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## *Fair Fight and Foul: A Dissenting Lawyer's Life*, by Thurman Arnold (1965)

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# BOOKS

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## BOOK REVIEW

FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE. By Thurman Arnold. New York: Harcourt, Brace & World, Inc., 1965. Pp. xi, 292. \$5.95.

"In spite of its imperfections and its aspects of high comedy," writes Thurman Arnold, "there is no career in the world more interesting than the law in the United States. You have an orchestra seat from which to observe the most fascinating spectacles" (p. 270). He sees Harvard busily buying books and just as busily giving scholarships to make sure the books are read, Yale trying to make law a behavioral science, lesser law schools trying to imitate one or the other, law firms with hundreds of lawyers working day and night to find cases to include in their briefs and "thus confuse the courts," judges and their law clerks in turn working just as hard to avoid being confused, Establishment high priests stamping the imprimatur of orthodoxy on things political and economic while castigating all other thinking as "unsound," Madison Avenue's P.R. men making the images of our political leaders, and scientists ("the only knowledgeable hard workers in the lot") devising means by which we can destroy ourselves and civilization (pp. 270-71). And he sees another fascinating spectacle — Thurman Arnold dressed in "striped pants" and "a high silk hat," passing in life's review (p. vii). As he watches himself go by, he attempts to record and understand his role in the human venture.

If one knows anything about Thurman Arnold, the prospect of reading his autobiography is inviting. Irreverent legal realist, former Yale professor, author of two brilliant books,<sup>1</sup> chief of the antitrust division of the Department of Justice in the latter days of the New Deal, ex-judge of the U.S. Court of Appeals for the District of Columbia, and friend and former associate of Justices Douglas and Fortas—these are the marks of a man about whom we should like to know a great deal. Thus for those who are familiar with his writings and want to understand the man in depth, his prefatory comment that writing auto-

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<sup>1</sup> ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

biography is "much like dressing yourself in striped pants, putting on a high silk hat, and watching yourself go by" is disconcerting, for it symbolizes formality and gives rise to the suspicion that when it comes to certain subjects, such as aspects of his personal life affecting his official conduct, Arnold will hide behind his stiff white shirt front and black tie. To a large extent the suspicion is justified. Arnold speaks of his youth with some candor, though the recollections of that period are intended to amuse as much as to enlighten, but as he approaches his important official years, he becomes more and more distant as a person, and the focus of the book shifts from Arnold's life to Arnold's views about life.

For those who expected the confessions of a legal realist, the shift is disappointing. Yet the book remains interesting to the end, mostly because it discusses and illustrates Arnold's major original insight—the significance of the symbolic aspects of law and politics—something political scientists and sociologists are just beginning to study systematically.<sup>2</sup> It may not have been by design, but no matter what Arnold discusses, he soon taps its symbolic dimension. Here are a couple of examples. Although he thinks the NRA was economic nonsense, he recognizes its symbolic importance, for President Roosevelt used it as "an instrument that gave the people hope and courage. When it ceased to do that, Roosevelt turned to other means" (p. 146). In regard to the Supreme Court, Arnold believes that the legal realists of the 1930's, himself included, did yeoman service in exposing the psychology that lies behind the facade of legal logic, but he concedes that "legal realism is not effective in giving to our legal institutions the public respect required to symbolize the great ideal of a rule of law above men" (p. 70). The Court today, he says, is dramatizing the ideals of due process and equality, and because it has been fairly successful in symbolizing these values, it has retained public respect and hence political power.

In symbolic terms, the most important position Arnold held was U. S. Court of Appeals judge. At the time of his appointment, it was his intention to spend the rest of his years on the bench. The chapter dealing with his judicial period is surprisingly short—less than four pages, half of which have little to do with Judge Arnold. Further, for some

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<sup>2</sup> EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963). Harold D. Lasswell, however, like Arnold, did much of the pioneer work in this area. See LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* pt. II (1935); LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* ch. 2 (1936); LASSWELL, LERNER & POOL, *THE COMPARATIVE STUDY OF SYMBOLS* (1952).

reason not directly disclosed in the text, those pages seem to have been written with tongue in cheek. Why did Arnold resign from the Court of Appeals? His answer is that he felt that he was by temperament more of an advocate than a judge, that the judicial role did not satisfy him, that he was impatient with legal precedents that reached unjust results, and that he felt restricted in being unable to speak out on controversial subjects. This is a plausible explanation, but one wonders whether there might still be more to it than that. Although Jerome Frank was able to adjust to the bench, it seems incongruous for a legal realist to take the robe without compromising his position; it is almost like an unbeliever taking holy orders. A legal realist at the bar is another matter; there his realism contributes to success in the profession. Unlike the judge, he can quip, as Arnold impishly did in his *Playboy* brief: "The only way to avoid such repellent descriptions is to hold that no nudes is good nudes" (p. 184).

*Fair Fights and Foul* was published just before Abe Fortas—Arnold's law partner and one of the persons to whom the book is dedicated—was appointed to the Supreme Court. A number of cases in which Fortas was counsel—such as *Lattimore*, *Durham*, and *Gideon*—are discussed, but no clear picture of Fortas' personality or value system emerges. The impression Arnold gives, however, is that he and Fortas were in substantial agreement concerning most social and political issues. In view of Fortas' elevation to the High Court, it is unfortunate that Arnold did not write in greater detail about his partner. There is, of course, still time to do so.

Thurman Arnold's memoir is delightful, informative, and interesting; it whets the appetite for more. And there is more to be said, a great deal more. But to say it Arnold will have to take off the high silk hat and striped trousers. Perhaps it is too much to ask for the candor of Rousseau, Norris, Gide, or Augustine. Many would settle for a good deal less—what Arnold himself would have settled for when he and Edwin Robinson taught their course at Yale on the psychological basis of law.<sup>3</sup>

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<sup>3</sup> See ROBINSON, *LAW AND LAWYERS* (1935).

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