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## Arnold: Fair Fights and Foul: A Dissenting Lawyer's Life

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## RECENT BOOKS

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

Thurman Arnold brought a very bright mind to the most varied career in the history of American law. A Chicago lawyer, Wyoming legislator, Laramie lawyer, West Virginia dean, federal prosecutor, Yale professor, federal judge, and founder of one of the nation's leading law firms, he has accumulated an enviable breadth of experience. His recounting of it is bound to entertain any lawyer and most laymen.

For profundity or novelty, the book is a bit disappointing. Arnold lacks the introspection or the immodesty to let us share his inside view of these experiences. If he has spared us the vulgar breast-beating that seems to characterize many lawyers' accounts of Cases They Have Won, he has not resisted the temptation to publish a work that might have been more accurately subtitled "A Lawyer's Favorite Briefs." *Fair Fights and Foul* is not any less readable on that account, however.

Appraised as advocacy, the book must be accounted a success. Partly this is because he is a facile advocate; partly it is because, like Perry Mason, he is on the right side of almost every issue. He is for good government, fast trains, pure water, reapportionment, integration, fair trials, the Federal Rules, the Supreme Court, humane treatment of mental incompetents, and competition. He is against McCarthyism, legislative abuse, red tape, poverty, big trusts, doctrinaire ignorance, the forms of action, censorship, and McNaghten's Rule. It is perhaps his advocate's skill that leads him to fight always from high ground.

He is not always shooting at fish in a barrel. This book purports to be in part an updating of his *Folklore of Capitalism*, and his economic views cannot be expected to seem unassailable to all. His prescriptions of a bit of economic planning, loose money, and budget un-balancing do not exactly express "conventional wisdoms." On the other hand, his affirmative proposals are never too precise; the conservative counterattack must locate a moving target. Arnold's purpose seems to be less to make new suggestions than to remark on the rising acceptance of some of his earlier views—to gloat, in other words, over recent election returns.

For this reviewer, Arnold's style is marred by his persistence in ascribing religious fervor to all his foes. This is almost a fetish. Doubtless there is some truth in the observation that our views on social issues must ultimately rest on faith of some kind, and some popular nostrums have little else to sustain them; it is helpful em-

phasis to dismiss them as primitive medicine for witch doctors. When the weapon is used as a blunderbuss in all directions, however, the recoil must be damaging to the marksman. So it is to Arnold. After garbing all his adversaries in the ghoulish masks and cloaks of medicine men, he is left as the only non-ghoul—the knightly champion of Reason. No one can play this role and get away with it. Arnold hasn't all the answers and, in the end, his views also must rest on faith of a sort. When this truth inevitably emerges from time to time, the reader is inspired to throw a rock or two at the iconoclast.

This feature of his style is most discomfiting in Arnold's chapter on the law as a learned profession. His point is made with such ambivalence that it is a little hard to be sure what it is, but the thrust seems to be that intellectual effort is less necessary for lawyers than it seems; the English make out pretty well with nothing but careless, glib advocacy, and the more scholarly approach of American lawyers is important only as ceremony. By smothering our contentions with footnotes and string citations, we nurse the illusion that we are distilling impartial principles of law to be applied by an impartial judiciary.

This ideal can never be achieved. An objective psychologist would probably say that it has no scientific basis, that no amount of research and conferences can eliminate the instinctive reactions that the environment and the training of a judge have created and that condition his reasoning. But such a psychologist would be forgetting that a more important purpose of the judicial process, exceeding in social value what happens in an individual case, is the belief it induces in the public that there is and can be impartial justice. This ideal is celebrated by our law schools and by our tradition of legal scholarship. It is offended by oral decisions made immediately after oral argument. We can never attain to Britain's speedy administration of justice.<sup>1</sup>

The appearance of learning is all that is required to preserve the illusion. There is an easy cynicism in this. Of course, the ideal described can never be achieved, nor perhaps can any other in such an imperfect world. But the pursuit of it is important for a reason that Arnold's behavioral psychologist would probably reject, if it occurred to him. It may be, as the psychologist might urge, that men are controlled by their environment and cannot control it; but their brutish lives are more interesting when they try. Our legal scholarship represents our collective effort to find means to control our collective destiny as a community. It is more than a heraldic ritual of impartiality; for that, trials by ordeal would serve as well. Our efforts at a reasoned legal process are the sign, also, of our confidence that together we may yet control the beast; that, by ordered means, we

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1. P. 260.

can do what we intend. When we stop doing the hard thinking about legal problems, we will yield our collective hopes for a more sociable future. The legal profession, with its responsibility for learning, is the custodian of these hopes. Woe to him who slackens!

It is possible to dismiss this view as so much ascetic Puritanism, and Arnold is tempted to do so. But he is ultimately true to his Presbyterian ancestors and embraces it. His career as scholar, judge, and advocate refutes his denial and demonstrates a concern for sound policy; he has eagerly joined in the process of forging it on the anvils of research, the sweat of earnest intellectual effort visible on his brow. This very book testifies to his belief that clear thinking has a future. If we scholars are not always lucid and relevant, that is no reason for the young advocate to become a cavalier. Arnold did not. And if he does not always know what he is talking about or studying, that is no reproach. The ideal need not be attained; it is sufficiently important simply that we prolong the quest for the ideal so that others can hope, and perhaps join in the entertainment of the pursuit.

In describing Arnold's own attitude toward the determinism he seems to preach, it seems fitting to use his own anecdote:

When I was twelve I worked for one of my father's clients, Colonel E. J. Bell. He owned large ranches and put up over two thousand tons of hay. I proudly drove a rake. The Colonel had a hay crew of about fifty men, which made it expensive when the rain stopped all haying activity until the grass was dry. One Monday it started to rain. Tuesday it was still raining; Wednesday the same. But Thursday was bright and sunny and the hay dried and the mowers went into the field. Friday morning the rakes and the stacking crew were called out. But at noon on Friday it began to rain again.

I remember the scene as if it were yesterday. I was unhitching my horses from the rake. The rest of the crew were doing the same. Suddenly there appeared from the direction of the ranch a tiny speck. As it grew larger we could see it was a man on horseback. Then we could see that it was Colonel Bell, riding toward us at a dead run. When he reached the haystack where we were unharnessing, he pulled his horse back on its haunches, drew his revolver and began to shout at God. "I see the bald-headed old S.O.B.," he shouted, "and I'll get him!"<sup>2</sup>

It is not hard to imagine Arnold in Colonel Bell's stirrups. *Fair Fights and Foul* is, after all, a sort of skyward shaking of the fist. It is admirable just because such audacity is the secret ingredient of aspiration, if not of progress.

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2. Pp. 6-7.