

LEGAL REALISM AND THE BURDEN OF SYMBOLISM: THE CORRESPONDENCE OF THURMAN ARNOLD

WARREN J. SAMUELS*

This study uses the recently published correspondence of Thurman W. Arnold to examine his work in legal realism, symbols, power, and antitrust. It focuses on how Arnold, seeing symbols as functional, not merely insubstantial, was quite comfortable in pursuing a successful career within the system and using symbols to affect behavior, as in his antitrust work.

I. INTRODUCTION

What do the lawyer and economist do upon discovering that the king has no clothes? Economics and law are existential disciplines. Both confront directly the reality of radical indeterminacy: human society is an artifact, subject to revision, reformed (deliberatively and nondeliberatively) through the processes of living and interacting. The future is indeterminate because it is in part created through the very effort to comprehend and control it. What, then, does the law-economics scholar do upon ascertaining that social awareness—including both economic study and the practice of law in all its ramifications—largely deals with symbols which, while socially functional, lack substance?

That question arises most forcefully with regard to Thurman Arnold, legal realist at Yale, antitrust lawyer, appellate judge, and Washington lawyer. Arnold is an enigmatic figure. His mind perceived fundamental social processes (although he did not make a career as a social scientist and had no “system”). In recognizing the symbolic construction of social reality, he exposed much of popular secular faith and ideology as

* The author wishes to thank John Henry Schlegel, Elizabeth Johnston, Stewart Macaulay, Joel Grossman, and two anonymous referees for their helpful comments on an earlier draft of the article.

insubstantial symbols (Arnold, 1935, 1937). This revelation appeared to liberals as a precondition to fundamental social change and was, for that reason, repugnant to conservatives. But Arnold also had his conservative and establishmentarian side. Moreover, for all his emphasis on the predominant role of insubstantial folklore (a synonym for symbols), Arnold appeared to interpret the world in terms of power and, thereby, power players. By seeing symbols as functional, not merely unreal, Arnold was quite comfortable in using them to affect behavior, particularly in his antitrust work.

The publication of a selection of Arnold's correspondence (Gressley, 1977), covering his entire life (1891-1969), provides important insight into his complex and truly enigmatic mind.¹ This essay will discuss Arnold's analyses of legal realism (including the relations between judiciary and legislature), symbols, power, and antitrust as revealed in these papers,² and attempt to interpret his thought in terms of the question posed at the beginning of the essay.

II. LEGAL REALISM

The editor of the selected correspondence correctly establishes Arnold's credentials as a legal realist: his demystification of law; functional analysis; concentration upon the nature of the legal decision making processes; skepticism as to rules, facts, and precedents; judicial subjectivity; and pragmatism (pp. 31ff). Arnold supported empirical (but not necessarily solely quantitative) legal research as instrumental to both understanding and reforming the operation of legal processes. However, such research was to be kept in perspective. Arnold wrote to Felix Frankfurter (February 23, 1933: pp. 195-196): "We have made the most elaborate purely objective study of the courts which, I think, has ever been made, and it shows, among other things, that there is no particular object in counting anything until you have an idea what you want the information for." Gressley (p. 34) has correctly stressed that to Arnold the functional role of the myths and symbols of law was more important than the empirical knowledge of facts per se, although

¹ The title derives from Robert Jackson's description of Arnold as "a cross between Voltaire and the cowboy, with the cowboy predominating" (Gressley, 1977: xiv; all page references not otherwise identified are to this book).

² Arnold engaged in a prolific correspondence with many of the great thinkers and jurists of his day. The author is, and the reader should be, sensitive to the interpretive limits inherent in the use of correspondence.

it might be more accurate to say that the existence of that functional role was the fact of principal importance to Arnold.

The concepts of legal realism enabled Arnold to penetrate the fundamentals of the legal process, with symbols becoming the subject of analysis rather than accepted elements of the universe of discourse. But legal realism involves a paradox:

The paradox is that I doubt if any law school as an institution can ever maintain an objective point of view as to the law. It would be like asking the Catholic Church to write an objective history of Catholicism.

Therefore, law schools all over the world gravitate into theology. The realistic law schools build up a theology of their own. . . . My own way of expressing the paradox is to say that if people generally agreed with what I said, nothing I said would be any longer true (TWA to Sergius M. Boikan, June 22, 1960: pp. 436-437).

Gressley (p. 34; see Arnold, 1957) quotes from articles by Arnold on symbols and on Jerome Frank:

Realists prove incontrovertibly that there can be no objective reality behind the law as a brooding omnipresence in the skies—only to find their own writings swallowed up and becoming a part of that brooding omnipresence which they are insistently denying.

But realism, despite its liberating virtues, is not sustaining food for a stable civilization.

In Arnold's view, legal realism was false and misleading insofar as it denied the perpetual role of, and need for elements of, faith. Old discarded faiths will be replaced with new and inspiring ones (p. 34). He objected to those who "think that some day we will 'grow up' and will no longer feel the need of drama and ritual and ideals which can only be taken on faith." Indeed, he argued that "I do not believe that I would want this to happen. . . . My general attitude toward courts and substantive law is generally criticized as 'cynical,' but I do not intend it to be so. Drama and even melodrama are to me very effective instrumentation controlling human emotions and conduct" (TWA to Arthur L. Goodhart, March 12, 1932: p. 185). In other words, the idealist and social control roles of law are inevitable as well as essential (p. 35). Identifying law (and economics) as so many symbols will not obviate the need for law or symbols. Arnold ultimately adopted the high priest, or manifest function, view of law:

May we compare the decision of an appellate tribunal to a play, which is well acted, and which is accomplishing its purpose in moving the audience. . . . A realist who bobs up constantly calling the attention of the audience to the fact that it is only a play, will spoil the performance, and should properly be ejected. The judges . . . should . . . not concern themselves with the fundamental truth of the lines, or they will ruin the play They derive certain dramatic effects, and the lines should be judged by their utility in expressing the ideals that the performance aims to get across the footlights (TWA to Arthur L. Goodhart, March 12, 1932: p. 184).

Law: Judiciary and Legislature

Arnold perceived a ubiquitous and inevitable tension between judiciary and legislature—between common law and statutory law—as modes of creating law and governing. He also understood that the immediately critical questions were who was to decide (make law) and what would be the balance of continuity to change in the law. The tension existed, for example, over rule making, judicial reform, judicial review, and substantive law. It also extended to constitutional politics. Accordingly his views were quite complex. Courts were and had to be essentially conservative, but he opposed the use of law to protect special privilege (p. 353). Instead, Arnold argued that activist judicial review negating experimental legislation would endanger the prestige of the courts (p. 200): “the judicial symbol will penetrate into corners where it has no business” (TWA to Felix Frankfurter, June 11, 1934: p. 201); and one should attack the judicial process from going “where it is obviously inapplicable,” although he “would not remove the judicial process from everything” (p. 203). Arnold could revere the majesty of the law, courts, and judges (p. 55); identify the role of symbols functioning to promote judicial power and prestige (pp. 34, 298); frequently criticize Supreme Court decisions; perceive “the decisions from which a completely new constitution has been evolved and gradually accepted since 1934” (TWA to Alpheus Thomas Mason, May 3, 1967: p. 467); assert that the ideal of impartiality and uniformity “justifies the existence of an independent judiciary” (TWA to Arnold L. Goodhart, March 12, 1932: p. 184); and contend that “the Supreme Court of the United States is my idea of a collection of useless priests and their preaching fills me with melancholy in spite of the realization of how inevitable it is” (TWA to Rev. William G. Gehri, January 9, 1936: p. 216). Arnold could defend the federal judiciary, asserting that it decided cases only on “precedent and principle,” not on “arbitrary personal opinions” (TWA to Arthur Sulzberger, August 25, 1939: p. 292); but he also could acknowledge that the judges of the Supreme Court “when . . . writing decisions which give ‘hospitable scope’ to legislative policy introspectively arrived at . . . have almost any latitude that they want to give themselves” (TWA to Edward A. Evans, February 17, 1941: p. 312).

With regard to continuity and change in the law, Arnold wrote that “lawyers and economists have always been a frustrating force in American society.” Furthermore, the role of the

Supreme Court is, paradoxically, to operate conservatively to permit change:

I disagree with you about the Supreme Court being an inadequate instrument for social change. I think it is most useful because it never presents a controversial issue in a way that requires any immediate action. . . . By this method the reactionary groups gradually wear themselves out, like a big fish struggling against a line with thirty pounds pressure (TWA to Rexford G. Tugwell, August 22, 1967: pp. 474, 473).

The heart of the matter, in Arnold's mind, was his Russian ballet theory of law: contradictory, even antinomial, elements enter into a moving parallelogram of force along a path of social change.

From a philosophical point of view, I believe that stable social organization must be like a ballet in which all sorts of characters, representing different ideas, dance in some sort of balance. . . . This idea of a stable society as a set of contradictory ideas in some sort of balance has no utility in the public forum. It has no inspirational quality. Yet the public is becoming dimly aware of it (TWA to Rexford G. Tugwell, May 26, 1967: p. 471).

A workable philosophy, it seems to me, is necessarily a maze of contradictions so hung together that the contradictions are either not apparent or else are reconciled by a mystical ritual. Your article makes me believe that this is pretty much the old natural law idea. . . . I have a more dynamic conception of society. . . . It seems to me that the Russian ballet theory of law adds just the moving element to the natural law concept necessary for my comfort. In other words, the unity and rhythm of an institution requires people dancing in different directions and alternatively coming together and apart (TWA to Edward H. Levi, December 11, 1937: p. 267).

Thus, "in America, . . . I suspect much of our trouble comes in treating *stare decisis* as a method of *deciding* cases, and not as a method of classifying ideals" (TWA to Arthur L. Goodhart, March 12, 1932: p. 184); "The trouble with us over here is that sometimes a court talks in terms of *stare decisis* and sometimes drags in all sorts of social and economic factors. . . . Our Supreme Court is constantly wavering between one position and the other. The trend of our law review talk is that courts should follow only those precedents which are of the type that ought to be followed" (TWA to Arthur L. Goodhart, March 9, 1935: p. 205).

Law, then, in Arnold's view, involves grand tautologies enshrined in, sanctioned, and given effect by symbols. Law is a set of symbols, but as such it is complex and laden with tensions between precedents, modes of law, and forces of continuity and change. The ultimate message of legal realism, in this context, is the reality of human choice. Correlatively, the central human problem is the management of changing preferences. Law is inevitably heterogeneous and tension-ridden. It also is inevitably normative.

Equal in importance to Arnold's emphasis upon the symbolic nature of law was his deep affection for law, lawyering,

and the legal process. He accepted the adversary process and espoused the traditional definition of the lawyer's client-centered responsibility (see pp. 128, 461; compare pp. 55-56). More broadly, Arnold's legal realism was not accompanied by deep disaffection for the society in which he lived. He considered himself a Middle Western liberal or progressive but, as Gressley (p. 94) argues, was "far more politically conservative than most of his friends or detractors ever realized." He believed "that our institutions are fundamentally sound and, therefore, all we need to do is attack entrenched special privileges" (TWA to Mr. and Mrs. William Allen White, September 9, 1943: p. 347). He identified with Senator Joseph O'Mahoney's (D., Wyoming) record as "just the kind of a liberal record that we need. It has no tinge of radicalism, it is in line with every established American tradition" (TWA to Leon Henderson, September 15, 1947: p. 373).

Change is to be gradual, but it must come. In 1934 Arnold wrote: "We have a system that does not seem to be able to adjust itself to a new class which is rapidly coming into power, i.e., the employee class, big and little. This class must save in order to get security and must work in order to get purchasing power. Both savings and work intensify the problems of distribution. . . . Worse things happen to societies because of failure to adjust than because of temporary misfortunes due to experimental adjustments" (TWA to Sam Bass Warner, April 26, 1934: p. 201). The next year he wrote: "I personally believe that Roosevelt is the only hope for sensible conservatives if they could see it that way. It is tragic that they should be so convinced that the clock could be turned back to 1929 that they do irreparable damage to a sane, conservative position by moving to positions on the extreme right" (TWA to Frank Murphy, September 3, 1935: p. 210). He stated his own position the year earlier in these words: "I would only be for the social change which comes in satisfying conservatives that their own symbols are not being abandoned and at the same time forcing them to face real issues and plan where a symbolism only confuses" (TWA to Felix Frankfurter, June 11, 1934: p. 203).

Over thirty years later Arnold wrote about reactionary groups wearing themselves out against the pressure of gradual court-supervised change (p. 473). Arnold accepted the system and supported in theory social change which accommodated but did not surrender to conservative interests, and which was gradual. Above all, he advocated an open economy in which

law was used to promote competitive behavior rather than protect entrenched special privilege. Arnold's identification with the New Deal and with vigorous antitrust enforcement (considered below) must not obscure his relative conservatism. To him, antitrust was a conservative, traditionally American, antiradical policy. (Arnold's reliance on the consent decree in antitrust enforcement is an indicator of his combination of antitrust and conservatism.) He wrote, in 1933, that "the best solution would be to develop a happy and content peasantry. However, I doubt whether this is possible in our present cultural pattern" (TWA to Harrison C. Dale, March 17, 1933: p. 197). This was certainly not a radical view.

Arnold defended civil liberties during the McCarthy period. He believed that the hunt for "subversive and un-American" activities was dangerous, that it paralyzed the "independent thought and action" which were "essential to the character of democratic government" (TWA to Edward S. Corwin, January 7, 1947: p. 369; and to The Editor, New York Times, February 12, 1948: p. 380). "The tragedy of it all is that I have very good grounds to believe that it is the communists themselves who are turning in to the FBI and the Congressional committees accusations against persons who are in their way" (TWA to George K. Gardner, April 19, 1950: p. 389). His patriotic defense of civil liberties also, perhaps paradoxically, led him to oppose the invocation of civil liberties in cases of civil disobedience and campus dissent during the Vietnam period. This he saw as going toward the "extreme left" (TWA to Ernest Angell, May 27, 1968: pp. 477-478). But Arnold made financial contributions to the campaign of Senator Ernest Gruening, with whom he disagreed over the Vietnam war (see pp. 472).

As Gressley concludes, Arnold's was a "conservative prescription for society. . . . Arnold believed capitalism to be as valid as any economic system; the problem was to make it work. . . . All Arnold advocated was finding a practical way of altering society without upsetting our traditions" (p. 38). For those who wrapped the imagery of the system around their established positions and practices, entrenched privilege or not, antitrust enforcement was made to appear radical. But to Arnold, this was a matter of symbols.

III. SYMBOLS

Arnold's analysis manifested enigmas and tensions because it comprised an amalgam of several seemingly disparate themes. He argued, first, that society, economy, and polity

were artifacts, a product of deliberative and nondeliberative human choice. Second, he most conspicuously argued that to understand social phenomena it was necessary to concentrate upon social symbols, or folklore, and not on some presumed underlying reality to which the symbols supposedly pointed. Symbols were seen to be important because they defined reality for people, and people acted and made choices based upon them. But, third, Arnold also argued that the symbols were ultimately specious and that, accordingly, one should study underlying power relations. More correctly, he believed that there was a complex process of interaction among symbols, among them and the behavior and choices to which they gave rise, *and* among them and the power structure. Symbolic structure and power structure interacted; each was both cause and consequence of the other. In effectively arguing for their joint importance, Arnold was in the tradition of grand social theory. Like Vilfredo Pareto, W.I. Thomas, Florian Znaniecki, and G.H. Mead, among others, Arnold thought that his was essentially a psychological point of view (TWA to Sam Bass Warner, April 26, 1934: p. 200).

One had to understand that symbols were important, not because they connoted anything real, but because they worked upon and reflected the human psyche. In Arnold's view, people acted upon their beliefs, and these beliefs became real in the consequences of that action; what they believed was what was important. As far as action was concerned, their beliefs were the operative reality. For example, in addressing the idea that politics is based upon discontent as to whether people "are getting enough money to live decently," Arnold maintained that "it is not important what they are getting. The only important thing is whether they think they are getting enough" (TWA to Eugene Davidson, July 23, 1937: p. 262). The general principle is: "If you once understand that human behavior is symbolic then you cease to look for the reality behind the symbols" (TWA to Sam Bass Warner, April 26, 1934: p. 200). People "are motivated by symbols and can be manipulated by them" (TWA to John R. Glenn, June 22, 1960: p. 437).

Arnold felt that the professions of law and economics did not contain truth but were laden with symbolic thinking which conditioned behavior; economics guarded vested interests, and the law lent them permanence (p. 35). Law was largely primitive ritual (TWA to Max Radin, June 5, 1936: p. 230) and all economic theory was so much folklore: "I believe most economic courses contain only theology. . . . Most . . . are an evaluation

of the soundness of one economic theory as compared to another" (TWA to Alpheus Thomas Mason, May 3, 1967: p. 468).³

Although Arnold revealed symbols to be substantially empty and often utterly meaningless, he emphasized (as did Pareto and J.H. Robinson) their essential social role. Belief in metaphysical entities and concepts functioned to sustain civilization and institutions, condition behavior, and cement society. What was substantively empty was nevertheless emotionally and thus socially *and* scientifically important (pp. 34-35).

Symbols were often anthropological subterfuges erected to protect cultural taboos (p. 61). "Protection" meant reinforcement because most symbols operated conservatively. But continuity had to confront change, and while established folklore was necessary, continuity could be had at too great a price (p. 516, n. 148). Old symbols in new settings may only function "to protect uneconomic special privileges and to sabotage reform" (TWA to Thomas Reed Powell, November 4, 1944: p. 353). The clash of continuity and change of symbols—what Joseph Schumpeter might call the creative destruction of symbols—meant that while "the Supreme Court of the United States is gradually manufacturing a new set of slogans," the old ones "are still hovering over the situation like a cloud and creating confusion whenever they speak" (TWA to Max Lerner, December 9, 1939: p. 298). What others called "hypocrisy," Arnold regarded "as the inevitable conflict between idealism and common sense. It is a psychological necessity for every human being to put on a silk hat and watch himself go by. He has to adopt a lot of different roles and, of course, they are inconsistent" (TWA to Joseph Hergsheimer, July 12, 1943: p. 347).

In the 1930s Arnold felt that the United States required a new set of symbols (pp. 35-38). In 1936 he wrote to Harold J. Laski (February 28, 1936: p. 224) that he was "looking for symbols to put a different class of politicians in power. Not a set of brighter or more intellectual politicians, because I doubt the efficacy of reason in political action, but a set of people with a different kind of objective"—politicians who were more pragmatic and opportunistic.

³ Arnold thought that John Kenneth Galbraith's courses at Harvard were "splendid" but that the teachings of economists at the University of Chicago were "fantastic nonsense" (TWA to Alpheus Thomas Mason, May 3, 1967: p. 468). Arnold, of course, was choosing certain symbols over others. He agreed that "Of course competitive doctrine is a kind of folklore but so is every other economic theory. In my view it is the only one that we can operate under. It is part of our cultural pattern and no nation can change that pattern" (TWA to Matthew Josephson, October 17, 1945: p. 366; see also p. 514, n. 136). On political theory and constitutional law, see pp. 183-185, 188, 202, 240 and *passim*.

Arnold, in calling for new symbols to permit socioeconomic change, said that he felt no personal need to write the new folklore for America (p. 231). But he clearly did take a functional or instrumental view of symbols: evaluation was to be by consequence, not by doctrine.

You judge the symbols as good or bad on the basis of whether they lead to the type of society you like. You do not cling to them on general principles when they are leading in the wrong direction (TWA to Sam Bass Warner, April 26, 1934: p. 200).

My own feeling is that man was born to be harnessed by priests and that this is one of the crosses which he must bear. However a realistic appreciation of this fact is like the physician's appreciation of the fact that he has certain physical limitations and a social diagnosis would require that his need in this direction be ministered to. Therefore I will make a distinction between useful and useless priests from the standpoint of humanitarian values (TWA to Rev. William G. Gehri, January 9, 1936: p. 216).

The operative questions become: Whose symbols? Whose conception of the good or desirable society?

Before considering the question of power, it should be made clear that Arnold did not eschew a personal role in the instrumental manipulation of symbols. His activism in the field of antitrust was no accident. He thought that doctrines about economic competition were folklore, but necessary nonetheless (TWA to Matthew Josephson, October 17, 1945: p. 366). If the joint concepts of competition and antitrust "were abandoned the last impediment to concentration of economic power would be gone" (TWA to Joseph Featherstone, August 11, 1965: p. 459). He later admitted that *The Bottlenecks of Business* (Arnold, 1940) "in effect asserted that if the antitrust laws were enforced all our economic ills would be remedied," and argued that "this extreme faith in the Sherman Act is nonsense, but there seemed no other way of explaining the antitrust laws to businessmen who had been evading them for over twenty years" (TWA to Rexford G. Tugwell, May 26, 1967: p. 471).

IV. POWER

Arnold was especially and unusually alert to the ubiquity and importance of power in human affairs. Although he did not formally theorize about power, his ideas on the concept are implicit in his writing. Several themes are evident in the correspondence. The distribution of power, income and wealth is important (p. 200). Economic history and political history are not separate subjects (p. 464); their nexus is power. Policy is a function of political power, that is, control of government (p. 232). Government is a function of class relations (although not in a strict Marxian framework) and of the philosophy of the

politicians in power (p. 224). Among other things, symbols function to rationalize power (p. 188). Finally, Arnold had a deep sense of the power play attending antitrust litigation (pp. 333, 354) and of the use of the war effort by business to restructure the control of the economy along monopolistic or cartel lines (p. 333).

Arnold's great interest was the economy as a system of power. He denigrated "the steadily growing concentration of economic power in the United States" (TWA to Oliver Jensen, June 10, 1959: p. 433). He thought that we had developed "an industrial feudalism" (TWA to Oliver M. Thomason, June 19, 1936: p. 230). The international cartel system he saw as a threat to stable world organization (pp. 350, 390-391); the League of Nations had been dominated, in his view, by the chemical and steel cartels (p. 350). He accepted twentieth-century industrialism but lamented the loss of economic individualism. He favored an economic politics of opportunity rather than security (pp. 44, 51-52). He lauded Roosevelt for having created "a new set of rules curbing the use of power by industrial empires" (TWA to T.A. Larson, June 6, 1966: p. 464).

What is the relative importance of symbols and power? Three aspects of an answer appear in Arnold's correspondence. First, symbols may not be substantial but they are important. Power players use symbols and, in that context, "philosophies are the most important thing in the world" (TWA to Harold J. Laski, January 9, 1936: p. 217).

[N]o social philosophy is worth anything unless it becomes part of the folklore of the people (TWA to Oliver M. Thomason, June 19, 1936: p. 231).

Second, symbols (ideas) and power coexist in an ambiguous mixture:

We are not going to pull out of the present mess without a great deal of confusion. On the other hand, we are not going to get any feeling of economic comfort until our predominant idea has at least a semblance of reality (TWA to Matthew Josephson, October 17, 1945: p. 367).

Third, emphasis is on real situations, ultimately articulated in terms of power, to which symbols relate, if at all, in no necessary way.

[W]riters, economists and philosophers as motivating forces in the development of social organization . . . have very little to do with it and you would have just as much socialism if Karl Marx had never lived as you have today. You know the thesis of my *Folklore of Capitalism* (TWA to Jerome N. Frank, June 18, 1945: p. 358).

All of the literature which I have received and read on child labor has been a battle of symbols. . . . My own impression, however, is that child labor in the south exists only because of political control of the few interested people (TWA to Epaphroditus Peck, July 13, 1936: p. 232).

[F]unds and personnel . . . are more important than sermons or abstract principles (TWA to Max Lerner, December 9, 1939: p. 297).

It would appear that the essence of Arnold's position is that symbols (words, philosophies, myths) function with respect to social organization and situations, but their content and role bear no necessary relation to any independent reality. Symbols and doctrines may and should be studied, not for their illusory substance or as independent of social reality, but as part of and subordinate to the study of social organization and situations having the logic of power and of symbols manipulated by power. Arnold was the critic of antitrust who ended up in charge (pp. 36, 39-40). But, fifth, while antitrust enforcement was vigorous, it was also limited in scope and thrust under Arnold's direction. He wrote that "the inevitability of vast integrated corporations . . . is contrary to the fundamental thesis in which I live and have my being" (TWA to Jerome N. Frank, June 18, 1945: p. 358), but the role of antitrust was to reform behavior, not restructure industry (pp. 43, 51-52).

The purpose of the antitrust laws is to insure freedom of business opportunity. They are not designed to protect small business from larger and more efficient competitors. They are not designed to prevent the growth of nationwide business enterprises so long as that growth is a product of industrial efficiency. Even if, through greater efficiency in operation and distribution, a corporation achieved a monopoly, that in itself would not violate the Sherman Act. But this has never yet happened. Monopolies have been built up using financial strength to buy out competitors or to force them out of business. It is this sort of growth and only this sort that the antitrust laws are designed to penalize (TWA to Alfred Friendly, August 9, 1961: p. 439).

The only purpose of the present antitrust laws is to make great industrial empires behave (TWA to T.A. Larson, June 6, 1966: p. 463).

Perhaps Arnold's ultimate message is that insofar as the function of symbols is to obscure and legitimize power, the policy analyst and student of society must penetrate to the level of power and the functional role of symbols with respect to power, and not be misled by the symbols themselves. Symbols do not reflect an independent reality but have a role in the social construction of reality as deliberative and nondeliberative instruments of power players.

V. ANTITRUST

Arnold's position on antitrust was quite complex. First, he clearly supported its promotion as a functional symbol to enhance a competitive economy (p. 44). As chief of the antitrust division, he was quite willing to respond to the press to improve the climate of opinion regarding antitrust (see pp. 233-340). Second, he supported vigorous antitrust enforcement, utilizing both criminal procedures and civil decrees. Third, he

believed that promotion of the symbols of antitrust supported antitrust enforcement *and* that antitrust enforcement enhanced the symbols, each contributing directly and indirectly to the realization of a competitive economy. Fourth, he lamented the fact that proposed amendments to the antitrust laws were caught between the extreme trust busters and the extreme appeasers, with the result that nothing happened: "People have used the better antitrust law in the future as an excuse for not doing anything under the present antitrust law" (TWA to William L. Chenery, May 5, 1939: p. 285). He also felt that the tax and antitrust laws were working in opposite directions (pp. 242-243). Nevertheless, however imperfect the present legislation, it was the only instrument available (p. 269). One aim was to avoid "a legally approved cartel system" (TWA to T.A. Larson, June 6, 1966: pp. 462-463). Absent conspiracy, however, administered prices were beyond the reach of the antitrust laws (p. 442).

VI. THE BURDEN OF SYMBOLISM

Thurman Arnold's work on symbolism must be considered a perennial topic for social scientists and other scholars, perhaps especially for those not interested in a demythicizing role who are likely to work unreflectively within the symbolic structure of their society and not be sensitive to Arnold's analysis and its implications. Public policy making and policy analysis continue to involve the deliberative and nondeliberative manipulation of symbols without substantive meaning. Symbolic perceptions function as starting points in legal reasoning and policy analysis. Symbols help classify and express ideals and policies, but they especially function to obscure the exercise of choice while giving effect to implicit choices contained in one perception or another. Arnold was one of the few persons well regarded in economics who concentrated his or her studies on the fundamental symbolic nature of social reality. Only Thorstein Veblen before and John Kenneth Galbraith since Arnold are major rivals in economics. Economics and other disciplines continue to require the development and application of Arnold's insights—as, for example, such scholars as Murray Edelman, Joseph R. Gusfield, Hugh Dalziel Duncan, and Peter L. Berger and Thomas Luckmann have done on political and sociological topics.

Thurman Arnold saw through the insubstantial symbols which clothe society to the naked power which lies at its core.

The fact that symbolism was one means by which society protected itself from power, as well as organizing and perpetuating itself, did not disturb him. He glorified in revealing the radical indeterminacy and hollowness which the symbols served to obscure. His forte was demystification.

But what does one do upon determining that conventional social awareness and analysis largely consist of insubstantial symbols? In the case of Thurman Arnold, this question becomes, or at least encompasses, another: What does one do in a world seen as a system of power?

Arnold's answer(s) is defined by his life. First, one takes the world as one finds it and lives and works within the symbolic system according to one's own lights, pursuing one's personal and social goals. Second, one can, if so inclined, search for some more or less esoteric or practical meaning of existence. Third, one would see, for example, law and economics as so much symbolism (a) functioning largely to reinforce established power, institutions, and ways of doing things—that is, in terms of continuity, but (b) also functioning in a manner generating and sanctioning change. The language of symbols thus would become the *mode of analysis* of power, the direction of freedom *vis-a-vis* control, and the resolution of continuity with change.

Fourth, one would accept some and reject other symbols as functional and desirable or dysfunctional and undesirable. One would exercise personal normative judgment and valuation in reaching conclusions as to the functionality and desirability of particular symbols and participate accordingly in and contribute to the evolution of symbolic structure. Fifth, one would *use* symbols selectively to advance one's policy goals and/or perceptions of desirable and necessary socioeconomic order, for example, antitrust or an independent judiciary. Sixth, in the process, one would tend to presume—albeit know better—that all right-minded persons would reach substantially similar identifications of symbols as functional or dysfunctional.

Seventh, coming full circle, one largely would accept the system and live within it on its own terms. One would recognize the game of power and psychology which exists in society for what it is and play the game to satisfy one's own ego and maximize one's own quest for position, prestige, power, and wealth. Arnold's career is evidence of his answer.

Arnold seems to reveal a good bit about himself in a story which he apparently never tired of telling. In a lecture, Harry Stack Sullivan described the process of adjustment through

which students become adult and rise above their infantilisms. Said Sullivan, as recited by Arnold:

Now, young gentlemen, when you have lost your desire for adventure, when you have forgotten romance, when the only things worthwhile to you are prestige and income, then you have grown up, then you have become an adult (TWA to John R. Glenn, June 22, 1960: p. 437; see also p. 32).

The irony, of course, is that in so doing one would be accepting the values expressed by the dominant symbols of society. One would pretend that the king was clothed. The analyst who (like Pareto) differentiates between the truth and social utility of myths, doctrines, and symbols finds that the distinction between truth and personal (or social) utility is a thorny problem.⁴ The statistician who finds that his work requires a personal determination of the problem to be studied also realizes that living requires resort to symbols, a personal theology or ideology. Both personal lives and entire civilizations require a normative philosophy. In this way, personal sustenance is thus compatible with the requirements of social control. This is consonant with Arnold's Russian ballet theory of law. The issue of Arnold's conservatism or liberalism becomes less important than how he came to grips with the problem of personal existence.

REFERENCES

- ARNOLD, Thurman W. (1935) *The Symbols of Government*. New Haven: Yale University Press.
 ——— (1937) *The Folklore of Capitalism*. New Haven: Yale University Press.
 ——— (1940) *The Bottlenecks of Business*. New York: Reynal and Hitchcock.
 ——— (1957) "Judge Jerome Frank," 24 *University of Chicago Law Review* 633.
 GRESSLEY, Gene M. (ed.) (1977) *Voltaire and the Cowboy: The Letters of Thurman Arnold*. Boulder: Colorado Associated University Press.

⁴ Arnold's emphasis on law as symbols and the specious character of what is often perceived as reality is akin to but not quite the same as the more recent emphasis that there is no social reality, only perceptions. Perhaps the more general view is that reality is both recondite and multifaceted, permitting diverse and selective perceptions and the competitive coexistence of symbols. Each social reality is largely a given for each individual brought up within it but is a dependent variable for mankind, that is, an artifact. The antinomies of realism versus nominalism and realism versus idealism have been around a long time. Nonetheless, how the nature of social reality is treated is important, especially given its artifactual or man-made character.