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Jurisprudence Washed with Cynical Acid: Thurman Arnold and the Psychological Bases of Scientific Jurisprudence

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I. Introduction

> . . .the most important social values in the world are the things that make no sense.
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> Thurman Arnold (1957).[1]

Like Jerome Frank, Thurman Arnold gained a large audience for his psychological realism. Indeed, his two best-selling works, *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937),[2] were the subject of prolonged and spirited public debate.

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This article is part of a larger project being prepared for the degree of J.S.D. at Yale Law School and will appear as a Chapter in a book dealing with the American Legal Realist movement as a whole. The author wishes to express his thanks to Professors McDougal and Reisman of Yale Law School for their critical comments on this manuscript. For the purpose of analysis, the author uses a modified version of the categories employed in the approach of Law, Science and Policy.

See H. D. Lasswell and M. McDougal, *Legal Education and Public Education and Public Policy: Professional Training in the Public Interest* (1942-43), 42 Yale L. J. 203.

M. McDougal, *Law as a Process of Decision: A Policy-oriented Approach to Legal Study* (1956-57), 1 Natural Law Forum 53 and *Jurisprudence in a Free Society* (1966-67), 1 Georgia L. Rev. 1.

H. D. Lasswell and M. McDougal, *Jurisprudence in Policy-oriented Perspective* (1966-67), 19 U. of Florida L. Rev. 486.

H. D. Lasswell, M. McDougal and W. Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence* (1967-69), 8 Virginia J. of Int'l. L. 188.

H. D. Lasswell and M. McDougal, *Criteria for a Theory about Law* (1971), 44 S. Cal. L. Rev. 362 and *Trends in Theories about Law: Comprehensiveness in Conceptions of Constitutive Process* (1972), 41 Geo. Wash. L. Rev. 1.

See also S. N. Verdun-Jones, *The Jurisprudence of Karl Llewellyn* (1974), 1 Dalhousie L.J. 441 and *The Jurisprudence of Jerome N. Frank — A Study In American Legal Realism* (1974), 7 Sydney L. Rev. 180.

1. Letter to Frank C. Waldrop, October 30, 1957: *Selections from the Letters and Legal Papers of Thurman Arnold* (Washington: Merkle Press, 1961) at 51 [hereinafter *Selections*].

2. *The Symbols of Government* (New York: Harbinger Books, 1962) [hereinafter

Delighting in his special brand of corrosive satire, Thurman Arnold employed the tools of psychology in a superbly witty—albeit merciless—debunking of traditional Jurisprudence. Significantly, Arnold was no mere academic commentator but an extraordinarily enthusiastic participant in public life; in the course of his chequered career he was Mayor of Laramie, Wyoming; Law Professor at Yale; Government Trust-Buster *par excellence*; Federal Judge; and formidable advocate (often in the service of causes that were anything but popular in the threatening days of rampant McCarthyism).[3] This gradually accumulating wealth of practical experience united with great literary talents and broad intellectual interests render Thurman Arnold one of the more formidable scholars of his generation.

At the outset, it must be stressed that Arnold's work owes much to the close association he enjoyed with his Yale colleague, Edward Stevens Robinson. It is impossible to assess the direction which Robinson's work might have taken had he survived a tragic accident but it is at least clear that his one major jurisprudential offering, *Law and the Lawyers* (1935), contains much that Arnold was later to build on with such eminent success. Since Arnold generously acknowledged his debt to his former colleague, frequent reference will be made to Robinson's work in the course of our analysis of Arnold's Jurisprudence.[4]

II. The Establishment of Observational Standpoint

> Looked at from within, law is the center of an independent universe with economics the center of a coordinate universe.

Symbols]; *The Folklore of Capitalism* (New Haven, Conn.: Yale University Press, 1962) [hereinafter *Folklore*].

3. See A. Fortas, *Thurman Arnold and the Theatre of Law* (1969-70), 79 Yale L.J. 988, particularly at 993. Among the victims of anti-communist hysteria whom Arnold's firm defended were Dorothy Bailey, Dr. John P. Peters, Owen Lattimore and Dr. Edward Condon.

4. Arnold stated that the genesis of *The Symbols of Government* and *The Folklore of Capitalism* lay in a course on the "psychological basis of the law" offered by himself and Robinson at the Yale Law School. See Arnold, *Fair Fights and Foul: A Dissenting Lawyer's Life* (New York: Harcourt, Brace & World, 1965) at 67-68. For a discussion of the nature of realism at Yale, see W. L. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973) at 67-69. A brief survey of Robinson's jurisprudence may be found in H. G. Reuschlein, *Jurisprudence — Its American Prophets* (Indianapolis: Bobbs-Merril Co., 1951) at 307-27. Robinson's major work was *Law and the Lawyers* (New York: Macmillian, 1935).

> Looked at from outside, we can begin to see what makes the wheels go round and catch a vision of how we can exercise control, not only of the physical environment, but also of the mental and spiritual environment. When men begin to examine philosophies and principles as they examine atoms and electrons, the road to discovery of the means of social control is open.[5]

Perhaps the influence of Robinson is most marked in the highly distinctive observational standpoint recommended by Arnold in his jurisprudential writings. When his colleague died in 1935, Arnold published a short tribute in the Yale Law Journal in which he credits Robinson with the development of an immensely important intellectual tool:

> Professor Robinson saw jurisprudence not from the point of view of an umpire deciding which jurists were right, but from the point of view of a psychologist studying a group which was undergoing spiritual conflict between ideals and practical needs, both of which had to be recognized . . . . He asserted that there was room for two sciences, one a science *of* law to be used within the little dramatic universe of the law and the other a science *about* law which was useful not on the judicial stage but in the conference room of the diagnostician of social institutions.[6]

This distinction between a science *of* law and a science *about* law lies at the very heart of Arnold's approach to law and legal institutions. In his view, law must be regarded as a form of symbolic thinking or as an attitude or way of thinking about human institutions in terms of ideals rather than of *observed facts*.

In other words, Arnold viewed law as a species of folklore and he urged social scientists to treat legal philosophies with the same degree of objectivity as that which characterized the anthropologist's approach towards the myths of primitive peoples. Arnold's favorite personification of this standpoint is the ubiquitous "man from Mars" who is completely free from any identification with the value conflicts underlying the legal system which is the object of his observation.[7] In this respect, it is evident that both Arnold and Robinson, like the institutional economists before them, profited greatly from the observational standpoint devised by the cultural anthropologists[8]: in particular, they owed a special debt to

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5. *Folklore, supra,* note 2 at 163-64.
6. T. Arnold, *The Jurisprudence of Edward S. Robinson* (1936-37), 46 Yale L.J. 1282 at 1286.
7. *Symbols, supra,* note 2 at 31.
8. The functional movement has given great vitality to legal thinking and has

Malinowski.[9]

However, in order to develop the standpoint of what he liked to call the "fact-minded" observer, Arnold followed Robinson's lead and turned to the specific field of psychology. Beginning with the premise that men are somehow constrained to personify social institutions, Arnold suggests that the psychologist's point of view towards such personifications may well provide the foundation for a scientific study of social problems. In *The Folklore of Capitalism,* he argues that the platform for a fact-minded observer should be the following:

1. Institutions are like personalities playing a dramatic part in society. They are to be judged by their utility in the distribution of physical comforts and in the development of an atmosphere of spiritual peace.
2. When institutions fail to function, reforms must be attempted with something like the same point of view with which a trained psychiatrist reforms an individual. That point of view must recognize that an institution has something which may be called a subconscious mind. This means only that its verbal conduct must be calculated to inspire morale and not to describe what it does.
3. Law and economics are the formal language of institutions on parade.[10]

Arnold believed that this point of view was one which, while it recognizes the vital role that folklore plays in social organization, does not mislead us as to its function in society. A priesthood of some kind or another is an inevitable concomitant of social life and its perspectives are a valid subject for serious study but these

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raised law to the status of a social science . . . . Culture from the functional standpoint is regarded not only as dynamic but as an organic whole. Modern anthropology endeavours to study exogamy, totemism and other manifestations of primitive culture not solely with regard to the narrow field which these phases occupy but also in relation to the entire field of social organization. Primitive culture is examined in action, and preconceived assumptions and paper schemes are banished. To-day law and anthropology are in their programme one. (H. Cairns, *Law and The Social Sciences* (New York: Harcourt, Brace & World 1935) at 10-11.)

One anthropological work of crucial significance in this context was Ruth Benedict's, *Patterns of Culture* (Cambridge, Mass.: Riverside Press, 1959). Note particularly c. 1.

9. See Bronislaw Malinowski, *Crime and Custom in a Savage Society* (New Jersey: Littlefield, Adams & Co., 1926). See also his article, *Social Anthropology* in *Encyclopedia Britannica* (14th ed., 1929).

10. *Folklore, supra,* note 2 at 137-38.

perspectives must not be allowed to influence the "fact-minded" observer's attempts to develop an understanding of the dynamics of the social process. In brief, the "priesthood" expounds the science *of* law or economics while the fact-minded observer develops a science *about* these disciplines.

The specific question we must now ask, however, is whether Arnold's clearly articulated observational standpoint is part of a genuinely comprehensive scientific approach to law or whether it is adopted as a mere "literary device" of some sort. Significantly, the latter view was expressed by Max Lerner — a close contemporary of Arnold's. Lerner contended that Arnold's standpoint was an intellectual tool more appropriately fashioned for the social satirist than for the genuine scientist.[11] However, a close examination of Arnold's underlying conception of science should reveal that Lerner's interpretation is in many respects seriously misleading.

III. Arnold's Conception of Science

Nowhere does Arnold undertake a detailed discussion of scientific method. Unlike Karl Llewellyn, for example, he does not attempt to explore the foundations for a methodology specifically suited to the study of legal phenomena;[12] nor does he appear to have shown much enthusiasm for the development of specific methods of social research. Indeed, it is said that Arnold was outspokenly contemptuous of the type of quantitative empirical study pioneered by his colleagues, Clark and Shulman, at the Yale Law School.[13] However, the tacit conception of science underlying Arnold's Jurisprudence is by no means impervious to investigation.

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11. The protestations of complete objectivity that we have been hearing from students of society in the past quarter century take on a religious note: it is as if they were washing themselves in the blood of the scientific lamb . . . I suspect that Arnold assumes his attitude of "detachment" mainly as a literary device. For he must know that the realm of society cannot be chartered with the inhuman precision that we apply to physics or astronomy . . . . It is as a prelude to . . . a scientific humanism that Arnold's book [*Folklore*] is chiefly valuable. It belongs in the category of corrosive books, which eat away the past complacencies, without the removal of which future constructs are impossible. (M. Lerner, *The Shadow World of Thurman Arnold* (1938), 47 Yale L.J. 687 at 687-88.)

12. See S. N. Verdun-Jones, *The Jurisprudence of Karl Llewellyn* (1974), 1 Dalhousie L.J. 441 at 446-52.

13. See, *e.g.*, C. Clark and H. Shulman, *Jury Trial in Civil Cases — A Study in Judicial Administration* (1934), 43 Yale L.J. 867. Arnold's opinion of such studies was conveyed to the author by Professor Myres McDougal.

Arnold's conception of science appears to have been moulded by at least two distinct streams of American social thought; first by institutional economics; and secondly by the brand of psychology advocated by Edward Robinson.

1. The Influence of Institutional Economics

Walton Hale Hamilton (an economist on the Yale Law Faculty and Arnold's friend for many years) was almost certainly the channel through which Arnold became acquainted with a school of economics that ranged far and wide in its intellectual breadth. The school had its roots in the work of Thorstein Veblen whose *Theory of the Leisure Class*[14] is in many ways a spiritual ancestor of Arnold's *Folklore of Capitalism*. The key to the institutional economist's approach is that he examines the economic system as part of human culture, which is itself conceived of as a complex of many institutions.[15] This intellectual scheme clearly influenced all Arnold's writings after 1935 and it is interesting to note that many of the issues he raises are explicitly foreshadowed in Hamilton's influential entry — "Institution": witness the following excerpts:

> In the course of time the function of an institution may be compromised by or perhaps even be lost in its establishment. The spirit may become the letter, and the vision may be lost in a ritual of conformity. In time a way of intellectual inquiry may become a mere keeping of the faith; a nice propriety in social relations may decay into a code of etiquette; or a morality intended to point the way to the good life may come to impose the duty of doing right. Thus ceremonial replaces purposive action and claims vicarious obedience . . . so long as laissez faire dominated our minds, dialectic served well enough to turn out explanatory apologies for the existing social arrangements; when we began to

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14. T. Veblen, *Theory of the Leisure Class* (New York: Modern Library, 1934). For the possible influence of Veblen on New Deal philosophy, see C. W. Mills, *Sociology and Pragmatism* (New York: Galaxy Books, 1966) at 466. For Veblen's role in establishing the intellectual background to American Legal Realism, see M. White, *Social Thought in America: The Revolt Against Formalism* (Boston: Beacon Press, 1957) at 21-27, 76-93.

15. For the influence of cultural anthropology on the institutional school, see A. Gruchy, *Economic Thought: The Institutional School* in 4 International Enclycopedia of the Social Sciences (New York: Macmillan and the Free Press, 1968) at 463. See also Benedict, *supra,* note 8. The influence is readily discernible in Veblen's work; note his approval of the following statement, "Anthropology is destined to revolutionize the political and the social sciences as radically as bacteriology has revolutionized the science of medicine": quoted in White, *supra,* note 14 at 22.

> demand that order and direction be imposed upon an unruly society, a genetic study of how its constituent usages had grown into empirical organization seemed proper. An inquiry into institutions may supply the analytical knowledge essential to a program of social control or it may do no more than set adventures for idle curiosity. In either event the study of institutions rests itself upon an institution . . .[16]

In addition to his role in fashioning what became a basic unit of analysis in Arnold's jurisprudence, it is clear that the particular interest of Hamilton in the integration of the traditionally "separate sciences" of law and economics had an equally fruitful impact upon the formation of Arnold's own broad interdisciplinary approach.[17] Indeed, it is instructive to note that Arnold's description of his colleague's work suggests that both scholars were attempting to fulfill the same intellectual task—namely the task of "observing the inter-actions of legal symbols and economic dogma with the pressures of the industrial revolution of the twentieth century."[18]

2. The Influence of the Psychology of Edward Robinson

> A sincerely fact-minded jurisprudence would insist upon getting behind the utterances of the judge to the psychological, sociological, and economic details of the case at bar. And more than that such a jurisprudence would insist upon examining the opinion of the appellate judge, not as the outpouring of a logical machine, but as the psychological processes of a fairly important member of a complex institutional life.[19]

As we can see from the above passage, Robinson himself was influenced by the institutional approach but his particular contribution to Arnold's intellectual development was the fashioning of a distinctively psychological observational standpoint. In his Yale Law Journal article reviewing Robinson's contribution to Jurisprudence, Arnold portrays his colleague as "an observer studying the effect of the psychological compulsions which form institutions on the conduct of those institutions."[20] Robinson

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16. W. H. Hamilton, *Institution,* in 8 Encyclopedia of the Social Sciences (New York: Macmillan, 1932) at 86. The influence of the institutional approach was a crucial factor in the development of American legal realism in general. See *e.g.*, Verdun-Jones, *supra,* note 12 at 447-49.
17. For the role of institutional economics in fostering an inter-disciplinary approach to social problems, see Gruchy, *supra,* note 15 at 466.
18. Eulogy delivered on October 30, 1948; *Selections, supra,* note 1 at 45.
19. Robinson, *supra,* note 4 at 67-68.
20. Arnold, *supra,* note 6 at 1288.

believed that, in this light, law and economics can *only* be viewed as part of the folklore of the people and, according to Arnold, this realization lead Robinson to lay his finger upon the reason for the hitherto unsuccessful integration of law with the social sciences. In Arnold's words:

> He (Robinson) did not think that there were separate "legal aspects" and "economic aspects" to a problem. He thought they were only different attitudes which men took toward the same set of events on different occasions.[21]

As a consequence, Robinson argued that social scientists should develop a unified approach towards the study of legal institutions; this approach would be founded in the promise that the intellectual bedrock of any meaningful science of social control must be the discipline of psychology. After all, law (being concerned with the regulation, mitigation, and composition of human conflict) necessarily revolves around matters psychological.

Tragically, Robinson's "naturalistic jurisprudence" remained in the realm of aspiration rather than tangible achievement. Robinson failed to develop any conceptual framework capable of generating testable hypotheses about law and social control; nor was he able to develop a methodology capable of implementing his grandiose scheme for a unified science of social control. At the root of these failures is his apparent reluctance to indicate what *specific* contribution psychology has to offer modern jurisprudence.[22] As a consequence, Robinson proved to be incapable of harnessing psychology to the service of a systematic science of human behaviour; indeed, his reader is often left with the distinct impression that psychology for Robinson is just another point of view masquerading as a social science:

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21. *Id.* at 1287.

22. See H. D. Lasswell, Book Review (1935), 44 Yale L.J. 388. Lasswell makes three pungent criticisms of the approach adopted by Robinson:

(a) Naturalistic analysis will not of itself lead to the humanism presumably favoured by Robinson: "A naturalistically equipped elite will not necessarily use candor in talking to anybody but itself. A full and free confession of intent to all the world is no necessary outcome of insight."

(b) Robinson fails to distinguish between psychologists and other social scientists adopting a naturalistic approach thus failing to emphasize the *relative* contribution which psychology has to offer.

(c) Robinson fails to underscore the "technical creativeness" of psychology by his neglect of specific research methods already developed by the discipline.

> . . . the essential feature of psychology is a persistent intellectual curiosity about the fundamental and general characteristics of human nature . . . .[23]

Fortunately, Arnold was able to establish a conceptual framework which significantly improved upon Robinson's diffuse insights. Arnold styled his approach "a science of political dynamics"; in the *Folklore of Capitalism,* he states:

> . . . I choose the term "Political Dynamics" to refer to a science *about* society which treats its ideals, its literature, its principles of religion, law, economics, political systems, creeds, and mythologies as part of a single whole and not as separate subjects, each with its own independent universe of principles. The term is not original and is already becoming familiar. I select it because it represents the easiest transition I can think of from the term "political economy" which described an individualistic era. We have reached a time when men are beginning to realize their complete interdependence, when the personality of the individual is submerged in the personality of the organization. What I have in mind is a science of the diagnosis of maladjusted organizations in an age where organizations have replaced individuals as units.[24]

The conceptual framework which constitutes this "science of political dynamics" is far from being a "mere literary device". Arnold developed it in such a way that it is perfectly capable of generating crucial hypotheses about law and social control; indeed, Arnold managed to establish twenty-four such constructs within the compass of *The Folklore of Capitalism.*[25] Furthermore, these hypotheses are eminently susceptible to empirical testing, as the following example illustrates:

> A conflict often arises between an ideal and a social need not accepted as legitimate or moral. This creates a situation in which an immoral and undercover organization will arise. The ideal will be represented by a moral organisation which proves that the social need is not a real need at all, but a form of sin. The need will be represented by an immoral organization, which will be accepted and tolerated as a necessary evil, in the same way that the church accepted the existence of the devil.[26]

Arnold discussed this particular hypothesis in relation to the

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There is little doubt that Lasswell's analysis applies with equal force to Arnold's own approach.

23. Robinson, *Law and the Lawyers, supra,* note 4 at 99.
24. *Folklore, supra,* note 2 at 349.
25. *Id.,* c. XIV.
26. *Id.* at 365-66.

enforcement of anti-trust laws, the growth of political machines, and Prohibition. Interestingly enough, it has recently been employed by Max Rheinstein in his analysis of the dualism of traditional divorce laws.[27]

However, while we may readily accept the proposition that Arnold's conceptual framework is capable of spawning meaningful hypotheses, we must also be careful to define the universe within which such a framework has utility. Arnold is chiefly concerned with the manner in which society—through the medium of various institutions—organizes itself to meet its practical needs. More specifically, he is concerned with the way in which such institutional activity is *legitimated* by means of symbols and creeds. The central thesis in his work is that, in an age of great social and technological change, these symbols and creeds may well come to impede the satisfaction of our ever developing practical needs; such a situation arises, for example, when new demands upon institutions can not be legitimated in terms of the prevailing political doctrines or when such demands encroach upon habits firmly entrenched by the long march of time. In brief, Arnold is almost exclusively concerned with the inter-action of symbols and dogma with the processes of social change. Thus his conceptual scheme is in fact confined to a much more limited range of phenomena than the term "political dynamics" suggests. Confined to this limited area Arnold's conceptual framework is reasonably adequate for its task but it is seriously deficient if it is to be the basis for a comprehensive study of politics.

In this respect, one of Arnold's fundamental assumptions is curiously ill advised. This assumption is the belief that institutional behaviour can be analyzed in exactly the same manner as that of individuals. Clearly such an approach can only be maintained for very limited purposes indeed. It must have been evident to Arnold

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27. Below the surface of an official law of high-minded moral purposes hides the "snake" of nonenforcement. Of this phenomenon, common to many parts of the world and rampant in the United States, but one example is consent divorce hidden under the facade of divorce as punishment of misconduct or as an escape hatch open solely in cases of complete and irremediable marriage breakdown. The institution had to be developed as the inevitable compromise between conservatives able to keep statute makers in fear and liberal pursuers of individual happiness. Like other kinds of sub rosa institutions, that of unofficial consent divorce cannot grow in the publicity of the legislature. (M. Rheinstein, *Marriage Stability, Divorce, and the Law* (Chicago: U. of Chicago Press, 1972) at 257-58.)

that such an approach studiously ignores the fact that institutional behaviour is bound to differ from that of individuals in those situations where the crucial factor is the *interaction* of individual with individual or of institution with institution.

A further difficulty is Arnold's complete failure to conceptualize power phenomena — a task which is clearly vital to the development of a comprehensive science of political dynamics. Indeed, although he makes frequent reference to "political machines" and "big corporations", Arnold never attempts to undertake any systematic examination of the bases of their power. Similarly, Arnold does not grapple with the problem of identifying the basic components of social and technological change even though his central concern is with the interaction of such change with institutional symbols and dogma. Instead of examining the actual processes of change, Arnold refers only to the "practical needs" which such change engenders.

We may therefore conclude that Arnold's conceptual scheme can only be applied to a limited area of the political process. In this respect, it is clear that Arnold's claim that he had laid the foundation for a science of political dynamics was somewhat premature. While the psychological analysis of institutions is a valuable study in itself it hardly amounts to the "key to the integration of law with the social sciences." Of course, political science was itself at a stage of relative infancy during the period which saw the genesis of Arnold's basic ideas[28]; hence it remained for subsequent generations to

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28. The point to be made is that Arnold over-stated the degree to which his "principles of political dynamics" could answer crucial questions about the political process as a whole. As with many scholars of the so-called realist movement, Arnold identified vital questions about law and the political process but found himself unable to tap any source of mature scholarship which was capable of furnishing adequate answers to such questions. At the time when Arnold's thought was in the process of formulation, political science was still in a stage of relative infancy and was only just beginning to develop meaningful theories about the political process. In discussing the growth of political science in America, Sorauf has argued:

> On the eve of World War II . . . American political science was something of a special case in the social sciences. It had no central organizing set of concepts or body of theory, as did the discipline of economics. It shared little of the interest of anthropology, sociology, and psychology for understanding the individual, his socialization, his motivation, and his behaviour . . . . . It was a heterogeneous, plural, and diverse discipline with little agreement about its central concerns, its methods, and its basic goals. It was a discipline uncomfortable in building theoretical propositions and perfecting methodologies. Above all, it was a discipline without a clear intellectual

incorporate Arnold's contribution into a systematic and comprehensive science of political dynamics.[29]

Although Arnold's psychological point of view obviously amounts to much more than a "mere literary device" it is fair to point out that it is not accompanied by any form of adequate methodology. Arnold evidently believed that he could study institutional symbols and dogma solely by examining the official utterances of the various institutions' spokesmen as reported in newspapers and other publications. However, it is difficult to envisage how such a method can be adequate for the task of testing the various hypotheses suggested by Arnold's analysis. Furthermore, it is rather unfortunate that Arnold's work is almost exclusively based upon an examination of a relatively short period in American social history for it may well be that many of his hypotheses would have to be modified in the face of data from other historical periods or from other countries and cultures. Finally, it may be noted that Arnold's inability to develop specific methods of empirical research caused him to ignore an important area of interest. By concentrating upon the official statements of dogma and ignoring the actual perspectives of the various members of any given institution, Arnold fails to document the *competing symbols* existing at different levels of institutional life; the fact that different members of an institution may defer to differing symbols and dogma within the same body is of crucial importance to any comprehensive study of the process of legitimation.[30]

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identity. (*Perspectives on Political Science* (Columbus, Ohio: Merrill Books, 1965) at 13-14.)

Perhaps Sorauf is more than a little cavalier in his dismissal of such prestigious forebears as Arthur Bentley and the Chicago School centered around Charles Merriam and Harold Lasswell. However, the Chicago School was largely contemporaneous with Arnold's development and, taking into account the inevitable lag between formulation and permeation of ideas, our general point remains valid. See A. F. Bentley, *The Process of Government; A Study of Social Pressures* (Chicago: U. of Chicago Press, 1908); C. E. Merriam, *New Aspects of Politics* (Chicago: U. of Chicago Press, 1925) and *Political Power; Its Composition and Incidence* (New York: McGraw-Hill, 1934); H. D. Lasswell, *Politics: Who Gets What, When, How* (Cleveland, Ohio: World Publishing Co., 1936).

29. For a basic framework mapping the social process, see H. D. Lasswell and A. Kaplan, *Power and Society* (New Haven, Conn.: Yale U. P., 1950). For a sociologist's view of the manner in which power phenomena may be conceptualized, see A. L. Stirchcombe, *Constructing Social Theories* (New York: Harcourt, Brace and World Inc., 1968) c. 4.

30. See, for example, the position of professional specialists within a large

IV. The Delimitation of a Focus of Inquiry

> . . .[A]shift of emphasis [is needed] from the study of legal doctrine to a study of the operation of an institution . . . [I]t is not easy for the lawyer to make the *court* the center of his study and to consider the doctrine of substantive law only as factors in preserving its power and independence, in determining its attitude, and in furnishing it with a method of expression.[31] (emphasis added)

Although Arnold's work surveys the whole gamut of institutional life, there is no doubt that the main focus of inquiry is squarely upon the *judicial decision*. In Arnold's view, our "spiritual government" centres on the judicial system and he argues that around this hub revolve all our popular ideals of government. On this basis, the reason why Arnold does not devote more attention to the process of administrative decision-making is to be found in his belief that "bureaucracy" is not endowed with the same symbolic importance as are the courts. Indeed, in his view, "bureaucracy" is itself a *negative* symbol conjuring up visions of rampant red tape and raising the spectre of the ancient American anathema — government by men as opposed to government by abstract principles of law.[32] Since Arnold's overriding concern was with the symbols and dogma, it is hardly surprising that he should gravitate to the judicial decision as the centre of his inquiry.

V. The Balance of Emphasis on Operations and Perspectives

> It is part of the function of "law" to give recognition to ideals representing the exact opposite of established conduct. Most of its complications arise from the necessity of pretending to do one thing, while actually doing another. It develops the structure of an elaborate dream world where logic creates justice. It permits us to look at the drab cruelties of business practices through rose-colored spectacles.[33]

Thurman Arnold's distinctive contribution to modern Jurisprudence surely lies in his highly innovative treatment of *perspectives*; in this respect, his efforts were not too far removed from those of Jerome

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organization: R. Presthus, *The Organizational Society* (New York: Vintage Books, 1962) c. 8.

31. Arnold, *The Role of Substantive Law and Procedure in the Legal Process* (1932), 45 Harv. L. Rev. 617 at 619.

32. *Symbols, supra,* note 2 at 200-209.

33. *Id.* at 34.

Frank.[34] While Arnold joins the mainstream of legal realism in demonstrating that legal principles are not controlling in the process of decision he also emphasizes his belief that this demonstration is but the beginning of responsible academic inquiry. Indeed, Arnold sternly rebuked many of his realist colleagues for their single-minded pursuit of the all-too-evident disparity between "law in action" and "law in the books"; in his view, such misplaced concentration on the blatantly obvious obscures the most important function of legal rules and principles.[35]

According to Arnold, the function of law is not so much to *guide* society as to *comfort* it. For him, the greatness of law lies in the fact that it preserves the appearance of unity while tolerating and enforcing ideals which run in all sorts of opposing directions. In his own words:

> "Law" is primarily a great reservoir of emotionally important symbols. It develops, as language develops, in spite of, and not because of, the grammarians. Though the notion of a "rule of Law" may be the moral background of revolt, it ordinarily operates to induce acceptance of things as they are. It does this by creating a realm somewhere within the mystical haze beyond the courts, where all our dreams of justice in an unjust world come true . . . .
>
> From a practical point of view it (Law) is the greatest instrument of social stability because it recognizes every one of the yearnings of the underprivileged, and gives them a forum in which those yearnings can achieve official approval without involving any particular action which might joggle the existing pyramid of power. It permits the use of an argumentative technique by which powerful institutions can be defended on the ground that taking away privileges from them would take away freedom from the poor.[36]

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34. See S. N. Verdun-Jones, *The Jurisprudence of Jerome N. Frank —A Study in American Legal Realism* (1974), 7 Sydney Law Review 180 at 191-96.

35. It is child's play for the realist to show that law is not what it pretends to be and that its theories are sonorous, rather than sound; that its definitions run in circles; that applied by skilful attorneys in the forum of the courts it can only be an argumentative technique; that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion. Yet the legal realist falls into grave error when he believes this to be a defect in the law. From any objective point of view the escape of the law from reality constitutes not its weakness but its greatest strength. Legal institutions must constantly reconcile ideological conflicts, just as individuals reconcile them by shoving inconsistencies back into a sort of institutional subconscious mind. (*Symbols, supra,* note 2 at 44.)

36. *Id.* at 34-36.

The novelty of this approach no doubt springs from Arnold's belief that man is basically an irrational beast, whose strong subconscious impulses effectively preclude him from exercising a free and deliberate choice between good and evil. However, Arnold argues that man is extremely unwilling to recognize the fundamental reality of his psychological predispositions because he has a compelling—albeit futile—desire to live in a perfectly rational and moral universe. In a vain attempt to satisfy this unattainable desire, man is perforce driven to erect elaborate systems of rationalization such as "Law" and "economics". These systems may be described as man's ideals or folklore. Now because there is no correspondence between the ideals he projects and the actual practices that exist in the real world social man is forced to create legal rituals and popular symbols which effectively render him unaware of the discrepancy between illusion and reality—thus facilitating his adjustment to an imperfect world. In Arnold's own words, man interposes "little pictures" between himself and the real world in order to console himself and to maintain the vitality of his institutions. Hence his view that Law's function is not so much to guide society as to comfort it.

No doubt this approach towards the study of perspectives owes much to Robinson's wry observation that judicial opinions should be examined in exactly the same manner as an anthropologist would examine the ceremonial utterances of the high priesthood in a primitive community. In any event, it is clear that Arnold missed no opportunity to ridicule those foolish men who wholeheartedly believed in the absolute reality of their myth-worlds. For example, Arnold's view of that venerable body — the American Law Institute — was that it "was ceremony of the very purest sort, dedicated to the ideal that this was a government of law and not of men."[37] Of Jurisprudence he bitingly said:

> We may describe jurisprudence or the science of law in our present day as the effort to construct a logical heaven behind the courts, wherein contradictory ideals are made to seem consistent. Naturally the contradictions are reconciled in the only way logical contradictions can ever be reconciled, by giving each a separate sphere to work in and pushing the inconsistencies back into the obscurity of great piles of books which are taken on faith and seldom read . . . .
>
> We may finally define jurisprudence as the shining but

37. *Folklore, supra,* note 2 at 78.

> unfulfilled dream of a world governed by reason. For some it lies buried in a system, the details of which they do not know. For some, familiar with the details of the system, it lies in the depth of an unread literature. For others, familiar with this literature, it lies in the hope of a future enlightenment. For all, it is just around the corner.[38]

However, despite his excessive *penchant* for literary humour, it is nevertheless clear that Arnold's approach to the study of perspectives greatly enriched modern Jurisprudence. In particular, his distinctive contribution lies in his articulate emphasis upon symbolism as the mediator between illusion and reality in social and political life. By adopting this fertile approach, Arnold's work emphatically underscores the crucial significance of symbolism in the process of authoritative decision-making. Among many other valuable insights, his treatment of symbolism led to a recognition of the distinctive role of the lawyer as a *manipulator* of symbols — as an active interventionist in the policy-making process.

However, while it is appropriate to praise the manner in which Arnold gave new direction to legal scholarship it is also necessary to recognize that his approach was often surprisingly shallow. In the words of a contemporary critic:

> . . . Arnold fails to differentiate between the levels of symbolism. There are symbols that are merely abbreviations, without which life would grow too complex for survival. . . . There are [also] symbols by which some men achieve and maintain a hold over the rest of mankind. There are finally, as Arnold might have learned from Whitehead, whole symbol-clusters that are evocative ways of thought and patterns of life. Man as we find him is irrational enough; but Arnold adds to this irrationality by attributing the distorting effects of symbolism even to the situations where symbols alone give life meaning and where they clear the path for, instead of blocking, social construction. He lumps all the symbolism of men's actions together, without getting at the purposes of those actions, without getting at the *for whats*? An irrational symbol for one purpose may be a perfectly rational symbol for another. It is Arnold's

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38. *Symbols, supra,* note 2 at 56-59. See also *Apologia for Jurisprudence* (1935), 44 Yale L.J. 729 at 729. Here, the function of Jurisprudence is explained:

> Functionally the primary purpose of the science of law is to be a sounding board of both the prevalent hopes and the prevalent worries of those who believe in a government of law and not of men, to reconcile these hopes and worries somewhere in the mists of scholarship and learning, and never to admit that this is what it is doing.

> capacity to say *for what*? to his symbols that is at the root of much of the book's confusion. When you see everything as undifferentiated symbols, then the symbol ceases to have meaning but takes its place only as a senseless particle in a mad dance . . .[39]

Arnold's frequently shallow treatment of symbolism is unfortunately complemented by a surprisingly sketchy approach towards the study of *operations*. Arnold frequently refers to his belief that "practical men" do not avail themselves of the teachings of law and economics but he fails to tell us anything about the decisions actually made by such "practical men", nor does he tell us much about the institutional framework which surrounds such decision-making activity. Similarly, while he is fond of treating law and economics as a play in which it is vital that the machinery behind the scenes remain concealed from the audience,[40] Arnold is nevertheless most reluctant to describe that machinery — at least in

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39. Lerner, *supra,* note 11 at 696-97.
For a strong criticism of Arnold's failure to differentiate between symbols and the values they represent, see G. Gurvitch, *The Sociology of Law* (New York: Philosophical Library and Alliance Book Corporation, 1942) at 186-87:

> . . . Arnold, having grasped with particular force the decisive importance of symbols in social and especially in jural reality, has been prevented from reaching acceptable conclusions because of deficiency in the conception of symbols themselves. Emphasizing rightly that social symbols are heavily charged with emotion and even with mysticism, he feels justified in concluding that they are entirely subjective projections, fantasies, meaningless illusions. This conclusion has been reinforced in him by an intellectualist prejudice, according to which all that is not subjective is necessarily rational. As though emotional-volitional values, inspiring symbols, could not be considered objective and spiritual, no less than logical ideas! . . . . The result has been skepticism . . . . Hence his negation of all possibility of differentiating symbols . . . . Thus Arnold finally cannot find a specific place . . . for law among social symbols.

Once again however, we should point out that Arnold had no source of mature scholarship to guide him in his approach to symbolism. Merriam, *supra,* note 28, was only just beginning to develop a systematic analysis of symbolism in the political process while Arnold himself was grappling with the problem independently. Furthermore, at this time, the Father of Symbolic Interactionism — George Herbert Mead — was only just beginning to scratch the surface of the implications of symbolism for social psychology. *Play, The Game, And the Generalized Other* appeared only in 1934. Coupled with the fact that Merriam, Mead and Lasswell were at Chicago, it is easy to see that Arnold was forced to develop his ideas in relative isolation.

For a more modern differentiation of symbolism, see H. D. Lasswell and A. Kaplan, *supra,* note 29 at 10-13, 103-105, 136.

40. *Folklore, supra,* note 2 at 357.

any terms more detailed than such vague phrases as "sub-rosa political machines."

VI. Conception of Authority and Control

In a post-war evaluation of Jerome Frank's jurisprudence, Arnold chided his realist colleagues for their failure to grasp the importance of "authoritarian law based on human reasoning and respected with mystical faith."[41] In stark contrast, Arnold's own concern with the fluctuating response of legal symbols to the challenge of social change led him to pay close attention to the process by which organizations legitimate their activities in terms of the prevailing social ideals of the day; in this respect, he clearly contributed much to our understanding of the *authoritative* element in law. Similarly, Arnold's focus upon the increasing lag between institutional creeds and the realities of social change ensured that he sufficiently emphasized the element of *control*.

Arnold's treatment of *authority* is among the most revealing in the literature of modern Jurisprudence. In his view, authority adheres to institutional decision-making when the latter is legitimated in terms of the prevailing myths and folklore of the day. In a developed society such myths and folklore are generally represented by a *Constitution*:

> Because words and ceremonies are our only methods of communication, everywhere we find that the creed is regarded as the cornerstone of social institutions. "In the beginning was the Word" is an idea which has been repeated over and over wherever language is used. In this way of thinking we are as primitive as the people of the Old Testament.
>
> Therefore, the folklore of every people runs in something like this form. A long time ago, with the aid of some sacred and infallible force, certain exceptionally gifted forebears formulated a lot of principles which contained the fundamentals of social organization. Nations which, like the United States, trace their beginnings to some single event think that their principles were discovered all at one time. This circumstance gives them a *written* constitution . . . .
>
> In this country we like to think that we decided to write down all our governmental principles in one document called the Constitution. Acutally, the Constitution consists of thousands of documents written at various times.[42]

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41. *Id.* at 26-27.
42. *Folklore, supra,* note 2 at 26-27. See also, Arnold, *Judge Jerome Frank*

Since it represents current myths and folklore rather than rules, the language of the Constitution is largely immaterial. "Out of it are spun the contradictory ideals of governmental morality." Indeed the very "*elasticity*" of constitutional language ensures that it can be used on both sides of any popular issue without the person using it having to be bothered with what the Constitution actually says:

> It is essential to constitutionalism as a vital creed that it be capable of being used in this way on both sides of any question, because it must be the creed of all groups in order to function as a unifying symbol. This way of thinking is essential to all governmental organizations. It is the method by which the organization can take pride in the superiority of its traditions. Pride in his early struggles and a clinging to traditions which have been handed to him by better men than he are deep-seated within the psychology of the individual.[43]

Now the Supreme Court's position as ultimate arbiter of the Constitution establishes it as the foremost symbol of authority in American society; indeed, it is placed at the very heart of the process by which decisions are *legitimated* in terms of the prevailing folklore and myths. According to Arnold, man's faith in a higher law makes the Supreme Court the greatest unifying symbol in American government. For the majority of the populace it is "the concrete dramatization of the ideal that there is a power which prevents government action which is arbitrary, capricious, and based on prejudice."[44]

Particularly fascinating is Arnold's discussion of the manner in which the Court's *authority* may be gravely threatened by a combination of rapid technological change and an inherent judicial reluctance to sanction the pressing needs generated by such change. In Arnold's view, the authority of the Court is maintained by its unique ability to reconcile opposing ideals in terms of "fundamental principles" which transcend the petty squabbles of our everyday existence. However, it is imperative that the philosophy of the court be *positive* if it is to retain the adulation of the public. If the Court allows its interpretation of the Constitution to become a judicial hairshirt constantly blocking practical decisions in the name of constitutional purity then its inopportune *negativism* will inevitably strip the court of its prestige. In Arnold's view, precisely such a

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(1957), 24 U. Chi. L. Rev. 633 at 634 and Verdun-Jones, *supra,* note 34 at 196-98.

43. *Folklore, supra,* note 2 at 29.

44. *Symbols, supra,* note 2 at 196.

situation pertained in the mid-30s when the Court's alleged conservatism precipitated a national crisis.

The manner in which the Court's authority was restored is perhaps best told in Arnold's own words:

> In this situation it was inevitable that the purely negative philosophy of the majority finally became untenable. There were only two possible outcomes to the proposal of the President. Either the Court would change or there would be a new court. Observers generally credit Mr. Chief Justice Hughes with the political skill which accomplished the change. It is represented in two opinions, one sustaining the minimum-wage law for women and the other permitting the Wagner Labor Relations Act to be applied to the Jones and Laughlin Steel Company.
>
> These opinions represent a transition from a negative to a positive philosophy of federal power. They are technical and uninspired. However, they did clear away the underbrush. They showed that the Court was capable of change.
>
> Finally, there appeared Mr. Justice Cardozo's opinion in the social-security case. Here was a note of hope and positive affirmation . . . .
>
> Here we have on a small scale, a way in which new social philosophies appear. There is first the battle, with the fighting speeches on both sides. Then there is the reconciliation with the past. And finally there is the inspirational synthesis of a new point of view. The social-security decision did much to restore the prestige of the Court because of its note of positive affirmation. Without it the writer has little doubt that Roosevelt's Court plan would have been quickly passed.[45]

However, while Arnold devotes considerable attention to the Supreme Court as the paramount symbol of *authority* in American government, he also underscores the fact that his approach towards the study of *authority* is *not* confined solely to the upper echelons of the constitutional hierarchy. Indeed, his treatment of the concept of *authority* is clearly applicable to *any* social institution which has developed any kind of established philosophy or creed — whether the institution be a court, a governmental organization, or a private business association.

Arnold's implicit recognition of the need to maintain a clear working conception of authority and control perhaps emerges most

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45. *Folklore, supra,* note 2 at 339-40.
See *Helvering* v. *Davis* (1936), 301 U.S. 619.
See generally, R. H. Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage Books, 1941) at 221-35.

conspicuously in his witty chronicle of the American scene in the era of the New Deal. In Arnold's view, the rugged individualism which permeated American folklore in the early twentieth century forcefully militated against the unwelcome recognition that effective power often lay *not* in the authoritative hands of Congress or the President but in the grasping hands of monolithic private corporations or in the illegitimate hands of unmentionable *sub rosa* political machines. The inability of legal folklore to adapt from a world of private property to a world of vast corporate wealth meant that government was frequently forbidden by constitutional *taboo* from regulating the excesses of industrial giants. Similarly, the prevailing legal ideology restricted the capacity of government to cope with ever-increasing social needs because the prevailing folklore cast the government in the rôle of a predator on private property. According to Arnold, therefore, the prevailing symbols and dogma of that unfortunate era prevented the established authoritative decision-makers from coping with the demands of a new world; instead, private enterprise exercised effective and unrestrained *control* over a wide sector of public life while pressing social needs were met by political machines which were denied the stamp of authority. In Arnold's eloquent words:

> . . .[W]e developed two coordinate governing classes: the one, called "business", building cities, manufacturing and distributing goods, and holding complete and autocratic control over the lives of millions; the other, called "government", concerned with the preaching and exemplification of spiritual ideals, so caught in a mass of theory that when it wished to move in a practical world it had to do so by means of a *sub rosa* political machine. There was no question as to where the temporal power lay. Occasionally, the spiritual government could make a business baron come on his knees to Washington, but these were rare occurrences. It was the general opinion in America before the depression that the government at Washington should render unto Caesar the things which were Caesar's, and confine its own activities to preaching. The attitude of the conservatives toward government in business was the same as toward a minister of the church who deserted his pulpit to buy a seat on the stock exchange.[46]

As we shall see, Arnold believed that greater *control* would only be restored to the nation's authoritative decision-makers in the event of a new folklore emerging within American Society: such a

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46. *Folklore, supra,* note 2 at 110.

folklore was to be born out of Roosevelt's struggle for the New Deal.[47]

VII. The Relationship between Law and the Social Process

> The judicial trial thus becomes a series of object lessons and examples. It is the way in which society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily. Yet there are two distinct kinds of object lessons — civil and criminal, the difference between them is hard to define, but easy for the man on the street to feel. For the businessman who needs a feeling of security from the encroachments of those who are appointed to enforce the law, the civil trial is most important. It exists to give the man of affairs a sense of security in his commercial relationships both from attack by his fellows and intermeddling of the government. However, it is too complicated in its rituals and terminology to appeal to the great mass of people who need to believe in the law. For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal.[47]

As we have already seen, Arnold was not concerned with developing a comprehensive framework for the study of law in society; instead he was concerned almost exclusively with a much more limited inquiry into the nature of the interaction between legal symbols and social change. Furthermore, we have argued that Arnold's failure to conceptualize power phenomena coupled with

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47. Arnold believed that a competent governing class could gain both power and legitimacy only if the profession of politics was upgraded. In his view, politicians were regarded with suspicion because in order to govern effectively they were frequently forced to violate "fundamental principles" of law and economics. In the 1930s, the result was the political machine. In this respect, note Lerner's biting comment:

> . . . Arnold is throughout [*The Folklore of Capitalism*] betraying his scheme of valuation. He depicts thinkers as stumbling along ineffectually while the decisions of the world are left to men of little logic and ruthless purpose. The intellectual, in the book, is always flouted in favor of the hard-boiled practical politician and the organizing genius. Arnold displays a faith in the latter almost akin to the sentiment the eighteenth century felt for the Noble Savage. And as a corollary to the esteem he feels for the big doers, and the leaning toward the great-man conception of the historic process, there is a tendency towards anti-massism in the book. (Lerner, *supra,* note 11 at 697.)

his seeming inability to identify the basic components of social and technological change often caused even this very limited inquiry to become a highly unsatisfactory undertaking. However, it is important to recognize that while his work frequently suffers from the conspicuous absence of a sufficiently systematic approach Arnold was nevertheless able to develop some fascinating and highly original insights into the relationship between law and the social process.

Arnold's positive contribution in this area surely lies in his lucid exposition of the notion that law may have a purely *symbolic* function over and above any *instrumental* function it may perform. Naturally, in an age when instrumentalism was the dominant philosophy in American society, Arnold's approach assumed a vital position in the construction of modern Jurisprudence. Perhaps the most highly documented facet of Arnold's thesis is his discussion of the symbolic importance of the anti-trust laws.[48]

In Arnold's view, the unique position of the anti-trust laws can really be understood only if they are viewed against the backcloth of a total legal culture. The folklore prevailing in the period spanning the gap between the adoption of the Sherman Act and the era of the New Deal may clearly be characterized by its emphasis upon *laissez faire* and rugged individualism. Naturally enough, within the confines of such a folklore, there was little room for the idea of governmental regulation of business; indeed to most Americans the idea was contrary to their most fundamental principles. Furthermore the underlying conception of a completely free and open market composed of rugged individuals so permeated American legal culture that the *quasi*-governmental functions performed by the largest corporations were completely ignored; instead the "thinking man" — to use Arnold's terminology — "personified" the corporations and treated them exactly as though they were "individuals" naturally participating in the great free market. However, the rapidly increasing concentration of corporate wealth and the notorious rapacity of so-called "Railroad Kings" and "Robber Barons" forced the Congress to act. Faced, on the one hand, by a dogma that idolized the concept of a free market consisting of "rugged individuals" and, on the other, by the social

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48. See generally, *Folklore, supra,* note 2, c. LX, *passim*; Arnold, *Fair Fights and Foul, supra,* note 4, c. 14, "The Sherman Act as a Charter of Economic Freedom".

need for the services rendered by the large business organizations, the legislation which ensued was a natural compromise. Indeed, in Arnold's view, the Sherman Act was a compromise which effectively reconciled the ideal of individual competition with the practical necessity for corporate enterprise by *symbolically* re-asserting the ideal in the form of extremely vague legislation while simultaneously permitting concentration of corporate wealth to continue largely unabated through lack of vigorous enforcement policies.[49] Arnold's discussion of the *symbolic* effect of the anti-trust laws may be summarized by his approach in *The Folklore of Capitalism*:

> In order to reconcile the ideal with the practical necessity, it became necessary to develop a procedure which constantly attacked bigness on rational legal and economic grounds, and at the same time never really interfered with combinations. Such pressures gave rise to the antitrust laws which appeared to be a complete prohibition of large combinations. The same pressures made the enforcement of the antitrust laws a pure ritual. The effect of this statement of the ideal and its lack of actual enforcement was to convince reformers either that large combinations did not actually exist, or else that if they did exist, they were about to be done away with just as soon as right-thinking men were elected to office. Trust-busting therefore became one of the great moral issues of the day, while at the same time great combinations thrived and escaped regulation. . . .
>
> . . . .The antitrust laws, being a preaching device, naturally performed only the functions of preaching.
>
> The actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels . . . .
>
> The reason why these attacks always ended with a ceremony of atonement, but few practical results, lay in the fact that there were no new organizations growing up to take over the functions of those under attack.[50]

Of course, Arnold was not really arguing that the *sole* impact of the anti-trust laws during the period 1890-1935 was symbolic. For example, he clearly emphasized in latter writings his belief that the enforcement policies of the Theodore Roosevelt administration had effectively precluded the importation of the European cartel system

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49. *Fair Fights and Foul, supra,* note 4 at 129-130.
50. *Folklore, supra,* note 2 at 207-20.

into the United States.[51] Furthermore, as Richard Hofstadter had pointed out,

> Even Thurman Arnold . . . had to concede . . . that the same anti-trust rhetoric, by encouraging the notion that great corporations could be disciplined and made respectable, had something to do with the fact that they finally did become respectable; and that without the presence of hostile laws the pricing policies of big business might have been a good deal more unfavorable to the public interest . . . even the overblown rhetoric of the anti-trust movement finds its place, and even the Progressive charade of anti-monopoly takes on a function that goes beyond mere entertainment. No doubt the immediate material achievement was quite small in proportion to all the noise; but there are many episodes in history in which intense struggle has to be waged to win modest gains, and this too must be remembered before we pass too severe a judgment on the great Progressive crusade against the trusts.[52]

Ironically, it was Thurman Arnold himself who — as Head of the Justice Department's Antitrust Division under Franklin Roosevelt — finally reversed this general pattern of non-enforcement of the anti-trust laws. In terms of his thesis, it is clear that the social

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51. In *Fair Fights and Foul, supra,* note 4 at 126, Arnold argues that Theodore Roosevelt transformed the Sherman Act "from a meaningless and ineffective formula into a sharp weapon". He bases this assessment on the prosecution brought in the *Northern Securities Case*. However, a modern historian suggests that even this prosecution was a ceremonial observance rather than a genuine effort to reinstate the philosophy of competition in the railroad industry:

> The Northern Securities case was a politically popular act, and it has strongly colored subsequent historical interpretations of Roosevelt as a trust-buster. It did not change the railroad situation in the northwest, the ownership of the railroads in that region, nor did it end co-operation among the Hill-Morgan and Harriman Lines. Roosevelt never asked for a dissolution of the company, or a restoration of competition. (G. Kolko, *The Triumph of Conservatism* (New York: Free Press of Glencoe, 1963 at 67.)

Nevertheless, Arnold is clearly right in his view that it was Teddy Roosevelt who "enshrined the act as part of our national folklore" and who made it "emotionally impossible for American business to co-operate in the European Cartel System":

> The image of the Sherman Act has not prevented tremendous concentrations of economic power, but it has prevented such concentrations from obtaining legitimate status.

Arnold believed that it was Teddy Roosevelt who created this "image". See *Fair Fights and Foul, supra,* note 4 at 128.

52. R. Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955) at 255-56.

function of those laws ceased to be predominantly *symbolic* and instead became overtly *instrumental*.

Arnold had previously undertaken a more general discussion of symbolic functions of the legal system in his earlier work, *The Symbols of Government*. One of the theses of that book was Arnold's view that the administration of criminal justice served at least two *separate* purposes; first, the keeping of order; and second, the "dramatization of the moral notions of the community."[53] At the heart of Arnold's discussion of the second purpose is his treatment of the public trial as the medium through which an individual case becomes the vehicle for conveying a series of object lessons to the public at large. Viewed in this light, it is clear that the public trial — with its elaborate protections for the accused — is not designed to act as an efficient instrument of crime control; instead, it is the centre of an elaborate ceremony which dramatizes fundamental community ideals and (hopefully) resolves the frequent conflict between them:

> Obviously . . . the public administration of criminal justice is not a method of controlling crime. It is rather one of the problems which must be faced by those who desire to control crime. Without the drama of the criminal trial, it is difficult to imagine on just what institution we would hang our conflicting ideals of public morality. It is hard to imagine government except in the light of a protector of decency and morals through a series of parables which are a guide to the honest and a terror to the outlaw.[54]

It is interesting to note that Arnold's concentration upon the symbolic functions of law foreshadowed the interest of many contemporary social scientists in this area.[55] Indeed, perhaps it is precisely in this area of research that Arnold's deserved success highlights the shortcomings of many of his colleagues in the so-called realist movement.

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53. *Symbols, supra,* note 2 at 153.

54. *Id.* at 147-8.

55. See *e.g.*, H. Garfinkel, *Conditions of Successful Degradation Ceremonies* (1956), LXI Am. J. of Sociology 420; J. R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: U. of Illinois Press, 1963); M. Edelman, *The Symbolic Uses of Politics* (Urbana: U. Of Illinois Press, 1964); V. Aubert, *Some Social Functions of Legislation* (1967), 10 Acta Sociologica 98; J. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance* (1967), 15 Social Problems 175. Note Garfinkel's elaboration of Arnold's thesis as to the social function of the criminal trial, at 424:

VIII. The Intellectual Tasks Performed by Arnold's Jurisprudence

1. The Clarification of Goals

> I have no doubt as to the practical desirability of a society where principles and ideals are more important than individuals. It is an observable fact that such a society is more secure spiritually and hence more tolerant. Yet the belief that there is something peculiarly sacred about the logical content of these principles, that organizations must be molded to them, instead of the principles being molded to organizational needs, is often the very thing which prevents these principles from functioning. The greatest destroyer of ideals is he who believes in them so strongly that he cannot fit them to practical needs.[56]

In Arnold's view, a set of ideals accepted as an article of faith is absolutely essential to the continued health and vitality of society and its constituent organizations. However, except in a very general sense, these fundamental ideals offer little guidance to the practically minded decision-maker; indeed, according to Arnold, their primary function is psychological being aimed at the "consolation of the masses". The decision-maker who attempts to perform his duties on the basis of logical derivation from the principles constituting an institutional creed or mythology is thus rendering society a grave disservice. As Arnold pointed out, even the most humanitarian decision-maker can effectively block social progress if he substitutes loyalty to abstract goals for a realistic appraisal of practical needs and practical methods of mobilizing organizational resources to satisfy such needs.[57]

> The devices for effecting degradation vary in the feature and effectiveness according to the organization and operation of the system of action in which they occur. In our society the arena of degradation whose product, the redefined person, enjoys the widest transferability between groups has been rationalized, at least as to the institutional measures for carrying it out. The court and its officers have something like a fair monopoly over such ceremonies, and there they have become an occupational routine.

The notion, that crime and its enforcement dramatize community ideals and thus perform a vital social function, really stems from Emile Durkheim's *Rules of Sociological Method* (New York: Free Press, 1966). However, Arnold does not appear to have been aware of Durkheim's work.

56. *Folklore, supra,* note 2 at 393.

57. . . . The failure of respectable people with humanitarian values to be effective in this country may be traced to their complete misunderstanding of the functions of public controversy. Unaware of the fact that it is not logic but

As was the case with most of the harbingers of Roosevelt's New Deal, Arnold perceived his role as being that of Hercules cleansing the Aegean Stables of unhealthy attitudes; in his view, the needs of American society were painfully obvious, the technology was available to satisfy them, and all that was necessary was the cultivation of a practical attitude on the part of the nation's authoritative decision-makers. For Arnold, as much as for Roosevelt, there was no need for a positive philosophy; results furnished their own justification. As Richard Hofstadter points out:

> At the core of the New Deal, then, was not a philosophy (F.D.R. could identify himself philosophically only as a Christian and a Democrat), but an attitude, suitable for practical politicians, administrators, and technicians, but uncongenial to the moralism that the Progressives had for the most part shared with their opponents.
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> . . . . . For the people at large — that is for those who needed it most — the strength of the New Deal was based above all upon its ability to get results.[58]

The precise nature of the "practical" attitude which Arnold hoped to foster in his quest for responsible decision-making was dramatically revealed in a striking passage from *The Symbols of Government*:

> From a humanitarian point of view the best government is that which we find in an insane asylum. In such a government the physicians in charge do not separate the ideas of the insane into any separate sciences such as law, economics, and sociology; nor then instruct the insane in the intricacies of these three sciences. Nor do they argue with the insane as to the soundness or unsoundness of their ideas. Their aim is to make the inmates of the asylum as comfortable as possible, regardless of their respective moral deserts. In this they are limited only by the facilities of the institution . . . . It is . . . possible to adopt a point of view toward government where ideas are considered only in the light of their effect on conduct. To a certain extent, the government which civilized nations impose on savage tribes

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organizations which rule an organized society they select logical principles as objects of their loyalties instead of organizations. (*Id.* at 384.)

For a valuable chronicle of the shift from the moralism of the Progressive era to the hard-boiled approach of the New Deal, see G. E. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Twentieth Century America* (1972), 58 Virginia Law Review 999 at 1024-26. See also Hofstadter, *supra,* note 52 at 316-28.

58. Hofstadter, *supra,* note 52 at 325-26.

> does succeed in taking this attitude; and success in dealing with such tribes is largely determined by the ability of the governing group to utilize taboos, instead of trying to stamp them out as unsound.[59]

Unfortunately, it was passages such as this which opened the door to widespread misunderstanding of Arnold's approach. Critics of his works charged that he was in effect denying the very validity of the task of evaluation and they supported the charge by focussing on the striking distinction which Arnold draws between having and projecting ideals, on the one hand, and making "practical" decisions, on the other.[60] Furthermore, many critics believed the effect of Arnold's approach was to place decision-making power in the hands of ruthless "opportunistic" men who would cynically manipulate symbols in order to obtain the approval of the masses.[61]

However, despite the fact that his approach to the task of evaluation is somewhat obscure, Arnold is surely miscast as a modern Machiavelli. If Arnold's approach is probed more

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59. *Symbols, supra,* note 2 at 232-33.

60. Arnold's language draws a false and almost vicious dichotomy between having and projecting ideals (called studying ritual "in the light of faiths and symbols") and scientific observation. The consequence of this is to make men foolish and scientific method unenlightened. (E. N. Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941) at 15-16.)

61. Edward A. Purcell Jr. in his article *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory,* [1969] American Historical Review 424 at 437-38 points out that the publication of Arnold's *Symbols of Government* and Robinson's *Law and the Lawyers* occurred at a highly inopportune time:

> The realists had raised, unintentionally, fundamental questions about the possibility and validity of democratic government at a time when the country needed reassurance and conviction.
>
> Inside the ominous framework constructed by the existence of the totalitarian governments, a new extremism in the realist movement itself was working to invite the bitter attack. In 1935 Robinson and Arnold . . . published studies that assumed a sweeping ethical realism . . .
>
> Arnold . . . argued that abstract theories and moral values were not only unfounded, but were wholly mythical . . . . In his sweeping rejection of the validity of . . . ideals Arnold left no basis for distinguishing between morally good or bad symbols or for establishing the legitimacy of any ethical position whatever. In his approach ethical values faded through relativism and out of existence.
>
> Shortly after their two books were published, at a time when men could see the rampant brutality of Nazism, the vigorous counterattack began its harshest phase.

Some of the harshest criticism levelled against Arnold and Robinson may be found in P. Mecham, *The Jurisprudence of Despair* (1936), 21 Iowa L. Rev. 669.

thoroughly it will be seen that he completely disapproved of the "Madison Avenue" manipulator and the hypocritical politician. In Arnold's jurisprudence, it is a fundamental assumption that decision-makers should exercise their powers in accordance with humanitarian goals. He never made the content of these goals explicit; perhaps, like the New Deal itself, he took it for granted that there was at least a minimal consensus in American society as to what constitutes the essence of "humane" behaviour. In any event, it is quite clear that Arnold did not entirely eschew responsibility for the postulation of his own recommended values. For example, he argued that his "insane asylum" model of government was "based on a *humanitarian ideal* which seems to be indestructible in the march of society — *the idea that it is a good thing to make people comfortable if the means exist by which it can be done.*"[62]

The goal of "making people comfortable" was really part of a philosophy, which Max Lerner has called "Middle class radicalism" — "something that is neither communism nor capitalism, but something else in its own way just as thorough going — that *tertium quid,* American radicalism."[63] What Arnold sought was an equitable distribution of wealth under a system of free competition.[64] In his view, "America can only survive under a

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62. *Symbols, supra,* note 2 at 236 (emphasis added).

63. Lerner, *supra,* note 11 at 701.

Arnold believed that a new governmental creed was symbolized by President Franklin Roosevelt:

> . . . all the signs point to the fact that a new creed, which can reconcile itself to the facts of human organization is about to born. It has as yet no formulas. It is represented vaguely by the personality of Roosevelt who has become a symbol for a political attitude which cannot yet be put into words. . .
>
> . . . he expresses for a majority of the public the current distrust of old myths and the belief that the government has a new role to play in providing for security of individuals in their jobs and in the distribution of goods. (*Folklore, supra,* note 2 at 390-1.)

"Middle class radicalism" is perhaps an excellent shorthand reference to the implicit social philosophy held by most of the legal realists. Garlan has another term for Arnold's philosophy: "Benevolent Justice". See E. N. Garlan, *supra,* note 60 at 108-113.

64. This goal is reflected in the work of the institutional economists; see *e.g.,* the following description of the approach of John R. Commons:

> Commons looked forward to seeing a form of "reasonable capitalism" in which conflict would be replaced by cooperation and reasonable values and practices would be established through administrative agencies working together with private economic groups. (Gruchy, *supra,* note 15 at 464.)

competitive philosophy and a strong antitrust enforcement''[65] because competition was a part of the American cultural pattern:

> In a society where individual freedom is the prevailing ideal, the *main* method of distributing goods and services must be by free exchange in a free market. It is not a particularly orderly process. It is not a planned economy. It is the only process which relies on the independence of the individual as a person rather than on his efficiency as a cog in a machine . . . . It is the American ideal because the existence of industrial democracy is the only basis on which political democracy can rest.[66]

A further important aspect of Arnold's social philosophy was his emphasis on the value of *tolerance*[67] and, in particular, his concern with freedom of speech. In his view, this latter goal was a ''spiritual value'' which was not even open to debate[68]: furthermore, it was an ideal to which he sacrificed a fair share of energy and time during his days in private practice. In the words of his partner, Abe Fortas:

> He was an individualist, and he was outraged when big government or a big corporation used its power to oppress or circumscribe individuals. I think that, despite his scintillating, devastating writings on the economic and social implications of antitrust, Arnold's passion as an antitruster stemmed directly from this basic, humanistic attitude — a Westerner's dislike of suppression, a Westerner's commitment to the openness of life.
>
> He was one of the last of freedom's gladiators who fought freedom's battles on these terms, the old-fashioned American terms. He was one of the last of the generation which was whole-heartedly committed to the fight for individual freedom, without regard to freedom-for-what . . . .[69]

Even though Arnold's basic goals are none too explicit, it is nevertheless somewhat surprising that his approach was the target of criticism that was almost irrational in its force. Perhaps the source of this vigorous opposition lay in a factor identified by Arnold himself when he suggested that the use of the tools developed by cultural anthropologists for the observation of ''primitive peoples'' could only be expected to arouse discomfiture when they were turned on the myths of modern man himself:

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65. Letter to Matthew Josephson, October 17, 1945; *Selections, supra,* note 1 at 105.
66. Arnold, *The Bottlenecks of Business* (New York: Regnal and Hitchcock, 1940).
67. *Symbols, supra,* note 2 at 269.
68. Letter to Feature Editor of the Saturday Review, December 2, 1954: *Selections, supra,* note 1 at 84.
69. Fortas, *supra,* note 3 at 998.

> An objective study of government is necessarily troubling to the intellectuals of our time because the prevailing mental pictures of our folklore compel us to deny the facts before us. Since those pictures represent current ideas of order and dignity in human affairs, objective observation of the facts of social organization appears to those who believe in its current myth to present government as meaningless, amoral, and uncontrollable except by methods condemned by our folklore as unscrupulous. Men cannot face the world without some sort of religion; they cannot feel comfortable about their government without a set of ideals which cannot be supplied merely by scientific observation.[70]

Within the context of the early years of the New Deal, Arnold's lack of concern for the clarification of ultimate goals is readily understandable; indeed, he was one among many jurisprudes who espoused the cause of experimentalism during the realist era. Unfortunately for Arnold, the second world war proved to be a sobering lesson as to the inadequacy of experimentalism as a philosophy; the tyranny of an abused technology was a foe that could not be defeated by ethical relativism. As Arnold himself later recognized, "it is easy to expose the irrationality of man's conduct and show the tremendous cost in material advancement of our belief in old symbols. Yet that cost must be paid because without them, as we can see in the case of Russia and Germany, men lose themselves in the greatest illusion of all, the illusion that absolute power may be benevolently exercised."[71]

2. The Description of Past Trends in Decision

> Courts owe their prestige to the fact that they are constantly making the law more and more certain. They owe their power to the fact that they never clarify total situations. They leave the cases which are just around the corner always undecided, and thus compel businessmen and legislators to be constantly in fear of their judicial veto.[72]

Unlike Karl Llewellyn, Arnold did not undertake any systematic study of past trends in decision. However, in three early articles he clearly outlined a framework for carrying out this intellectual task. In *Criminal Attempts — The Rise and Fall of an Abstraction* (1930), *The Restatement of the Law of Trusts* (1931), and *The Role of*

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70. Folklore, *supra*, note 2 at 388-89.
71. Letter written in November 1959: *Selections, supra*, note 1 at 57.
72. *Symbols, supra*, note 2 at 173.

Substantive Law and Procedure in the Legal Process (1932), Arnold followed the lead of other legal realists — such as Cook and Oliphant — by contending that the plotting of past trends in judicial decision should be in terms of factual background and future utility rather than in terms of logic and definition.

In his article on criminal attempts, for example, Arnold contended that legal scholars had been seriously mistaken in their prolonged efforts to treat "attempt" as a *substantive* crime; in his view, jurists should discuss criminal attempts *only* in relation to the particular crime attempted. According to Arnold, the "law of attempt" simply meant that the courts were exercising an innate *power* to "fill in the gaps" which a set of definitions inevitably leaves when applied to human conduct.[73] In his view, it was absurd — and indeed dangerous — for legal scholars to treat a power as though it were a definition of a substantive crime because that approach would either destroy the power or else "hopelessly confuse it." Perhaps the key phrase of the article was the following:

> May we not restate our generalizations so as to describe more accurately the results of the past and cause less confusion in the future?[74]

In his more celebrated article on the Restatement of the Law of Trusts Arnold further developed his approach to the task of describing past trends in decision. The main thrust of the work is a withering attack on the techniques used by Professor Scott coupled with a demonstration of alternative methods available for restating the law of trusts. Arnold argued that the Restatement merely presented modern ideas and current problems in "the garb of ancient language" and that it was really designed to present a "complete philosophical system." By way of contrast, Arnold presented an alternative method of restatement which he recommended for adoption by legal scholars; the gist of the recommendation was that the language of the law of trusts should be examined in the light of its utility in solving modern problems — Arnold described his approach as follows:

> To avoid the confusion caused by the fact that all sorts of problems are included under the term "Trust", we need only recognize the implications of the admission made in the

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73. *Criminal Attempts — The Rise and Fall of an Abstraction* (1930), 40 Yale L.J. 53 at 75.
74. *Id.* at 74.

> introduction that "a trust is one of several juridical devices", and that it has been used in inconsistent ways. It is not the name of an organized philosophy, it is simply a bad piece of indexing. But paradoxically enough, the fact that so many people consider it as an organized philosophy and have written so many books from that point of view is the very reason why this conventional department of the law so badly needs the attention of the American Law Institute. The reclassification of the cases using this term, already under way, is hindered on every turn by the existence of this ancient and too inclusive concept. If the restatement is to clear away the debris and make a new arrangement possible, it must abandon definitions in favor of a simple descriptive process of the purposes for which this logical machine is used in different kinds of cases.[75]

In the third article mentioned, Arnold contends that legal scholars should examine substantive law and procedure in the light of the functions they perform in the actual operation of the judicial system. More specifically, he argued that "substantive law" and "procedure" are only classifications which represent an *attitude* towards legal rules. "Substantive law", in Arnold's view, performed the function of maintaining the prestige of the judiciary:

> Substantive law, insofar as it is peculiar to courts, is the justification of the attitude that courts are acting impersonally and that their government is one of laws and not of men. It is not an institution which governs society, yet its function requires it always to appear to be. Without an independent judiciary we would have no occasion to use it among our ideals. Something else, such as Divine Right of Kings, or the Five-Year Plan, would take its place.
>
> Legal writers, scholars, and philosophers furnish the necessary theological background without which no abstraction which gives prestige to a human institution is able to survive.[76]

According to Arnold, therefore, an attitude of "substantive law" indicates that judges and legal scholars must discuss legal rules in terms of abstract principles; on the other hand, an attitude of "procedure" indicates that legal rules will be discussed only in terms of their practical utility and applicability to a particular problem. "Procedure" — unlike "substantive law" — is *not* concerned with maintaining judicial prestige and hence it can be

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75. *The Restatement of the Law of Trusts* (1931), 31 Col. L. Rev. 800 at 814.
76. *The Role of Substantive Law and Procedure in the Legal Process* (1932), 45 Harv. L. Rev. 617 at 634.

discussed in practical terms without any fear that inconsistencies will impair the authority of the judicial system.

It was Arnold's contention that legal scholars should attempt to discuss the inter-play of "substantive law" and "procedure" from the point of view of their differing functions within the legal process as a whole. According to Arnold, American legal scholars of the 1930s were classifying too many past decisions in terms of "substantive law" — with the inevitable result that a surfeit of conflicting precedents began to tarnish the prestige of the courts.[77] His own recommendation was that legal scholars should reduce the excess of precedents by classifying more judicial decisions in terms of "procedure": it was his belief that this shift in approach would enable the courts to maintain their prestige while at the same time permitting them to discuss an increasing number of cases in terms of practical problems rather than in terms of abstract principles which are unrelated to reality:

> We have a very practical problem before us, to make our way to judicial expression more intelligible, and our judicial principles and ideals more effective. The writer thinks that it can only be solved by determining what problems may be removed from the rigid philosophy of substantive law and brought down into the practical atmosphere of procedure. This is not a denial of the necessity of a rigid philosophy of substantive law in our judicial system. It is simply an attempt to point out that the legal scholar or critic, by centering his attention on the judicial institution in connection with the problems with which it is confronted, can determine which of these problems should be treated with the attitude of substantive law, and which with the attitude of "procedure".[78]

Unfortunately, Arnold never developed the basic framework outlined in these three early articles. As a result, the task of describing past trends in decision did not become a dominant facet of his jurisprudence.

3. The Prediction of Future Trends in Decision

> . . . while the guess of a technician has a fair chance of being wrong, the guess of a student of governmental or economic theory is almost sure to be wrong . . . . a review of expert guesses made before the depression seems to indicate the truth of the assertion . . . In larger affairs the diagnoses of the majority of

77. *Id.* at 636.
78. *Id.* at 647.

> those trained in legal and economic science were even worse . . . . . The most careful and scholarly lawyers, leaving out of consideration the limitations of the Supreme Court as an organization, proved conclusively that the Wagner Labor Act would be declared unconstitutional.[79]

It should have become evident by this stage that Arnold clearly rejected the notion that decisions can be predicted on the basis of legal or economic theory. However, unlike Underhill, Moore and other scholars, Arnold did not turn his attention to quantitative analysis as an alternative method for pursuing the task of projecting future trends in decision.

However, Arnold did argue that a knowledge of "organization factors" would lay the basis for reasonable accuracy in the task of prediction. In connection with a discussion of the failure of economic theorists to make accurate predictions concerning the Great Depression, Arnold said:

> The best predictions came from men who were not using current fiscal symbols but who were thinking in terms of organization. Floyd Odlum of the Atlas Corporation rose to a position of immense financial power by engaging in financial undertakings at the time when most experts had determined that financing was unsafe because of the Securities Exchange Act and other governmental interferences with business. He was successful because he thought in terms of control of great industrial armies.[80]

Curiously, Arnold does not suggest any systematic procedures for predicting future decisions on the basis of such "organizational factors". Indeed, he appears to have considered the predictive task to be a very low priority in the Jurisprudence he sought to build.

4. The Scientific Task; The Analysis of Factors Conditioning Decision

One of the significant hallmarks of the American legal realist movement was its deep-rooted concern with the psychology of the judicial decision-making process. Edward S. Robinson — Arnold's close companion in the 1930s — was a notable example of such concern. In his view, the scientific task should revolve around a systematic analysis of the various psychological pressures which — whether consciously or subconsciously — mold the judicial

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79. *Folklore, supra,* note 2 at 134-35.
80. *Id.* at 200-201.

decision-making process. The factors he earmarked for close study were extremely diverse — they include biological drives, legal and ethical values, the interpersonal dynamics of group decision-making, and the individual decision-maker's subjective perception of the acceptability of his determinations both to those who review his decisions and to those who are directly affected by them.[81] Robinson described an important purpose of such research in the following manner:

> Possibly with the development of a thorough going naturalistic jurisprudence we shall be able to incorporate into the science of law a sympathetic and useful understanding of the curious mental traits of judges, juries, politicians, and laymen to the end that there may be a basis for legal control comparable to that which already exists in the more enlightened areas of education and psychiatry.[82]

In complete contrast with the approach suggested by his closest colleague, however, Thurman Arnold never manifested the slightest interest in constructing a model of the decision-making process. On the contrary, his focus upon the judicial decision was but a part of an intricate analysis of the role played by the judicial system in the maintenance of the social order. As we have stressed previously, Arnold's overriding concern was with the psychological function performed by the legal system and the tenor of his thesis is that the courts perform a predominantly ceremonial function in the course of which conflicting ideals are reconciled by the invocation of "higher" principles and the general population is "comforted" by the fond illusion that abstract principles of law — and not mere men — govern society. Since his principal concerns lay elsewhere, an analysis of the factors affecting decision did not become an integral part of Arnold's Jurisprudence.

However, despite the fact that he did not commit himself to a rigorous performance of the scientific task, Arnold nevertheless discussed certain *organizational* factors which are clearly crucial to an understanding of the decision-making process. These factors are contained in Arnold's "principles of political dynamics" and are gathered together under the title of "*organizational personality*":

> When men are engaged in any continuous cooperative activity, they develop organizations which acquire habits, disciplines, and morale; these give the organizations unity and cause them to

81. Robinson, *supra,* note 4, c. VIII.
82. *Id.* at 316.

> develop something which it is convenient to describe as personality or character. . . .
> The personality which organizations acquire is the result both of accident and environment. The accidental features depend mostly on the types of individuals who first assume control. The environment puts great pressure on those individuals to conform to what is expected of them in terms both of practical results and the representation of sentimental ideals.[83]

We have seen in some detail that Arnold copiously documented what may be termed the "negative effect" of folklore and organizational myth on the decision-making process; that is to say, he clearly illustrated the manner in which an overly rigid adherence to ideals may prevent decision-makers from meeting the emergent needs of a society in the throes of rapid change. Furthermore, Arnold's principles of political dynamics demonstrate the emergence of alternative decision-making bodies when the web of myth paralyzes traditional institutions; the classic example of this process being the success of the political machine in the 1930s. Similarly, Arnold showed that the need for "practical" decisions in a modern society spawns a host of agencies and arbitrational bodies to which little symbolic value is attached thus freeing the decision-maker from the necessity of dramatizing community ideals.

There is no doubt that these basic insights significantly enrich our understanding of the pervasive influence of symbol and myth in the decision-making arena but they do so only in a haphazard and fortuitious manner. Arnold's jurisprudence is conspicuously lacking in any attempt to develop a systematic treatment of the factors conditioning decision. As we have seen, Arnold ignores the individual psychology of the decision-maker and his discussion of the environmental variables conditioning decision is limited to broad generalizations about myth and folklore. While the concept of "organizational personality" suggests many possible avenues of exploration in the pursuit of knowledge about the factors conditioning institutional decisions, it is one of the tragedies of Modern Jurisprudence that Arnold failed to pursue them.

5. The Invention and Evaluation of Policy Alternatives

> . . .one who desires to be effective in society must be permitted to hope and to work for that hope. The wages of pessimism are

83. *Folklore, supra,* note 2 at 350.

> futility. The writer has faith that a new public attitude toward the ideals of law and economics is slowly appearing to create an atmosphere where the fanatical alignments between opposing political principles may disappear and a competent, practical, opportunistic governing class may rise to power. Whether such a hope is well founded or not is impossible to say . . . .[84]

Arnold offered no detailed programme for the guidance of decision-makers. As we have seen, he was an unabashed experimentalist whose main goal was the achievement of a more equitable and more efficient means of distributing wealth within American society. Presumably, his approach to the task of inventing and evaluating policy alternatives would approximate that of such scholars as Cook and Dewey whose efforts were directed at the improvement of choice on the basis of a more informed understanding of the resources available to the decision-maker.

In this connection, it is interesting to note that Arnold believed that the rise of a new class of social technicians during the 1930s would foster the very attitude necessary for the implementation of experimental decision-making: in his view, the coming to power of such a group would create a folklore in which the scientific approach to the solution of social problems would become an accepted part of the decision process:

> Today we can observe the rise of a class of engineers, salesmen, minor executives, and social workers — all engaged in actually running the country's temporal affairs. Current mythology puts them in the rôle of servants, not rulers. Social workers are given a subordinate rôle. For purposes of governmental policy their humanitarian ideas are positively dangerous, because they put consideration of actual efficiency in the distribution of goods above reverence for the independence and dignity of the businessman. It is as if a usurer attempted to sit at the table in social equality with the mediaeval baron to whom he was lending money.
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> Nevertheless, it is this great class of employees, working for salaries, which distributes the goods of the world. The new class, however, has already shown signs of developing a creed of its own and a set of heroes. In our universities it is represented by a group of younger economists, political scientists, and lawyers.[85]

Unfortunately, Arnold did not suggest any procedures for the systematic consideration of policy alternatives; like the majority of

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84. *Symbols, supra,* note 2 at 270-71.
85. *Folklore, supra,* note 2 at 38-39.

American Jurisprudes in that optimistic era, he evidently felt that the inculcation of a scientific attitude was innovation enough for a legal system suffering from a prolonged overdose of arid conceptualism. In the years following the second world war, however, there is evidence that Arnold regretted having stopped his inquiries at that point and he expressed keen disappointment with the achievements of the new "social technicians".[86] As Jacques Ellul has so poignantly stated:

> . . . it is apparently our fate to be facing a "golden age" in the power of sorcerers who are totally blind to the meaning of the human adventure.[87]

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86. In the last chapter of *Symbols*, . . . I note that the psychiatric point of view is spreading to the conduct of government and institutions and express the belief that the attitude toward law and economics "is slowly appearing to create an atmosphere where the fanatical alignments between opposing political principles may disappear and a competent, practical, opportunistic governing class may rise to power." I appear to have been right in my prediction but not in my hope. (Letter written in November, 1959: *Selections, supra,* note 1 at 57.)

87. J. Ellul, *The Technological Society* (New York: Vintage Books, 1964) at 435. Note Arnold's attitude as manifested in a letter written in December 1956: *Selections, supra,* note 1 at 54-56:

> . . . the new conception of governing people by the manipulations of symbols and attitudes has not brought pleasant results. It has given us Madison Avenue instead of Wall Street, it has led to the belief of the Communist that he may manipulate men's minds with conscious hypocrisy. It has not been a unifying force and I have now come to the belief that moral principles firmly believed in as a matter of faith are essential to freedom in any society..