraction.

This was not an entirely new idea, nor has it proved unique to Arnold. A generation earlier, Oliver Wendell Holmes had suggested that in deciding culpability for attempt, “[e]very question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help”; for this reason, he refused to analogize a failed effort to poison another to attempts to achieve “lighter crimes.”<sup>81</sup> Writing a decade after

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78. *Id.* at 76–77, 80.

79. Compare *id.* at 76 (outlining Arnold's “policy” for deciding criminal attempts), with *People v. Lee Kong*, 30 P. 800, 800–01 (1892) (“He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but, very fortunately for the officer of the law, at the moment of attack he was upon the roof viewing the scene of action at an opening some distance from his contemplated point of observation, and thus no substantial results followed from appellant's fire. . . . That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part.”).

80. A defendant who attempted forgery, for example, should not be prosecuted so long as no harm was caused “and we do not have the same desire to extend [a forgery law's] limits as we do in the case of murder”; a child accused of attempted rape when he was below the minimum age required for criminal liability should be punished based on his physical and emotional maturity, not on arbitrary age distinctions established in the abstract; attempts at incestuous marriage that are foiled before completion should be exonerated where a court concludes “that nothing short of the completed crime should be punished.” Arnold, *Criminal Attempts*, *supra* note 66, at 77.

81. *Commonwealth v. Kennedy*, 48 N.E. 770, 771 (Mass. 1897). In *The Common Law*, Holmes wrote:

Eminent judges have been puzzled where to draw the line [of culpability], or even to state the principle on which it should be drawn . . . . But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 68 (Mark DeWolfe Howe ed., 1967) (1881).

Arnold's article, Jerome Hall also suggested that the attempt doctrine was sufficiently fact-specific and indeterminate as to require significant delegation to triers of fact in every case, albeit with "the best possible methods for guidance of judgment" from substantive law and an active appellate review for "irrational verdicts."<sup>82</sup> Like Arnold, Hall called for shifting the focus in criminal attempts doctrine away from the "logical manipulation of propositions to try the consistency of theories" and toward concern with "the functioning of the system" of criminal justice.<sup>83</sup> But Arnold appeared not to trust the doctrinal limitations that appellate courts would develop or, worse, adopt from academics or treatises; for him, deference to the trial courts' response to a fact pattern and to a particular defendant was sufficient. His approach seemed both superficially attractive in its criticism of its rivals and subject to widely different, unpredictable results across cases. It was not a doctrine so much as a grant of authority. It rightly recognized and critiqued the excesses of doctrinal form but offered nothing in its place but potentially random, individualized judgments.

As critique, Arnold's realist intervention correctly identified the slippery incoherence of formalist efforts to domesticate the unruly concept of criminal attempts. He could not, however, shame or shut down these efforts; nor did he propose an alternative scheme that would shift attention from a trans-substantive concept of attempt to what he saw as a more grounded and fact-specific approach that would compare an alleged attempt to the specific crime attempted. The doctrine today remains as muddled and contentious as it was in Arnold's era,<sup>84</sup> yet it continues to attract commentators who obsessively offer their own solutions as if only they and their pet theory can finally solve the doctrinal riddle.<sup>85</sup> In so doing, Arnold illustrated the core problem realists faced: They could see through formalism's empty concepts and incoherence and they could demonstrate the failure of those concepts to explain what courts did and what they should do; but realists often failed to displace formalist concepts with significantly more functional approaches, nor could they displace the desire among academics and the legal profession for the concepts that formalists produce, and the "dream of predictability" that formalists claimed to offer.<sup>86</sup> This failing would become the central question for Arnold's next article on

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82. Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 827–28 (1940). Notably, Hall did not cite Arnold's article, although he did cite Holmes. *See id.* at 822–23.

83. *Id.* at 831.

84. Mark Kelman famously "trashed," in critical legal studies terms, criminal law doctrine in large part via the attempt doctrine—a trashing that Leo Katz recently updated in terms of contemporary strains and tastes of legal theory. *See* Leo Katz, *Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law*, 163 U. PA. L. REV. 1945 (2015); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 620–27, 652–56 (1981). According to one of its proponents, the Model Penal Code does no better. *See* William T. Pizzi, *Rethinking Attempt Under the Model Penal Code*, 9 OHIO ST. J. CRIM. L. 771 (2012).

85. Rather than offer an extremely long footnote with citations to a dozen or more law review articles to illustrate this point, consider a very recent, high-profile effort which claimed, more than eighty years after Arnold's critique (and thirty years after Kelman's, *supra* note 84), that "courts and commentators have consistently failed to explicitly offer a coherent theory of this fundamental area of criminal law," before confidently pronouncing: "Despair no longer. This Article offers a framework for thinking about attempts that solves important problems of adjudication—problems to which we currently lack principled solutions despite the great frequency with which defendants charged with criminal attempts appear in courtrooms." Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 95 (2014). I am quite confident that the riddle will remain unsolved eighty years hence.

86. *See* Arnold, *Criminal Attempts*, *supra* note 66, at 80.

criminal law, which foreshadowed the basic insight of his post-realist theory of law.

#### IV. CRIMINAL LAW AS ADMINISTRATION: LAW ENFORCEMENT

Immediately following *Criminal Attempts*, Arnold published a similarly realist doctrinal article in 1931 in the *Columbia Law Review* that critiqued the new Restatement of the Law of Trusts.<sup>87</sup> Again, he mocked formalist, elitist, and academic efforts to tame an unruly doctrine, and again he advocated the pragmatic, functionalist approach taken by courts that focused on the facts in individual cases and privileged the ends sought by those who created trusts over the formal requirements for trust creation that a conceptualist approach would require. Two years later, Arnold returned to the topic of criminal law administration in an article that sought to investigate—or, as he described his method, “dissect”—the term “law enforcement” and to consider why scholars are unable to persuade courts and legislatures to adopt their great ideas.<sup>88</sup> What are the “stimuli” to which courts respond, Arnold asked, and why do the “low-minded schemes” of pedestrian reformers and politicians succeed when the “high-minded” ones, put forth by those with the best of intentions and intellectual pedigrees, fail? This question departed from those he asked in his previous two articles, which focused instead on criticizing those bad, high-minded ideas that failed to persuade judges who rightly preferred their own intuitions about the facts of cases to the abstractions proposed by academics. Here, the question was not what or how but *why*—why do courts act the way they do, what forces affect their operation and decision-making, and what can reformers do to improve the performance of courts and legislatures?

At least on the surface, then, Arnold’s dissection method sought more than simply description and reformist prescription. “Law enforcement,” as a concept or ideal, “has . . . its value in inducing a feeling that criminal justice is both impartial and impersonal,”<sup>89</sup> and his dissection would in turn serve as a means to investigate the larger issue of law’s resistance to reform. He took a systematic view of the entire criminal justice system and reviewed all of the relevant institutions: prosecuting and defense attorneys, the courts, the legislatures that create the substantive criminal laws, and the public whose moral commitments and prerogatives presumably constitute the basis for criminal law and whose support gives legitimacy to the state.

His analysis began with the ideal of the “law” to be enforced. Scholars during his time (as well as our own<sup>90</sup>) decried the expansion of criminal laws—although especially relevant in 1932 was the federal prohibition on the manufacture, sale, and consumption of alcohol, which not only expanded the number of laws but also their violation by a broad swathe of the public. Arnold characterized criminal law doctrine as an “elaborate . . . attempt to reconcile and make more definite the implications of the vague public ideals

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87. Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

88. Arnold, *Law Enforcement*, *supra* note 1.

89. *Id.* at 6.

90. See generally Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197–1213 (2015) (summarizing the literature on overcriminalization); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001) (describing criminal law’s excessive “breadth and depth”).



that surround the criminal courts.”<sup>91</sup> Because the body of criminal sanctions needing enforcement bore the weight of the nation’s cultural and social values, the law’s incessant expansion merely reflected the multiple and contradictory concerns it was required to address. When any existing law appeared to be widely violated and underenforced, he observed, legislatures passed new laws to address whatever issue the initial laws had not yet resolved.<sup>92</sup> At the same time, some existing criminal laws were underenforced and some minor violations by “respectable” individuals were under-prosecuted because neither the offenses nor offenders appear to be “criminal.”<sup>93</sup> The *law* part of “law enforcement,” then, may represent a perfect ideal of a morally-based, coherent criminal code, but in reality it fails to constitute a mechanical, essential body of rules. Instead, it ceaselessly spreads in response to the latest panic while society projects its incoherent and contradictory moral principles upon it.

The *enforcement* part of the phrase, also “a reverently held ideal,” presumes that prosecutors and judges mechanically, impartially, and impersonally apply all laws equally, no matter the relative merit of any one law.<sup>94</sup> During debates over Prohibition, for example, both the “drys” who led the charge for temperance laws and the “wets” who opposed them claimed a commitment to the ideal of law enforcement: for the drys, the Volstead Act could and should have been enforced universally and mechanically, while one of the wets’ most vociferous complaints was that the inevitable inability of prosecutors and courts to strictly enforce the prohibition laws would perforce degrade the principle of law enforcement.<sup>95</sup> No one sought strict enforcement of *civil* laws—such as tortious negligence, breach of contract, regulatory ratemaking, and unfair competition—whose legitimacy survived their imperfect enforcement by courts. But the simpler, more widely applicable, morally-derived *criminal* prohibitions, whose violation was more likely to receive public attention through newspaper and radio, appeared to require perfect enforcement.<sup>96</sup> The ideal view of “law enforcement” presumes an essential relationship between moral codes and the state: substantive laws establish norms of behavior, and it is the role of government to strictly police and punish those who violate these norms. For Arnold, it serves as “the dramatization of the moral notions of the community.”<sup>97</sup>

The ideal runs aground, however, on the realist shores of administration. Rather than viewing their jobs as the lead actors in a moral drama, Arnold argued, prosecutors in fact attempt to achieve the functionalist end of a criminal justice system—an orderly community.<sup>98</sup> To do so, they administer laws in rational but imperfect ways outside of the public’s view, using their discretion to wield substantive criminal laws as “an arsenal of weapons with which to incarcerate certain dangerous individuals who are bothering society.”<sup>99</sup> They could not, and did not, prosecute everyone who violated a crime, because

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91. Arnold, *Law Enforcement*, *supra* note 1, at 7.

92. *Id.* at 14.

93. *Id.* at 15.

94. *Id.* at 6, 11.

95. *Id.* at 11–12.

96. Arnold, *Law Enforcement*, *supra* note 1, at 96.

97. *Id.* at 8.

98. *Id.*

99. *Id.* at 9.

doing so would merely “clog the machinery” of justice “with relentless prosecution of comparatively harmless persons.”<sup>100</sup> Law enforcement largely occurs in the decisions made by prosecutors to pursue certain alleged criminals, to strike bargains with some to gain guilty pleas, and to go to trial against some small number of others—all in order to best allocate limited resources while protecting the public from the worst and most dangerous criminals.<sup>101</sup> Meanwhile, courts play only a minor role in the maintenance of public order, and the criminal trial, as Arnold’s later work would argue (and as the next section explains), is an almost entirely symbolic exercise that does little more than dramatize the ideals of law enforcement.

Arnold drew two conclusions from this wide gulf between the public ideal of strict, moral law enforcement and the “law in action” of administrative practice. The first concerned the consequences of this gulf for criminal law and procedure. The distance between ideal and practice inevitably creates incoherent and largely meaningless doctrine, rather than the pure logical concepts that formalist academics would prefer, as the laws to be enforced cannot contain the ideals they are putatively intended to observe. In addition, the gap between the ideal of law enforcement and its actual practice led all of the knowing players in the system to protect the actual workings of the criminal justice system from public knowledge. The bargaining process that settles a majority of criminal prosecutions is driven underground because it emits “a bad odor,” while the ideal of criminally punishing all who violate the criminal law hampers the use of civil reparations to resolve disputes between defendants and victims.<sup>102</sup>

Second, Arnold argued that the public ideal constitutes the conditions under which any effort to reform the criminal justice system must operate. The would-be reformer, Arnold argued, “should base his entire scheme of reform on a technique of public acceptance, which neither criticizes nor attempts to change general preconceptions, but rather uses them to accomplish the desired ends.”<sup>103</sup> Formalist ideals about law enforcement cannot be merely swept away in the tide of reform; rather, realist, progressive interventions must work within or even manipulate those ideals to achieve piecemeal change. For example, psychology and psychiatry seemed to be chipping away slowly at the assumption of individual criminal responsibility, while one of the unintended consequences of Prohibition seemed to be an expansion of individual constitutional rights, like the Fourth Amendment right against illegal search and seizure, as broader and stricter enforcement of the laws against otherwise upright citizens created a popular backlash.<sup>104</sup> Incremental change from outside the law (imported, for example, from emerging fields of the social or medical sciences), or publicly supported changes from within the law, could accomplish reform. Thoroughgoing changes were unlikely to succeed, however, if they challenged, and could be seen as challenging, an ideal like law enforcement.

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100. *Id.*

101. *See* Arnold, *Law Enforcement*, *supra* note 1, at 17–18.

102. *Id.* at 19.

103. *Id.* at 13.

104. *See id.* at 20–22.

## V. THE DRAMA OF THE CRIMINAL TRIAL

If Arnold viewed the ideal of “law enforcement” as masking prosecutorial discretion with the false and impossible cover of mechanical perfection, he viewed the ideal drama of the criminal trial as masking the irrationalities and injustices of substantive law with the gloss of procedural fairness. In a characteristic argument that he made first in *The Symbols of Government*<sup>105</sup> and then repeated only a few years before his death,<sup>106</sup> Arnold claimed that the criminal trial is an essential practice in *all* stable societies, from the primitive and the medieval to the modern and from China to England, and that it is one of the fundamental operations that make the judicial system “[t]he center of ideals of every Western government.”<sup>107</sup> The criminal trial’s symbolic preeminence—observable during Arnold’s time in newspapers, film, drama, and popular novels, and today in those media and even more in television—derives as much from its ceremonial procedures as from its instrumental objectives and results. Indeed, for both the general public and elites, the fair and neutral processes of a criminal trial are at least as important as a resulting verdict. A properly conducted, formally fair trial that results in a guilty verdict for an innocent defendant 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>108</sup> For the legitimacy of both the criminal justice system and the society whose values that system is supposed to uphold, doing it right is more important than getting it wrong. Public, dramatic, understandable procedure trumps substantive injustice.

To illustrate this dynamic, Arnold recounted the heresy trial of Joan of Arc, the transcript of which had recently appeared in an English translation.<sup>109</sup> With his typically outrageous irony, Arnold announced his great respect for a clearly “political” trial in which the accused was presumed to be guilty of a substantive crime by her judges, the faculty of the University of Paris sitting as a secular appellate body in the Castle of Rouen.<sup>110</sup> Surely, his contemporaneous reader must have thought, such a trial represents the relative savagery and ignorance of pre-modern conceptions of justice—after all, the defendant was executed by fire for the crime of heresy by a state controlled by occupying English conquerors. But Arnold claimed that the medieval show trial resembled a contemporary, well-run political trial.<sup>111</sup> Despite the political pressures placed upon it, the court developed “a record of dignity and impartiality” and provided many of the requirements of modern due process.<sup>112</sup> It even demonstrated its formal independence from the popular

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105. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

106. Indeed, his writings on the criminal trial were both so characteristic of his thought that he restated them a few years before his death, more than three decades after publication of *The Symbols of Government*. See Thurman Arnold, *The Criminal Trial as a Symbol of Public Morality*, in *CRIMINAL JUSTICE IN OUR TIME* 139 (Yale Kamisar et al. eds., 1965).

107. ARNOLD, *supra* note 105, at 128, 131–33.

108. *Id.* at 142–43.

109. See *THE TRIAL OF JEANNE D’ARC*, at ix (G.G. Coulton & Eileen Power eds., W. P. Barrett trans., 1932).

110. ARNOLD, *supra* note 105, at viii–ix.

111. For a contemporary account of the trial that is consistent with Arnold’s, if less hyperbolic, see DANIEL HOBBS, *THE TRIAL OF JOAN OF ARC* 10–32 (2005).

112. ARNOLD, *supra* note 105, 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

and political controversy surrounding the accused; for example, it ruled out the torture of Joan as unnecessary, despite the fact that the judges were no doubt accustomed to such methods of salvation.<sup>113</sup> The court could do nothing but “represent the prevailing ideals and phobias of its era,” like those modern courts that outlaw obscene materials or punish vocal political dissent, and apply the prevailing doctrines of heresy, belief, and ecclesiastical hierarchy with sufficient gravity, humility, and neutrality such that it could protect its own prestige.<sup>114</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>115</sup> It was savage *and* mechanical; a perpetrator of ideological injustice *and* a symbol of great fairness. The latter terms in those ironic dualities made the court an apparently neutral, symbolically significant, and acceptable institution of justice, even as it applied primitive, superstitious beliefs and exacted a brutal judgment.

The modern criminal trial is little different, Arnold argued, as it offers the drama of procedural criminal justice, and as such constitutes a “great humanitarian ideal,”<sup>116</sup> even as it frequently subverts the pursuit of substantive justice. Consider first the role of zealous criminal defense attorneys. By their alleged actions, guilty criminal defendants have imperiled the forces of law and threaten future harm should they be released. And yet, their attorneys threaten to disrupt the moral order by providing them with a vigorous defense. If these attorneys fail to exploit any technical or procedural opening in the trial proceedings, however, they threaten to disrupt a system of advocacy that positions them as agents of their clients.<sup>117</sup> Defense tactics, in turn, lengthen the time and costs of criminal trials and may subvert the cause of justice—as in the archetypal, if fairly rare, instance in which the defendant is acquitted or a trial dismissed due to a technical rule of evidence or trial procedure. Vigorous criminal defense may be essential to the drama of the criminal trial and to the ideal that defendants should receive a fair hearing in which they are represented fully and fairly, but the use of aggressive trial tactics appears to conflict with the attorneys’ role as officers of the court and frequently prove costly to the administration of criminal justice.

These costs might be worth bearing if balanced by a rational, trustworthy adjudicatory system—that is, if we could have confidence that zealous advocacy on both sides led to more reliable verdicts, then perhaps the excesses of the advocacy could be more easily endured. Alas, Arnold argued, such is not the case. The jury is not a deliberative decision-making institution—it is “an unpredictable body,” Arnold wrote, “moved by emotional considerations, and not careful of the fundamental principles of the law because of ignorance, prejudice, etc.”<sup>118</sup> It offers neither justice nor administrative efficiency. And yet, like the zealous advocates whose one-sided spiels it is supposed to

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conviction, and a permanent written record. *Id.* at 136–37.

113. *Id.* at 138.

114. *Id.* at 136–37.

115. *Id.* at 140.

116. *Id.* at 143.

117. ARNOLD, *supra* note 105, at 142–44.

118. *Id.* at 144.

consider critically and weigh, the jury is also “the great symbol of justice,” ideally serving the role of a deliberative assemblage of peers able to pass judgment on the defendant and thereby give dignity to the proceedings and uphold the rights of the accused.<sup>119</sup> As a representative, democratic sample of the citizenry apart from the state, the jury serves as the “shock absorber” for systemic criticisms of the criminal justice system. It can withstand the inevitable criticism arising from unsatisfactory results in individual cases and inconsistent results across cases.<sup>120</sup> The symbolic value of the citizen jury, and the procedural legitimacy it brings to the criminal trial, transcends the potentially inferior substantive results the jury will render in its verdict.

Meanwhile, the judge directs the various players in the drama through their necessary roles. As in Joan of Arc’s trial, a judge does not “question the underlying assumptions of the government which it supports, however regrettable those assumptions may be.”<sup>121</sup> His responsibility is entirely procedural, only that “of an umpire”;<sup>122</sup> when successful, the criminal trial judge allows all the circumstances to be considered by the jury and produces a record by which the “future” can judge “all the relevant facts.”<sup>123</sup> The ideals of the criminal trial drama, then, embody the state’s effort to legitimate itself and its criminal justice system: the adversaries zealously advocate; the jury deliberates; the court referees and enforces. At the same time, the criminal trial emerges in Arnold’s description as an ideological mask over a system that malfunctions, with lying, conniving advocates seeking to free guilty defendants or punish innocent ones; manipulable, inattentive juries; and judges acting as little more than bureaucrats whose authority is limited to the stage directions of trial procedure.

At first glance, Arnold’s description appears to be a familiar ideological critique of the state and its criminal justice system, anticipating the New Left and critical theoretical jeremiads against a criminal process and state that seem more concerned with their own legitimacy than with substantive injustice.<sup>124</sup> Curiously, however, Arnold’s efforts to demystify the criminal trial’s socially symbolic functions were not especially critical—his voice certainly lacks the timbre of rage with which such demystification is usually made. Instead, Arnold frequently analogized his work on the criminal trial and on other areas of law to that of an anthropologist seeking not to condemn or celebrate his subjects but to capture through thick description their peculiar folkways. He was a detached social scientist, not a hand-wringing prophet. He simply described the ways that the American criminal justice system privileges procedure over substance—suggesting, perhaps, that he was a closet conservative, as one critic has argued.<sup>125</sup>

But rather than either a nascent radical or conservative, Arnold was a Progressive

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119. *Id.* at 144–45.

120. *Id.*

121. *Id.* at 140.

122. ARNOLD, *supra* note 105, at 145.

123. *Id.* at 140.

124. The best examples of such scholarship are the essays on crime and justice in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998). See David Cole, *Two Systems of Criminal Justice*, in *THE POLITICS OF LAW*, *supra*, at 410; Elliott Currie, *Crime and Punishment in the United States: Myths, Realities, and Possibilities*, in *THE POLITICS OF LAW*, *supra*, at 381; David Rudovsky, *Police Practices*, in *THE POLITICS OF LAW*, *supra*, at 434.

125. See Ayer, *supra* note 9, at 1067–68.

Era intellectual who trusted the state apparatus as the preeminent means to develop and impose rational means to solve social and economic problems. He was also a legal academic of his time who believed in procedure as a means to protect fairness, impose social order, and promote and take advantage of institutional competence. But he was, at least as much, an ironist in the tradition of his contemporaries H. L. Mencken and Thorstein Veblen who perversely noted, and even celebrated, how procedure's privileged position could lead to horrific substantive results.<sup>126</sup> He either embraced or found tolerable the structural flaws in the criminal justice system, and he seemed to view its imperfections not as targets of reform but as essential components—perhaps unexpected consequences, but necessary ones—of a system devised, populated, and acceded to by humans of inherently limited capacity. He appears neither as a conservative seeking to uphold existing traditions and institutions nor a radical who rejects them. Arnold leaves us with a burning, frustrating question: Was he making a normative claim in favor of popular sentiment and against justice and administrative efficiency, or were his sarcasm and irony components of a campaign to unmask and critique the paradoxes and contradictions of the criminal trial?

#### VI. POST-REALISM AND CRIMINAL LAW

Part of this confusion comes from Arnold's complicated relationship with legal realism and from tensions within realism itself. As a means to enforce the law, the criminal justice system appeared to Arnold the realist as significantly less than perfect. He identified the criminal trial's weaknesses, comparing it unfavorably to the dispute resolution available through arbitration and the enforcement of federal laws and regulations by administrative agencies,<sup>127</sup> while he berated both the sporting nature of trial techniques wielded by attorneys and the inability of criminal penalties and the penal system either to reform the guilty or make society safe.<sup>128</sup> His critique of doctrine—from the narrow problem of criminal attempt to the broader ideal of the law to be enforced—and his characterization of the criminal justice process—from the broad delegation of prosecutorial enforcement to the criminal trial's drama—at once embraced the law in action and noted its shortcomings. Like a good realist and a good Progressive, he could have suggested a resolution for the problems he identified, some clever prescriptive fix: trust the trial judge's intuition (for which he advocated in his doctrinal article), or trust the law in action rather than the law on the books (as he seemed to suggest in his article on law enforcement), for example. And of course he did. But realism's narrative resolution of the crises or flaws that its proponents identified—study it and fix it!—did not altogether satisfy Arnold.

Instead, he mocked and snickered and sometimes enjoyed a good belly laugh. Because how can you reform the institutions and doctrines of the delusional?<sup>129</sup> In fact,

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126. See Fenster, *Symbols of Governance*, *supra* note 9, at 1096–99 (drawing connections among Arnold, Mencken, and Veblen).

127. ARNOLD, *supra* note 105, at 128–29.

128. *Id.* at 145–46.

129. Arnold's critique of prevailing thought and institutions is most clearly visible in the titles of the two books he wrote as an academic: *The Symbols of Government*, *supra* note 105, and *The Folklore of Capitalism* (1937).

the criminal trial had endured from Joan of Arc's day to Arnold's, and even to our own—and not merely as a means to make determinations of guilt and innocence. It survives, Arnold proposed, because the administration of criminal justice is not a method of controlling crime but a popular drama of public morality, one meant to provide “a series of parables which are a guide to the honest and a terror to the outlaw.”<sup>130</sup> The criminal trial symbolizes the morality and rationality of governance, offering “the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world.”<sup>131</sup> It may not provide an efficient and satisfactory resolution of the conflicts and contradictions between the individual and the state—indeed, perhaps it cannot do so, even if reformed and improved—but it validates both the state's preeminence and the dignity of the individual within the dramatic spectacle that pits one against the other in a formally equal setting. The criminal trial is not a pragmatic tool subject to incremental improvement through the rational, practical intervention of smarty-pants academics and reformers. It is an ideological *symbol* of a rational judicial system within a stable government and society, legitimating both the substantive laws it is used to enforce and the state itself. Its symbolic authority overshadows the formal, procedural inadequacies that Arnold and his colleagues and contemporaries who studied the criminal courts found. The criminal trial's role as drama, in sum, is neither a reflection of the criminal justice system's perfection nor an empty, manipulative tool by which the state controls its subjects. Rather, it is an essential institution by which the state enforces the law, protects the individual through seemingly fair and neutral procedures, and, of equal importance, *portrays* its law enforcement and fairness to its spectating public.

That said, Arnold offered the possibility for positive change in the criminal justice system in the institution of the prosecutor. Prosecutors decide how to best protect the public while efficiently managing scarce government resources. They need sufficient authority and deference to achieve these goals. The same commitment to expertise and the state was implicit in his prescription for the criminal attempts doctrine. To evaluate a defendant's culpability for attempt, Arnold would defer to the trier of fact, who could develop and best evaluate the facts of a particular case—and while this figure might typically be a jury, Arnold seemed to suggest that his respect was for judges, presumably appellate judges, who were responding to their close review of a trial record. The ideal formal concept underlying an abstract doctrine is foolish, meaningless; the knowledgeable expert, closely evaluating the facts on the ground, is far better able to resolve the dispute effectively and correctly.

Arnold observed that the social ideals of law enforcement were empty but pragmatic. Functionalist expertise, he felt, could nevertheless govern effectively through his own ideal: a state which operated consistently with legal realist and Progressive Era values while it appeared in the symbolic guise of a mechanical, formalistic machine. The ideal of “law enforcement” suggests to the public that the state's authority to choose how and when to enforce the laws, and the flexibility with which it does so, does not exist. Under the ideal, all laws are enforced, fully and equally. The ideal legal form, sought so strenuously by Arnold's formalist contemporaries in the criminal attempts doctrine, needs conceptual

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130. ARNOLD, *supra* note 105, at 147–48.

131. *Id.* at 129.

clarity and consistency. Arnold's "attempt at social dissection" of the law enforcement ideal thus proceeded as follows: He mocked general, formalistic principles, whether they were held by rival academics or the general public or, more likely, both; he noted the symbolic nature of these principles; he offered observations of how the law "really works" in practice in opposition to the misunderstandings that formalistic principles produce; but he asserted that efforts to reform the law to better reflect and accommodate the law in action are unlikely to succeed unless they respond to and accommodate the outdated, formalistic principles that he had earlier mocked. The fact that individual prosecutors might abuse their discretion and that the entire criminal justice system could become fundamentally unfair given the unfair distribution of resources between the state and criminal defendants<sup>132</sup> was not part of Arnold's theory or calculation.

A decade after he left Yale, Arnold had the opportunity to apply his theory of criminal law on the bench to an issue that his academic work had briefly considered: the relationship between criminal insanity and the element of *mens rea*, or the mental state required for criminal culpability. In the intervening years, as Judge Arnold recognized in one of his earlier D.C. Circuit decisions, a coordinated movement had developed that sought "to give courts the assistance of unbiased [psychiatric] experts who are not selected by parties to the proceeding" for purposes of judicial review of administrative bodies making decisions regarding the criminally insane.<sup>133</sup> Arnold's realist embrace of the social sciences and of expert administrative processes, as well as his friendship with Yale psychologist Edward Robinson, suggested that he would embrace this effort to bring psychological insights to the treatment of the mentally ill and, by extension, to the evaluation of criminal defendants.

The D.C. Circuit's then-prevailing standard for whether a defendant could be excused from criminal liability due to insanity had been established by the British House of Lords in the mid-nineteenth century *M'Naghten* decision.<sup>134</sup> The so-called *M'Naghten* rule limited consideration to the defendant's ability to distinguish between right and wrong—those who could do so faced responsibility for their willful acts.<sup>135</sup> The rule did not, of course, incorporate a complex, modern understanding of sanity that psychology and psychoanalysis would later provide; instead, it offered a fairly crude, moralistic conception of insanity based on what it assumed was an easily identifiable, essential baseline of moral behavior and cognition, as applied by a trier of fact based on a cursory examination of a defendant's understanding of contemporary norms.

But law's modernity could not simply replace moral conceptions of criminal responsibility with the breakthroughs of social and behavioral sciences. In order to remain legitimate, Arnold argued, the law was required to act as if it represented a separate, better realm of folklore and symbols than whatever currently prevailing scientific method and findings that experts espouse. In his 1932 "Law Enforcement" article, he wrote,

The search for definitions of *mens rea* since the *McNaughton* case [sic], while it may express public morality, is pathetic in its failure to solve the trial problem of

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132. See Bibas, *supra* note 38, at 2469–96.

133. *De Marcos v. Overholser*, 137 F.2d 698, 700 (D.C. Cir. 1943).

134. (1843) 8 Eng. Rep. 718 (H.L.).

135. *Id.* at 722.



keeping emotion out while letting science in. And now comes the latest and most entertaining development of all, the parade of psychiatrists and alienists before the bewildered jury. Since they are “scientists” every believing person expects them to agree, if not now, at least some time in the future when the court or some impartial body selects them. No practical person expects anything of the kind. In practically all cases where the issue is contested they serve only one function, which is to permit evidence of mitigating circumstances to be brought before the jury.<sup>136</sup>

Here again is the classic Arnold reversal, the strange mix of a conservative’s willingness to accept traditional morality with the realist’s search for a functional explanation and the cruel ironist’s sarcastic insinuation that the traditional view may be wrong.

While on the bench, Arnold authored two significant decisions that considered the intersection of law and the modern sciences of the mind, *Holloway v. United States*<sup>137</sup> and *Fisher v. United States*.<sup>138</sup> Arnold’s opinion in *Holloway* held that the issue of whether a criminal defendant is mentally impaired and therefore not responsible for his actions is a jury question, and the testimony of licensed psychiatrists regarding a defendant’s mental state “cannot bind the jury except within broad limits.”<sup>139</sup> Psychiatry applies diagnostic and therapeutic science, while the criminal law requires the jury apply the moral judgment of the community; the two are incompatible, Arnold concluded, and in the context of the criminal trial, science is merely evidence for the jury to consider rather than an authority to which the courts must defer—even when all three of the psychiatrists who testified at trial agreed that the defendant was psychopathic, and two testified that he was unable to tell right from wrong at the time of the offense.<sup>140</sup> Arnold’s opinion in *Fisher* affirmed the district court’s refusal to give an instruction, proffered by the defense, that would have required the jury to consider the defendant’s “mental, nervous, [and] emotional . . . characteristics” in determining whether he murdered with premeditation.<sup>141</sup>

At issue in both cases was the relationship between the claims of science and the commitments of the legal system. In his decisions, Arnold reasoned that because the legal system’s normative values operate in a realm distinct from the purported advances of modern science, the role of the judiciary is to enforce the boundary between law and science, while the role of the jury is to consider and decide the relevance of expert testimony regarding the defendant’s mental state. Psychology and psychiatry proceed from a set of assumptions regarding reason, instinct, emotion, and impulse that differ from “the instinctive sense of justice of ordinary men,” he wrote in *Holloway*; at the same time, “groups of distinguished scientists of the mind” frequently fail to reach consensus regarding the mental state of defendants because of their field’s complex, sensitive understanding of the mind.<sup>142</sup> The problem of moral responsibility that the jury must

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136. Arnold, *Law Enforcement*, *supra* note 1, at 20.

137. 148 F.2d 665 (D.C. Cir. 1945).

138. 149 F.2d 28 (D.C. Cir. 1945).

139. *Holloway*, 148 F.2d at 667.

140. *Id.* at 665–66.

141. *Fisher*, 149 F.2d at 29. *Fisher* was later overruled in *United States v. Brawner*, 471 F.2d 969, 999–1000 (D.C. Cir. 1972) (en banc), which held that courts may allow and instruct the jury regarding expert testimony on abnormal mental conditions that are insufficient for complete exoneration but relevant to rebut or establish a specific mental condition that is an element of the crime. *Id.* at 1002.

142. *Holloway*, 148 F.2d at 666.

resolve, by contrast, allows no such complexity.

These decisions appear at first glance to conflict with what one would expect from a progressive realist's approach to the issue. But that would misjudge Arnold and his view of the judicial role. In *Fisher*, he asserted that "age old conceptions of individual moral responsibility cannot be abandoned" when juries determine the guilt of a defendant, "without creating a laxity of enforcement that undermines the whole administration of criminal law."<sup>143</sup> If those words had appeared in his academic work, they would have dripped with sarcasm—and indeed, recall that earlier he had ridiculed the "entertaining development" of a "parade of psychiatrists and alienists [appearing] before the bewildered jury."<sup>144</sup> To Professor Arnold, the jury was a symbol of all that was both perverse and necessary about the criminal trial; to Judge Arnold, forced to actually consider the implications of his theory for jury deliberations, the jury must rely upon "the instinctive sense of justice of ordinary men."<sup>145</sup> Accordingly, the jury—an imperfect institution that Professor Arnold noted was limited in its decision-making and deliberation by its members' inadequate intelligence and susceptibility to emotional appeals—required protection from the advances (and pretensions) of the "scientists of the mind." This view of the jury departs strikingly from Arnold's view of the capacity and responsibility of the judge in his earlier decision in *De Marcos v. Overholser*, in which the D.C. Circuit held that a court may at its discretion initiate a psychiatric evaluation of a prisoner who petitions for release from involuntary psychiatric confinement on the ground that his mental health is restored.<sup>146</sup> There, Arnold concluded, "a fair trial cannot be given in a case like this unless the court is permitted to avail itself of every opportunity which the law allows to consult scientific experts."<sup>147</sup> What could not be trusted to a jury in its determination of guilt, a judge could—and perhaps should—order and consider in determining a prisoner's petition for release.

Judge Arnold had applied the ideas of Professor Arnold.<sup>148</sup> Both jurist and academic trusted the insights of modern, progressive science while each stepped back from radical reform in order to protect the flawed but essential institution of the jury. Judge Arnold had donned the judicial robe, seated himself at the appellate bench, and played his predetermined role. He had left behind his ironic and omniscient voice for the jurist's gravitas and influence. It is no wonder, then, that he quit the play after only a brief time. It was left to his successors on the D.C. Circuit to experiment with the place of psychiatric testimony in the criminal trial and to grant juries more freedom to consider more complex, technical issues regarding a defendant's sanity.<sup>149</sup> Later still, the Circuit backtracked and

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143. *Fisher*, 149 F.2d at 29.

144. Arnold, *Law Enforcement*, *supra* note 1, at 20.

145. *Holloway*, 148 F.2d at 666.

146. *De Marcos v. Overholser*, 137 F.2d 698, 700 (D.C. Cir. 1943).

147. *Id.* at 699.

148. See Warren P. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377 (1955). Arnold agreed with this argument. See Letter from Thurman Arnold to Warren P. Hill (Mar. 29, 1955), in SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD 131 (Victor H. Kramer ed., 1961).

149. See *Durham v. United States*, 214 F.2d 862, 874–76 (D.C. Cir. 1954), *rev'd*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (establishing the rule that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect," providing a more technical, psychiatrically informed definition of "disease" and "defect" than in precedent and other jurisdictions, and citing *Holloway*'s approach to

thereby confirmed Arnold's intuitive sense of the criminal justice system's limits by returning to a more traditionally moralistic definition of insanity.<sup>150</sup> The popular drama could not bear the weight of imperfect, complex modern behavioral sciences. As Arnold predicted, the necessity of the criminal justice system's role as a social drama had trumped efforts to revise and reform it.

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the roles of judge and jury in determining mental capacity and insanity as consistent with new rule).

150. See *Browner*, 471 F.2d at 973 (adopting the Model Penal Code approach, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."); ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 102–03 (1967). See generally CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM* 518–24 (discussing the admissibility of expert testimony on the ultimate issue of a defendant's sanity or capacity), 568–82 (discussing similar regarding *mens rea*) (4th ed. 2003).