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Realism, What Next?

Cover Page Footnote

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REALISM, WHAT NEXT?

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IN PREVIOUS articles¹ the writer has attempted to point out the shortcomings and excesses of legal reformation operating under the banners of functionalism and realism. Herein will be noted the arrival of the outriders of the "surrealist"² cult who are driving ahead in a new

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1. *Principles or Facts?* (1935) 4 *FORDHAM L. REV.* 53; *Functional Nonsense and the Transcendental Approach* (1936) 5 *FORDHAM L. REV.* 272; *More Functional Nonsense—A Reply to Felix S. Cohen* (1937) 6 *FORDHAM L. REV.* 75.

2. Realism, the lusty youngster of modern philosophies of law, has advanced to the stage where it is inaccurate to assign all realists to the same juristic pigeon-hole. As the years go by, it is becoming increasingly evident that realism, the leftist movement in the law, is itself divisible into left, center and right groups. Llewellyn, leading disciple of the new approach, early issued the warning that realism is not a unified technique. "If one thing", he says, "it is twenty things in one." Llewellyn, *Some Realism about Realism* (1931) 44 *HARV. L. REV.* 1222, 1223.

I accept the Llewellynian classification. For example, I observe wide differences in the realism of Karl Llewellyn and Jerome Frank. The former frankly refuses to accept the full sweep of Frank's absurdity that alleged certainty of law is traceable to the survival of the child's belief in the omnipotence of its father. Cf. FRANK, *LAW AND THE MODERN MIND* (1930) c. VIII, and Llewellyn, *Law and the Modern Mind: A Symposium* (1931) 31 *COL. L. REV.* 82, 84; see Pound, *Fifty Years of Jurisprudence* (1938) 51 *HARV. L. REV.* 777, 797.

Nor do I believe that Thurman Arnold's complete ouster of "reason" and "principles" as reliable guides in shaping and controlling human action would be acceptable to more moderate realists. See *infra* pp. 208-210. "In the house of jurisprudence, there are many mansions." Pound, *The Call for a Realist Jurisprudence* (1931) 44 *HARV. L. REV.* 697, 711. A permissible paraphrase might read: In the house of realism there are many tenants; some at will; some at sufferance; and a few disseisors. So far as I am aware the landlords of the realist household have not yet started ejectment proceedings against any of the occupants.

Despite the necessity for the classification of realists according to the degree of their revolt against the idea of a stable, predetermined legal order, there are unities of method which are discernible among all adherents to the realist technique. On the positive side: experimentalism, fact-finding, the functional approach, scientific methods and skepticism. On the negative side: denial of reason, free will, principles and rules. In varying degrees, these are the earmarks of the realist school.

The difference between the extremists and the more temperate members of realism is due to the fact that the former drive facts and functions to the point where they *alone* explain law and all human institutions; principles and rules, reason and free will, are mere symbols and dogmas which cover up and conceal the real forces shaping the social order. So stated, I cannot agree with Llewellyn's complaint that realism is confused and unfairly distorted by its critics. Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 *N. Y. U. L. Q. REV.* 159, 162 n. The seeds of realism, fertilized in skepticism and anti-rationalism, have brought forth the inevitable harvest—a complete abandonment of all *a priori* principles. See *infra*, note 44.

offensive which attacks the Constitution as a mere fetish or symbol³ and questions the validity and utility of reason and principles, moral or legal, as worthwhile guides in the shaping of law, systems of government and other institutions.

Wizards with cures for all the ailments affecting the legal order are busily listing the taboos which clog the processes of juristic thinking; dealing bludgeon-blows to the myths and word-magic of the lawmen; exposing the symbolism resident in the dry-as-dust concepts of judge and lawyer; tearing away the ceremonial robes of the courts; and revealing judicial frailties in all their barren nakedness. Armed with realistic scalpels our legal surgeons⁴ are digging beneath the tissue words and ponderous paragraphs of judicial opinions and exposing the economic bias, muscular twitchings and subconscious motivations which really control the courts' decisions. So we are told that the law of the classical tradition is a hodge podge of transcendental mysticism,⁵ static stupidity⁶ and vaporous abstractions; that its solving words⁷ and and sacred shibboleths must be uprooted and supplanted by rugged realism, scientific methods,⁸ the functional approach and a frank facing of the facts, or—exit the law!

What has brought about this alleged collapse of the legal order? Surrealism speaks: More responsible than any other cause for the breakdown of law has been the sinister influences of symbols—in law, in government and in religion. Encased in the skin of one lonely word, symbolism, is the seed which has produced the harvest of our destruction. Small wonder that the unrestrained wrath of top-flight realists should be directed to the ouster of all symbols and their train of creeds,

3. Lerner, *Constitution and Court as Symbols* (1937) 46 YALE L. J. 1290.

Some of the more tender-minded adherents to the realist's program object to the contention that the "outriders" of realism have reduced the Constitution to a mere fetish. See *infra* p. 211.

4. Realism has developed a bit of a "fetish" for medicine-worship. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 55-60; ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) 55, 71, 267.

5. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809; cf. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272; see also Cohen, *Correspondence* (1936) 5 FORDHAM L. REV. 548; Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen* (1937) 6 FORDHAM L. REV. 75; Cohen, *Correspondence* (1937) 6 FORDHAM L. REV. 356.

6. ROBINSON, *LAW AND THE LAWYERS* (1935) 31.

7. CHASE, *THE TYRANNY OF WORDS* (1937). See Kennedy, Book Review, *TYRANNY OF WORDS*, *infra*, p. 296.

8. FRANK, *LAW AND THE MODERN MIND* (1930). Frank's book is largely devoted to a disclosure of Piaget's child psychology, Vaihinger's "as if" philosophy, Malinowski's anthropology, Freudian inhibitions and Watson behaviorism.

dogmas and slogans. Articles,⁹ yea books,¹⁰ are written picturing the magic, fetish and absurdity of symbols; symbols which have held mankind thought-bound and helpless beneath their mysterious spell. From Plato to Bacon to Pareto (and indeed, from Tinker to Evers to Chance)¹¹ realists tell us that the concealed force of symbols has directed the movements of iron (or gloved) hands throughout the world.

SYMBOLS OR CYMBALS?

In recent years, the name of Thurman W. Arnold has come to typify in legal circles, and especially in law school environment, a symbol-smasher de luxe, an unrestrained critic of the legal order, an iconoclast who has neatly demolished legal fictions, punctured well established beliefs and debunked rationality and moral principles as motivating causes of human action. Safely harbored in his academic study at Yale Law School, Professor Arnold earned his laurels as champion totem-thumper, taboo-twister and dogma-destroyer *via* the pages of his current books *Symbols of Government* and *Folklore of Capitalism*. Caustic sarcasm and wit flowed freely from his facile pen directed against the devotees of "creed" and "rituals"; folklore and slogans were fair game for the professor who was intent upon setting up a Realist Utopia wherein objective thinking and the technique of the laboratory would be applied to our social relations. Professor Arnold has now doffed his academic robes and entered public service, but it may not be amiss to keep alive his original estimate of law and government. Indeed, his entry into public service has aroused renewed interest in his diagnosis of the aches and pains of the body politic on the assumption, perhaps, that he might prescribe some of his palliatives for his new patient.

The events incident to his confirmation disclose the fears are unwarranted.¹² Arnold is a laboratory dissector without plan or program;

9. Corwin, *The Constitution as Instrument and as Symbol* (1936) 30 AM. POL. SCI. REV. 1071; see additional references in Lerner, *supra* note 3, 1290 n.

10. ARNOLD, *op. cit.* *supra* note 4, *passim*.

11. Realism ought to do something about the folklore and symbolism of the professional baseball player with his pennants, cups for the most valuable player, etc. Now, believe it or not, baseball is to have its symbolism enshrined in a Hall of Fame.

12. Witness the examination of Professor Arnold before the sub-committee of the Senate Judiciary Committee. The investigation centered about the views of Arnold expressed in his books, *THE SYMBOLS OF GOVERNMENT* and *THE FOLKLORE OF CAPITALISM*. N. Y. Sun, March 11, 1938, at p. 6.

Professor Arnold had a rare opportunity to do some of his choicest symbol-smashing before the sub-committee of the Senate Judiciary Committee, but apparently he was in a most conciliatory mood.

Writing his *FOLKLORE OF CAPITALISM* in New Haven and defending the book in Washington were two different tasks.

In New Haven, Professor Arnold, the author, wrote that our anti-trust laws "became the greatest protection to uncontrolled business dictatorships" (p. 214); that they remained as a most important "symbol" for "crusades" by men like Theodore Roosevelt and

a professorial photographer who pictures things "as is". Symbolism lost its most vigorous opponent when the Department of Justice acquired an Assistant Attorney General.

One preliminary observation before turning to a consideration of Professor Arnold's critique: A word about his style. The genial professor possesses a lucid pen, dipped deep in wit and sarcasm, which holds the attention of his readers. A dissenter, however strenuously he may object to the sophistry latent in the surrealism of Arnold, pays tribute to a writer who is able to make jurisprudence a best seller. While his sensational viewpoint is primarily responsible for his capture of the public interest, the playfulness of his treatment of symbols and myths is a contributing factor. In the same light vein (and not too seriously), it is purposed to examine objectively some of the counter-totems which Thurman Arnold is erecting under the attractive labels of realism and experimentalism.

One of Arnold's constant complaints which threads through his philosophy of life and law is that man is a victim of symbols and shibboleths which befog realities and prevent analysis of human institutions. We are living in a dream world of rituals and dogmas; each one of us, Arnold warns, has his own stock of ceremonials and slogans which have no reality but are used as dressing gowns to cloak unpleasant conflicts and clashes in our social relations. Symbols clutter up all walks of life and prevent social reform. And so Arnold devotes himself to the task of disinfecting germ-ridden maxims and empty abstractions. Determined to examine functionally the workings of our institutions and to expose the tinsel textures which conceal their real substance, Professor Arnold goes forth in search of material.¹³ Entering the metropolitan area, Arnold comes across an example of an institution which would be "undermined" by a bit of objective analysis. His keen

Senator Borah (p. 217); that anti-trust laws "instead of breaking up great corporations, served only to make them respectable." (p. 227) For a complete "laboratory" analysis of the futility of anti-trust legislation, see ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 207-229.

In *Washington*, replying to a question by Senator Borah whether he believed at heart that the anti-trust laws could and should be enforced, Professor Arnold, the candidate, replied: "I do, I certainly do." "Then", Senator Borah replied, "you ought to revise your book." N. Y. Sun, March 11, 1938 at p. 6.

Even among sympathetic liberals, I detect expressions of regret regarding Arnold's testimony before the sub-committee. Lerner writes: "Arnold got the recommendation confirming his appointment, but I am half-inclined to the view that he left his theory behind on the field of battle." Lerner, *The Shadow World of Thurman Arnold* (1938) 47 *YALE L. J.* 687, 700.

13. "The process of objectively examining the theories behind our own institutions, rather than of arguing their truth or falsity, at first gives us a shock. We can discuss savage taboos and understand them. Then we may use our information in guiding the savages. The same point of view toward our own institutions seems to *undermine* them." ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) 95. Italics inserted.

eye lights on the inspirational motto adorning the facade of the New York City Post Office. It reads:

"Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."¹⁴

Tender hearted sentimentalists who have paused before the edifice in tear-drenched admiration of the postal poesy chiseled thereon will sense the keen cut of the realist's sabre when he reads the Arnoldian comment:

"All this means is that mail will be delivered even in winter. So translated, however, it *spoils* the building."¹⁵

Recovering from the rude blow which reduces the lofty aphorism to the proportions of a prosaic schedule of mail deliveries, the symbol worshipper stands by helplessly while the realist pulls apart his favorite dogmas and creeds—one after another.

Fairness to our ritual-wrecker impels the admission that Arnold has kindly spared the conceptualists at least a few fantasies. *Mirabile dictu*, and thanks be, the whole mythology surrounding Santa Claus is acceptable to the hard-hearted realist whose "purge" of symbolism graciously excludes good old Kris Kringle. It seems that Santa Claus is not in the same class as the motto aloft the New York City Post Office. The distinction is somewhat subtle but we accept it at its face value.¹⁶ Grateful though we are for the concession which allows the creed of Santa Claus continued existence, we are still somewhat confused by Arnold's contention that the erasure of the above motto on yon gray building would "affect the morale of our post-office employees"¹⁷ and delay the morning mail! I suspect that our stern critic of symbols wrote the foregoing lines regarding post-office lyrics and Santa Claus in a jovial mood. Entering into the spirit of the symbol-smashing campaign, we suggest that there is no danger of Professor Arnold's running out of materials. Indeed, it was hardly necessary for him to leave New Haven in search of samples illustrating the emptiness of slogans and ceremonials. Close by was the kennel of Handsome Dan II, canine symbol of old Eli's bulldog spirit. What an opportunity he missed to criticise the sob-stories about the recent demise of the Yale

14. *Id.*, at 95.

15. *Id.*, at 95. Italics inserted.

16. "Since our chief concern in this volume is with ways of thinking about society, we will give little space to the social attitudes and habits which unify organizations. These two factors are easily understood in institutions where the creeds are admittedly ceremonial in character. *Thus we understand the attitudes and habits which center around the Christmas celebration because the creed of Santa Claus is recognized to be pure drama. We therefore can talk about Santa Claus objectively without destroying his emotional value.*" ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 32. Italics inserted.

17. ARNOLD, *supra* note 13, at 95.

mascot. Using his laboratory methods, he could have demonstrated scientifically that Handsome Dan II was *just another dog!* One wonders whether this bit of realism would "spoil" the Harkness Memorial Building (another symbol, by the way) or would "affect the morale" of the Yale students. In any event, it is submitted that symbol-busting, no less than charity, should begin at home.

I suggest that his revised edition (recommended by Senator Borah) should embrace symbols having a wider influence than the inspirational ode on a local post-office. Take, for example, the cracked Liberty Bell (always capitalized, mark you, by the symbol-worshipper). Arnold ought to set us straight on the physical properties and scrap-iron value of a busted bell that neither dings nor dongs, and yet is heard, like that shooting affair at Concord bridge, 'round the world. Another juicy tid-bit would be the reproduction of Veblen's realistic pronouncement that the flag foots up to a piece of woolen bunting. The Napoleonic dictum that imagination rules the world is due for a violent revision with the arrival of a realist anthology; our insignia-iconoclasts are chasing facts, *brute*¹⁸ facts, and there is nothing to do about it except perhaps to opine that they are apt to make life really real, but dreadfully drab. I am wondering what is going to happen to the simple minded folk who hold fast to the naive philosophy that the odors emanating from the dissecting room may be mitigated mildly by an occasional glance at the roses entwining the front porch. The modest demand of the idealist is that he be permitted to live at least a *part* of his life in the sunshine; a complete eclipse of the sun is a fact, but it is not a significant or permanent one. Out of the misty memory comes the couplet:

"Two men looked out from prison bars.
One saw mud; the other saw stars."

OYSTERS ON THE HALF SHELL

But make no mistake about it, Arnold's treatise is not confined to the validity or utility of nursery rhymes anent Santa Claus and Snow White or to the feasibility of applying the acid test of surrealism to mottoes adorning public edifices. No, indeed! The world is Arnold's oyster¹⁹ and he finds fault aplenty with his earthy bivalve. The insti-

18. Pound, *Fifty Years of Jurisprudence* (1938) 51 HARV. L. REV. 777, 795: "Realists are fond of speaking of 'brute facts', as if brutality was a test of actuality."

Cf. Arnold: "I wrote [my book] as a dissector in a laboratory. . . . The resulting picture is not a pretty one to hang in the parlor." N. Y. Sun, March 11, 1938 at p. 6. The query of the anti-realist is: "Why hang it in the parlor?"

19. "If a youth be taught at home or in school that there are no fundamental underlying principles, but that the world is his *oyster*, to be consumed at such time and in such fashion as he may see fit, or that it is to be made over to his heart's desire, one need not wonder when a spirit of lawlessness and restlessness under order and restraint

tutions all about are viewed through the penetrating microscope of surrealism. First, and perhaps foremost, religion is taken into the laboratory and subjected to X-ray examination. Here is the basic institution, which provides the "spring board" for Arnold's critique against all institutions—law, economics, government, and the courts. The Church is the incubator of symbolism: "Nothing disturbs the attitude of religious worship so much as a few practical observations."²⁰ Whereupon Arnold ascends the pulpit to make a few helpful observations regarding creeds and dogmas.²¹ This is neither the time nor the place for the analysis of Arnold's attack upon religious worship. Suffice it to say that his comment regarding God and religious faiths sets the tone and pattern of his cynicism regarding idealism in all walks of life. It is herein mentioned merely because it is a necessary and a basic link in his broadside against *all institutions*. Unless it is carefully noted that his entire campaign against symbolism stems from his attack upon "theological concepts", one loses the significance of his ruthless attack against principles and the use of reason in the legal order. Note his "tie-up" of theology and jurisprudence.²² We are now ready to set

find expression in his life." Nicholas Murray Butler, *Law and Lawlessness*, address before Ohio Bar Association, January 26, 1923. Italics inserted.

We have some rather pertinent examples of the "oyster"-philosophy in the European scene today: "Following the speech [by Hitler] a battalion of Storm Troops passed before Der Fuehrer, singing popular marching songs and shouting '*today Germany is ours; tomorrow the whole world will belong to us!*'" N. Y. Herald-Tribune, March 29, 1938 at p. 6.

Cf. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 11, wherein he dismisses Communism and Fascism as "magic words" which were "imported" by newspapers and magazines to impede progressive changes in our system of government. Then follows the sentence: "The parables of the wild Russian and the cruel German were admirably adapted for use as *bogeymen*." Italics inserted.

20. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 30.

21. His first suggestion would be to get rid of "an unremitting search for the universal truth". Gone is the antiquated notion that the essence of faith was "that we must undergo personal inconvenience to save our souls in the future". Warming to the attack, Professor Arnold throws the searchlight on the dark spots of religious dogma and sets down the keynote of his attack against the symbolism of theology. "In theology a separate personality known as the Redeemer appeared to represent benevolence, and thus enable God to escape from the logic of punishment for sin. . . . The existence of these separate institutions is justified by a complicated literature which explains why a merciful father (*sic*) had to sacrifice his son (*sic*) in order to be merciful. . . ." For the full development of Arnold's attack upon religious dogma, see *THE SYMBOLS OF GOVERNMENT* (1935) 59-71. *THE FOLKLORE OF CAPITALISM* (1937) 26-38.

22. "Theology and jurisprudence are compelled to face the same logical contradiction. Just as jurisprudence today is the ultimate justification of the ideal of a rule of law above men, so the theology of yesterday was the ultimate justification of a rule of a moral and logical god above men and even above governments. If an omnipotent God really rules the world in a rational and moral way, how are we to account for so much disobedience of his mandates? If the law really directs society, how are we to account

down the real breadth of Arnold's criticism against *rationality* and *morality* as guiding forces in our work-a-day world.

"A comparison of the law of today and theology of yesterday brings into startling relief the fact that once we take a *rational* and *moral* attitude toward any human institution our thinking runs along the same grooves and is complicated by the same logical and moral conflicts."²³

The obvious solution is to abandon a "rational and moral" attitude as a norm or standard not alone in theology but in law and in life.²⁴

THE CONSTITUTION—OUR NATIONAL TOTEM?

*"Every tribe needs its totem and its fetish and the Constitution is ours."*²⁵

The sentimental American who conceives of the Constitution as a covenant based upon reason and containing principles of right and justice is due for a rude awakening when he reads the realists' analysis of our organic law. The realists' estimate of the permanency and validity of the Constitution, and indeed of government by law instead of by arbitrary will, has been recently summarized by Dean Pound as follows:

"Also in the United States the realists and on the Continent a type of nationalist consider the idea of a state ruling according to law and not according to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior."²⁶

Strong words these, words which have aroused the more tender-hearted

for its failure to direct the practical world and in the ordinary lawsuit?" *THE SYMBOLS OF GOVERNMENT* (1935) 59.

23. *Id.* at 59. Italics inserted.

24. An interesting sample of Arnold's morality-complex is found in his paper defending the Supreme Court Plan (1937) 23 A. B. A. J. 364, 366. Professor Bogert had suggested that the proposed plan to enlarge the Supreme Court was "something subtly immoral and dishonest." Bogert, *A Law Teacher's View of the President's Plan* (1937) 23 A. B. A. J. 251, 253. Professor Arnold curtly dismisses Bogert's contention in the following manner: "Mr. Bogert is, of course, not the kind of man who is willing to justify immorality of any kind and therefore is against the plan."

Professor Bogert should have known better than to speak of "immorality" or "dishonesty" in the presence of our valiant symbol-smasher and idol-buster. Mr. Bogert evidently had not read our gladiator's *THE SYMBOLS OF GOVERNMENT* wherein he deprecates the taking of a rational or moral attitude toward any human institution.

25. Lerner, *supra* note 3 at 1294. Italics inserted.

26. POUND, *THE FUTURE OF THE COMMON LAW* (1937) 19-20.

realists with the demand that the Dean name names.²⁷ After repeating the above indictment by Dean Pound, Professor Patterson says:

"The emotional significance of this passage is clearer than its intellectual content. Without citations one has difficulty in identifying these realists."²⁸

If it is permissible for an *amicus curiae* to interpose a brief substantiating with citations the charges of Dean Pound, it may serve the worthwhile purpose of arousing right-wing realists to the realization that within their camp are many recruits who have taken the realists' flag and carried it forward to new frontiers. Let it be noted that the issue raised by Professor Patterson's comment is a simple one: Is it possible to identify by name realists "who scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced *principles of right and justice* and to *reason*?" At the moment, we are not interested in the determination of the soundness of the realists' position regarding the dynamiting of the Constitution as a "solemn covenant", but merely in the search for realists who uphold such extreme expressions.

We offer as Exhibit A the following passage from Arnold's *Folklore of Capitalism*:

"In an age where Reason is God, constitutions or fundamental creeds are always *supposed* to be the result of rational thought on the part of our forebears."²⁹

It is clear that Arnold is maintaining the contention that *reason* had nothing to do with the making of the Constitution; the entry of rational judgment is merely a supposition contrary to the real facts (facts, of course, which are visible only to the impartial realist). Again, says Arnold:

"The language of the Constitution is immaterial since it represents current myths and folklore rather than rules."³⁰

Having ousted reason in the preceding quotation, Arnold herewith gets rid of *rules* and *principles* as constituent elements in the making of the Constitution. Under the microscope of realism, the language of the Constitution is reducible to a bundle of "myths" and "folklore". It is respectfully submitted that the foregoing passages establish Arnold's position as a Constitution-debunker *par excellence*. If Professor Patterson still doubts the eligibility of Arnold's admission to Dean Pound's

27. Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. REV. 162n; Patterson, Book Review (1938) 38 COL. L. REV. 538.

28. Patterson, *supra* note 27, at 539.

29. ARNOLD, *op. cit.* *supra* note 16, at 27. Italics inserted.

30. *Id.*, at 29.

missing footnote let him read Arnold's writ of ejectment against the word-magic latent in "justice",³¹ "the thinking man",³² "rational diagnosis"³³ and "moral attitudes".³⁴

A survey of Arnold's books reveals that he contests the validity of *all* principles of *right* and *justice* and the utility of *reason*. If Dean Pound committed any error in the above quotation it was in his failure to set down the fact that one may search in vain through the Arnoldian philosophy for any rational or moral norm or standard which escapes cynical dismissal as a myth, symbol or dogma.

Arnold is not alone in his ouster of the Constitution as a document of reasonably stable ingredients conceived by men of reason and containing principles as working guides for the courts. The title of Max Lerner's article in the Yale Law Journal, *Constitution and Court as Symbols*,³⁵ was not a misnomer. His thesis follows closely the view point of Arnold as the following typical passage³⁶ discloses:

"To understand the fetishism of the Constitution one would require the detachment of an anthropologist. *Every tribe needs its totem and its fetish, and the Constitution is ours.* Every tribe clings to something which it believes to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe. This is true of civilized nations as well. Men need always something on which to fix their emotions, whether positively in the form of adoration or deification, or negatively in the form of a tabu. Like every people, the American people have wanted some anchorage, some link with the invariant."

31. *Id.*, at 167-168.

32. *Id.*, at 5-12.

33. *Id.*, at 142-145.

34. ARNOLD, *supra* note 13, at 59.

35. Lerner, *Constitution and Court as Symbols* (1937) 46 YALE L. J. 1290.

36. *Id.*, at 1294. Italics inserted. Since joining Lerner and Arnold together because of the assumed similarity of their views regarding the Constitution, I have read Lerner, *The Shadow World of Thurman Arnold* (1938) 47 YALE L. J. 687. Herein, Lerner raises substantial objections to the full sweep of the Arnoldian "tactic". He questions Arnold's wholesale ouster of symbols (p. 696) and his anti-intellectualism and anti-rationalism (p. 697).

Lerner then concludes: "There can be no doubt that a new movement of what we may call middle-class radicalism is arising in America. To my mind, Arnold—more than any man who has appeared on the landscape so far—is its philosopher: He *rationalizes* both its thought and its tactic." (p. 701) Italics inserted. Lerner's pen slipped, I fear, in writing the last lines. The italicised words disclose two errors:

(1) Lerner should be more careful with his tenses. Arnold *was* the philosopher of a new movement. As Lerner himself concedes, Arnold checked his philosophy in New Haven prior to his appearance before the Senate Judiciary Committee (p. 701). See *supra* note 12.

(2) Lerner's statement that Arnold "rationalizes" middle class radicalism in America is highly debatable. It does not accurately describe Arnold's estimate of mental operations. THE SYMBOLS OF GOVERNMENT (1935) 11-18, 59; THE FOLKLORE OF CAPITALISM (1937) 142-145.

Arnold has considerable difficulty in distinguishing between such "polar words" as "up" and "down",³⁷ but both he and Lerner are crystal clear in their declaration that the Constitution (as a "solemn covenant") is both *down* and *out!* In fact, as a durable receptacle of "announced principles," it was never "up".³⁸ I suspect that there are many forward-looking reformers who are lagging behind the trail blazers of the new cult,³⁹ somewhat leg-weary in an effort to keep up with the leaders. One can sympathize with the middle-of-the-road realists who pause before accepting the viewpoint of Lerner or Arnold which reduces the Constitution to the proportions of a totem pole, but the time has passed when the defender of moderate realism can justly criticize a commentator for accepting the face value of writings issued by their brethren enunciating the realistic attitude toward our institutions.

REALISM, WHAT NEXT?

A few years ago Dean Clark attractively entitled a scholarly paper, "Law Professor, What Now?"⁴⁰ He reviewed the status of the law professor in a changing world and addressed himself to the consideration of the question of "whether we are doing our part in seeing that the law fulfills its social functions in modern society." He then added: "My hope is that now the time will be found ripe for affirmative action."⁴¹ During the four years which have elapsed since Dean Clark's paper, his hopes for affirmative action have certainly been realized in respect to the activities of realism. The time is fast arriving when another question will be asked: Realism, what next?

The history of the successive steps of realism has been elsewhere narrated.⁴² We are now concerned solely with the cumulative effect of the constantly widening attack upon law, order (in the sense of regularity), principles and rules. To the outsider it seems that this pendulum-swing is due in part to the excesses inherent in any movement enthusiastically acclaimed by its followers. But only in part. One who objectively considers this phenomenon of irrationalism⁴³ and the over empha-

37. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) 167.

38. "Every phase in the Constitution designed to protect the *submerged individual* has become an instrument for the protection of large organizations. There is no time to develop here this commonplace theme." Arnold, *supra* note 16 at 33. Italics inserted.

But the contentions that the proposed plan to pack the Supreme Court might jeopardize the rights of the "submerged individual" are dismissed by Arnold as "symbolic arguments." *Id.*, at 54-55.

39. Note 2, *supra*.

40. (1934) 7 AM. L. SCHOOL REV. 1009.

41. *Id.*, at 1010.

42. Pound, *Fifty Years of Jurisprudence* (1938) 51 HARV. L. REV. 777; *supra* note 1.

43. "Whereas you can prove anything by logic, you cannot prove anything without it. There is, therefore, another kind of wishful thinking. The first kind is rationalization

sis upon facts (brute or beautiful) may well wonder whether surrealism is anything more than a natural and inevitable excrescence of the parent movement tossing aside its swaddling clothes as it attains the age of maturity. Immersed in these doubts, we repeat our query: Realism, what next?

The question is a fair and timely one. The answer must come from the proponents, not from the opponents, of realism. The excesses of the outriders must be as difficult for the "rightist" realist to digest legally as they are for the "symbol-worshipping" transcendentalist.⁴⁴ The path is strewn with shattered symbols; free will⁴⁵ discarded; rationality, morality, religion and honesty debunked; principles and juristic stability levelled to the ground. The question which intrigues the onlookers is whether the veteran proponents of realism are for or against the latest purge. Now that Arnold seems to be recognizing the difference between his theories "in books" and "in action"⁴⁶ (a distinction

which is good logically but is based on false premises chosen wishfully. The second kind is irrational thinking. Here we assert a conclusion despite the fact that it cannot be proved logically by sound premises, or deny a conclusion even though it follows necessarily from premises which we accept as sound. This is obviously also wishful thinking, differing from the first sort, which uses logic for its purposes, by trying to avoid logic. Thus, there are two kinds of *wishful* or bad thinking: (a) logical: rationalization; (b) illogical: irrationalization." ADLER, *WHAT MAN HAS MADE OF MAN* (1937) 63.

44. Compare Llewellyn's qualified acceptance of the vitality and helpfulness of principle with Arnold's rejection of the utility of the same. Arnold, *supra* note 16, *passim*; *supra* note 13 at iv, 105, 125. "I concur with Fuller that conceptual or 'doctrinal bridges' mightily further legal engineering." Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. REV. 159, 181-182. "We can no longer usefully retain 'principle' as a premise from which to deduce conclusions, a fixed formula for verbal manipulation. Yet we *can* and *must* retain it as a convenient and fairly accurate summation of past decisions and of apparent trends. . . ." LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) Introd. ix. Italics inserted. Cf. Llewellyn, *Ballade of the Oracle's Priests' Miracle* (1938) 1 NAT. LAWYERS GUILD Q. 30. Llewellyn has been hammering at the title-concept in the law of sales. His attack is against lump-concept thinking; the too expansive use of a concept without adequate analysis of the factual set-up. LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 571-574. He does not, however, insist that the title concept should be completely abandoned. Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. REV. 159, 170. His plea, amply supported by case law, for the breaking down of the title-concept is understandable even to a critic who questions the soundness or practicability of his proposed approach.

What happens to Llewellyn's attack upon lump-concept thinking when it passes through the surrealist's sieve? Arnold certainly would accept Llewellyn's criticism of lump-concept thinking. Would Arnold be satisfied with the qualified retention of concept-thinking? We suspect that Arnold would reject the concept in toto and would ban all thinking about the concept as well. Starting together on the same road, Arnold leaves Llewellyn at a way-station and disappears from view over the legal horizon.

45. ARNOLD, *supra* note 37, 5-12; Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 HARV. L. REV. 169, 175.

46. See note 12, *supra*.

well known to the realists) and is busily engaged in enforcing the "principle" of the anti-trust laws,⁴⁷ the perplexities of the situation, to say the least, have not decreased.

Realism, what next?

(To be continued)

47. See note 36, *supra*.

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