The Dramas of Criminal Law: Chapter [?] of *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*

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NOTE TO SSRN READERS:

The essay that follows is a chapter of a book I’m writing on the legal realist Thurman Arnold’s writings on legal and cultural theory that he published while he was a Yale law professor in the 1930s. Various other pieces of my book project have been published and are available in draft form on SSRN. To situate this chapter, I include as a preface the brief draft introduction to Part II of the book, in which this essay will appear as the first chapter. The preface is in italics; you can skip it if you’d like, but if you know nothing about Arnold’s position as a legal realist, it provides a little insight. The actual essay begins on p. 3. I’d love to receive any comments you might have on this essay, as well as on the project as a whole.

**Introduction to Part II**

Arnold was a flirt, or at least a flit. He did not concentrate on any one field of substantive law early in his career; indeed, it was not until his antitrust work for the Department of Justice that he was ever closely associated with a particular area of law. In the seven-year period between his first major law review article and the publication of *The Folklore of Capitalism* (1937), he wrote about criminal law, criminal procedure, civil procedure, trusts, administrative law, and jurisprudence, among other things. In 1930, his scholarly reputation was for major quantitative, empirical studies of legal procedure like those he had led at West Virginia, where he engaged the entire law school in studying the state courts and the local justices of the peace throughout the state. At the same time, his administrative reputation was, as Spencer Waller has characterized it, that of an “academic entrepreneur,” energetic and desirous of attention for West Virginia’s law school, for which he had high intellectual and educational aspirations as the flagship (and only) law school in the state. He would abandon West Virginia for Yale, just as he would abandon quantitative research for doctrinal criticism and, ultimately, the broader social criticism for which he would gain a popular audience. To extend the entrepreneur metaphor, he gained market share and tried to stay ahead of his competition.

One could reach a number of conclusions from this record. If scholarship is defined as the careful mining of bounded fields of research in which one applies a narrow range of methodologies to a narrow object of inquiry in order to produce or elucidate comprehensive theories, normative ideals, or expertise, then Arnold looks like an unserious scholar. If legal scholarship requires some engagement in the world in order to produce workable reforms that purport to improve the world, then Arnold appears to have accomplished little outside of antitrust enforcement—about which, tellingly, he wrote nearly nothing as an academic. One

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could even go so far as to say that Arnold’s continually shifting gaze manifests the attention span of a two-year old. One wouldn’t be wrong.

But Arnold was different, both in temperament and intellect, from the universe of 1930s-era legal academics, so perhaps we should apply a different metric to his work. Figuring out Arnold’s work—its main themes, its underlying purpose, its strengths and its weakness—is the aim of this part.

The chapters that follow identify four distinct areas in which Arnold wrote—five, if you separate criminal law and procedure, as the legal academy does today (but didn’t during Arnold’s time). Arnold treated each subject differently because of issues intrinsic to each subject; he also tended to treat a subject differently because of when in the trajectory of his academic career he wrote on it. He began both his quantitative and qualitative work considering issues of criminal law and procedure, and he returned to these issues in Symbols of Government; accordingly, I consider this scholarship first, for what it illuminates about his intellectual journey. I turn to his work on jurisprudence next and explicate how his treatment of abstract issues of theory—especially in their relation both to legal practice and to his thoroughgoing instrumentalism—illustrates his intellectual anti-intellectualism, as well as his differences from the more philosophically-inclined realists like Karl Llewellyn and Felix Cohen.

His scattered thoughts on the constitutional position of executive branch agencies and the regulatory state were his most explicit political writings as an academic, and demonstrate two important dynamics in his work: his ability to recognize the conceptual limits of traditional conceptions of law and his creativity in proposing solutions to those conceptual limits. It also represents his best efforts as an academic to apply his insights about the symbolic domain of governance to legal and political questions. Finally, his post-academic writings and speeches on antitrust law allowed him to demonstrate precisely how the application of his ideas might assist a government agency in achieving its regulatory and political goals. To the extent that he was successful as head of the Antitrust Division in the Department of Justice, these writings suggest that his work was as insightful and as practical as he had boasted; to the extent that his success might have been historically contingent on the moment in which he entered public service and to his own personality, it suggests some limitation on its usefulness.

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Only if we recognize that the chief function of the criminal court is not to enforce law but to dramatize law enforcement do we have a sensible basis for understanding or reform.\(^4\) – Thurman Arnold (1932)

Arnold did not concentrate on any one field of substantive law early in his career; indeed, it was not until his antitrust work for the Department of Justice that he was ever closely associated with a particular area of law. In 1930, his scholarly reputation was for major quantitative, empirical studies of legal procedure like those he had led at West Virginia, where he engaged the entire law school in studying the state courts and the local justices of the peace throughout the state.\(^5\) At the same time, his administrative reputation was, as Spencer Waller has characterized it, that of an “academic entrepreneur,” energetic and desirous of attention for West Virginia’s law school, for which he had high intellectual and educational aspirations as the flagship (and only) law school in the state.\(^6\) He had arrived at Yale, initially in the summer of 1928 and then for a year-long visit in 1930, in great part to join its dean Charles Clark and young faculty recruit from Columbia William O. Douglas in their empirical study of the Connecticut courts—which, following the money made available from the Hoover administration, had morphed into a study of criminal docket in the Connecticut federal courts as part of the National Committee on Law Observation and Enforcement, popularly known as the Wickersham Commission.\(^7\) Around the same time, Harvard’s Dean Roscoe Pound attempted to woo Arnold away from New Haven to develop a to-be-defined quantitative project on criminal law.\(^8\) Looking to fill gaps in their faculty and compete for empirical researchers at the moment that quantitative methodologies’ stock was high, talent-spotting administrators were coming after Arnold.

But Arnold’s methodological commitment didn’t last long. Within a few years he would begin to mock quantitative studies for producing little more than a “mass of statistics” that lacked meaning, and he developed a set of stock jokes about nerdy bean-counters and their work

\(^4\) Thurman W. Arnold, Law Enforcement—An Attempt at Dissection, 42 YALE L.J. 1, 24 (1932).
\(^5\) For his account of the work he did at West Virginia, see Thurman Arnold, Review of the Work of the College of Law, 36 W. VA. L. Q. 319 (1930); Thurman Arnold, Collection of Judicial Statistics in West Virginia, 36 W. VA. L. Q. 184 (1930).
\(^7\) See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE 82-90 (1995).
that he would continue to use throughout his career. Although he may have abandoned systematic empirical research, he used the results of his earlier quantitative work in some of his new, more impressionistic work, and the objects of his earlier study and the notion that some empirical reality about crime and society lurked beneath the doctrinal gloss of criminal law remained important to his writings. Two of his first four major academic articles concerned criminal law and procedure (while a third considered procedure more broadly in its relationship to substantive law); and one of his criminal law articles made reference to the “law in action” that he and his collaborators found in their work for the Wickersham Commission.

The criminal justice system—which was not one of realism’s major foci, although it was one of Dean Pound’s—would remain one of Arnold’s interests throughout his academic career, and he returned to it in new material in *The Symbols of Government* (1935) and even during his brief period on the bench, when he was forced to consider the issue of criminal insanity and mens rea about which he had written a decade earlier.

Criminal law thus serves as a good entry point into Arnold’s scholarship, and especially into his concern with law’s functionalism and with functionalism’s role in the broader symbols of governance. Arnold’s early articles on the subject display his accelerated intellectual journey from quantitative to qualitative realist, and from arch to post-realist, while his later return to the subject extended this journey further. As public law that defines and enforces substantive prohibitions, criminal law and procedure allowed him to develop some of his most important ideas regarding the law, politics, and the state. And although it is doctrinally, procedurally, and administratively complex, criminal law and the criminal justice system are the areas of law to which the public and press pay the greatest attention. As a result, they served as an especially good means for Arnold to think through the relationships between law, the state, and popular sentiment. Writing in the midst of Prohibition, Arnold examined how the public sought to understand and affect criminal justice through political and moral debate. Arnold was not uninterested in the doctrinal and administrative complexity of criminal law and procedure—his first major law review article, written during his initial year-long visit to Yale, waded into the morass that was (and remains) of the law of criminal attempt. But he sought to understand why the law and the legal system appeared convoluted, how the public responded to the state’s legal opacity, and how legal and political institutions sought to maintain their legitimacy while balancing the need for protecting individual rights, administering an overburdened criminal justice system, and enforcing—or appearing to enforce—the law.

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9 In his autobiography, for example, Arnold mocked his own work on the Connecticut courts: “The result was the most fascinating body of legal statistics that has been collected in this century. They had only one flaw. Nobody then and nobody yet has ever been able to think of what to do with them.” THURMAN ARNOLD, FAIR FIGHTS AND FOUL 63 (1965). Arnold was not the only one; Karl Llewellyn would later characterize Underhill Moore’s study of parking patterns as “the nadir of idiocy.” Llewellyn, *On What Makes Legal Research Worthwhile*, 8 J. LEGAL EDUC. 399, 400 (1956).

10 These include Arnold, *Law Enforcement*, supra note; and Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 Yale L. J. 53 (1930); the other two articles were Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932); Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

Criminal Procedure in Action

In their Wickersham Commission study, Dean Clark, Bill Douglas, and then Arnold, with the help of a battery of assistants, investigated the work of the federal courts in Connecticut, while they found academics in other law schools (including the one in West Virginia whose deanship Arnold would soon forsake in favor of Yale’s prestige and limelight) to conduct similar studies in other states. Arnold promoted his group’s work in a “progress report” published in a 1931 issue of the *A.B.A. Journal* that described the project in explicitly realist terms, emphasizing its study of the “law in action” through “that which happens in law suits” while rejecting the formalist study of the “formation of principles.” His group, Arnold claimed, didn’t simply aggregate cases within empty concepts, but instead obtained “mass statistics” of the actual procedures that courts used, and then “counted and tabulated” these statistics with the fabulously newfangled technology of the “Hollerith Punch Card Systems.” Real results and insights into the state of the law would surely follow, as would the opportunity for reform.

The preliminary results of their study of criminal cases in Connecticut, Arnold reported, offered some “rather surprising” data that “raise[d] interesting queries for future examination.” The investigators, as well as those who sponsored the study they undertook, shared certain assumptions about how federal courts were performing in response to the deluge of prosecutions under the federal Volstead Act prohibiting the production, sale, and possession of alcohol. They all assumed that the courts were suffering from “the widely advertised results of what is generally called ‘the sporting theory of justice’”—foolishly complicated procedural considerations and delays, irrational juries, and cutthroat fights between prosecution and defense that called into question the justice and correctness of the result in individual cases. Instead, they found that the federal criminal docket, at least in the District of Connecticut, constituted a system that seemed “almost too efficient”: courts resolved a large percentage of cases resolved expeditiously, without technical arguments or delay, and held only nine criminal jury trials in a three-year period. They achieved this “efficiency” because the prosecution and defense frequently bargained to achieve a mutually acceptable plea agreement that the assigned judge would in turn accept.

What was so “surprising” and “interesting,” as one recent commentator has quite rightly noted, is that they discovered modern criminal procedure, in all its unromantic glory. This process might have seemed at odds with traditional conceptions of mechanical law enforcement, and it certainly suffered from being “executed sub rosa where the merits of the prosecutor’s action cannot be examined.” For Arnold, however, such bargaining was an essential element of the discretion vested in the prosecuting attorney. It constituted a necessary means to provide

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12 *Schlegel*, *supra* note , at 88.
13 NEED CITES
15 *Id.* at 801, 800.
17 *Id.* at 801.
18 SCHLEGEL, need cite.
justice in individual cases and manage the prosecution of “unenforceable laws” that required prosecution of more defendants than the criminal justice system could effectively administer.\textsuperscript{19}

The Connecticut federal courts study was one of a burgeoning group of empirical studies of local criminal courts being undertaken throughout the country,\textsuperscript{20} and the results Arnold and his collaborators found corresponded with those of other surveys, which also revealed the surprising extent of prosecutorial discretion and negotiated compromise between the state and defendants.\textsuperscript{21} Commentary on the relationship between substantive criminal law’s aims and criminal procedure’s administrative peculiarities followed quickly. In the first edition of his landmark book \textit{Theft, Law, and Society} (1935), Jerome Hall, a rising star in the study of criminal law and a student of Karl Llewellyn, compared what the crime studies revealed about prosecutorial discretion with that of previous centuries and found that the legally sanctioned area of prosecutorial discretion had increased “considerably” in modern criminal law, particularly in its application by prosecutors to individual defendants three years later.\textsuperscript{22}

Notwithstanding the apparent excitement of this discovery—and perhaps because of the boredom and hard work that comes from creating a large data set that allows such a discovery—the courts study would mark the end of Arnold the empiricist. But he would soon consider the implications of the modern criminal procedure that he found into his writings. Before then, however, he began his sole-authored academic work with a more traditional foray into realist doctrinal criticism.

\textbf{Doctrinal Realism: The Criminal Attempts Doctrine}

Arnold’s first major law review article sought to radically reconsider the criminal attempts doctrine. Cases and commentaries had long lamented the doctrine’s complex, if not incoherent, distinction between those uncompleted criminal offenses that warrant punishment and those that do not.\textsuperscript{23} The inchoate nature of the offense and the difficulty of line-drawing across failed efforts to complete different substantive offenses—should the test for attempted murder, for example, be the same as that for attempted forgery?—made and continue to make the doctrine both impossible to figure in the abstract and, for that very reason, enormously attractive to scholars seeking to prove their analytical mettle. Arnold would offer a prototypically realist

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\textsuperscript{19} \textit{Id.} at 801-02.
\textsuperscript{20} ALLEN HENDERSHOTT EATON, SHELBY MILLARD HARRISON, A BIBLIOGRAPHY OF SOCIAL SURVEYS 79-81 (1930) (listing sixteen empirical studies of local, state, and federal criminal justice issues published between 1904 and 1927, with the majority published in the 1920s). The most prominent study was the Cleveland Crime Survey, which was overseen by Felix Frankfurter and Roscoe Pound and published as \textit{Criminal Justice in Cleveland}. CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds., 1922).
\textsuperscript{22} JEROME HALL, \textit{Theft, Law and Society} 111-17 (1935) (noting).
\textsuperscript{23} \textit{See}, e.g., Hicks v. Commonwealth, 9 S.E. 1024, 1025 (Va. 1889) (complaining that attempt is “more intricate and difficult of comprehension than any branch of the criminal law”); 1 BISHOP'S CRIMINAL LAW ¶ 725, at 517 (John M. Zane & Carl Zollmann eds., 9th ed. 1923) (describing attempt as an “intricate and important” doctrine that is “imperfectly understood by the courts”).
approach, one that trusted the intuitive ability of judges to identify criminally culpable attempts and that thoroughly distrusted efforts to formulate broadly applicable, formal definitions of a trans-substantive concept of attempt.

What constituted the non-realist approach that Arnold sought to overturn? A series of recent publications had offered various, and often contradictory, formalist efforts to tame the doctrine, each of which suggested that formal clarity could put an end to the inconsistency found in caselaw. A generation earlier, Joseph Beale, the ardent Harvard formalist who would later become the realists’ bête noir, had similarly asserted the doctrine’s coherence. Beale’s 1903 Harvard Law Review article conceded the dichotomous nature of attempt by noting that the doctrine simultaneously concerns “a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary” and a distinct offense that has “the qualities and characteristics of other crimes.” Ignoring the complications that might arise from this insight, Beale confidently identified four elements of the attempt crime, emphasizing its distinctiveness and ignoring the specificity of the substantive crime attempted. Thus, an attempt was simply an act (“a step toward a punishable offense”), the intent to “adapt[]” that step towards a purpose to complete the offense, nearness of success, and failure. Elements, clearly defined, could bring principled order to a difficult doctrine.

But even Beale’s assured analysis of attempt could not tame criminal attempt, and the terms of the debate he sought to end remained just as alive among the next generation of law professors. Arnold’s contemporaries tried novel analytical and historical approaches to sort and resolve criminal attempt’s riddle. For Francis Sayre of Harvard, a prominent criminal law professor and casebook author, attempt constituted a thoroughly modern doctrine, one first articulated in a brilliant 1784 decision by Lord Mansfield that generalized previous, scattered common law approaches to uncompleted offenses. Sayre consolidated Beale’s four elements into three: act, intent, and consequences, with intent playing the dominant role and the consequences of an attempt the least significant one (since by definition they could not include the consequences of a successful criminal offense). Sayre’s intent inquiry focused on whether the intended consequences constituted a crime, and, if the defendant’s failure to complete the crime was based on a mistake of fact, whether that mistake was one that a “reasonable man” in similar circumstances with criminal intent would make. If the intent requirement was met, the defendant would be liable for a criminal attempt so long as the act was sufficiently advanced.

Sayre’s confident parsing of the doctrine faced competition, however. An effort by Professor John Strahorn and published in the University of Pennsylvania Law Review peered into

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24 On Beale and the realists.
26 Beale, supra note , at 492.
27 The Bishop treatise agreed with Beale that the doctrine could be distilled to essential elements, although it restated only three—intent, performance, and failure—and suggested that all authorities seemed to be in general agreement as to the “essentials of the crime . . . though they differ in their forms of expression.” 1 BISHOP’S CRIMINAL LAW, supra note , § 729, ¶ 1, at 519.
28 Francis Bowes Sayre, Criminal Attempts, 41 HARV. L. REV. 821, 834, 836-37 (1928) (citing Rex v. Scofield, Cald. 397 (1784)).
29 Sayre, supra note , at 838-39.
30 Sayre, supra note , at 839, 859.
the doctrinal abyss and found that criminal attempt’s riddle could be solved by focusing not on act and intent but on the question of whether an attempt creates “a substantial impairment of some interest protected by the involved prohibitions against the crime or its related attempt.”

Strahorn reached this innovative idea of focusing on the prohibition’s purpose rather than the defendant’s intent by engaging in a complicated effort to divide the issue of impossibility—defendants whose failure to complete a criminal act was caused by its impossibility as a matter of fact or law—into multiple types of impossibility (“extrinsic,” “intrinsic,” and “legal” impossibility) and multiple types of attempts (“relative” and “direct” attempts). This effort at analytic distinction, its proponent claimed, could offer greater clarity in explaining past cases and guiding future decisions—but it could not, alas, offer perfect predictability.

John Curran, another of Sayre’s competitors, argued in a two-part series published in the *Georgetown Law Journal* that an attempt merited criminal punishment to the extent that it breached the peace and thereby challenged and harmed the state’s authority. Curran challenged Sayre on doctrinal history, claiming that attempt was not a modern invention but had always been consistently understood in Anglo-American law as distinct from a completed crime; he also challenged Sayre’s conceptual understanding, arguing that the underlying criminal nature of the act was attempt’s threat to public order and the state rather than the defendant’s criminal intent.

To understand the varied approaches each of these confident authors proposed, consider their disparate comments on *People v. Lee Kong* (1892), a then-noteworthy case in which the California Supreme Court upheld a trial court’s conviction for assault with intent to kill. The defendant, keeper of a gambling hall, had learned that the police had put his premises under surveillance, and that an officer had bored a hole in the roof to observe the illegal proceedings therein. Lee Kong shot a pistol at the peephole, mistakenly thinking the officer was in position at a moment when the officer was in fact perched elsewhere on the roof. The defendant was tried and convicted of assault with intent to murder on the ground that the officer would likely have been killed had he been at the location where the defendant had aimed and shot. The issue on appeal was whether the defendant had a “present ability to commit a violent injury upon the person of another,” as required by California’s statutory definition of assault, despite his mistake regarding the officer’s location. The California Supreme Court reasoned that because Lee Kong knew the officer was on the roof when he fired with the intent to kill him, he manifested both the intent and the ability sufficient to meet the statutory requirement.

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32 “Intrinsic impossibility” refers to the defendants’ ineffectual effort to engage in a substantive offense; “extrinsic impossibility” occurs when a normally effective attempt is frustrated by some occurrence outside of his control; and “legal impossibility” refers to instances when the attempted act is not prohibited by law. *Id.* at 962-63.
33 “Relative attempts” are those that fail to complete a substantive criminal prohibition; “direct attempts” are acts that are themselves punishable by statute or, at the time of Strahorn’s article, common law crimes. *Id.* at 963-64.
35 People v. Lee Kong, 30 P. 800 (1892).
36 *Id.* at 800-01.
37 *Id.* at 801.
Most early twentieth-century commentators on criminal attempt agreed with the result, but for different reasons. Beale, the outlying über-formalist, supported the decision to the extent the facts showed the defendant intended to shoot his bullet “into contact” with the policeman; but if Lee Kong merely aimed at the defendant’s eye, which he thought he saw through the peephole, then the intended contact was not criminal.  

This absurd distinction apparently needed no explanation for Beale, and so he failed to provide one. Sayre’s explanation, again focusing on the defendant’s intent and also a bit mystifying, was at least a little more comprehensible: insofar as Lee Kong had intended to shoot at the peephole, he appeared to have no intent to murder (since he mistakenly thought the police officer was in that position); but because he also intended to hit the body of the officer with his bullet, he clearly intended to murder and his mistake as to the officer’s location was a “reasonable” one warranting criminal punishment. Strahorn supported the decision because the intended victim’s fear of death or bodily harm “was a substantial impairment of [the officer’s] interest to be free from the fear of death”; Curran, too, viewed the decision through the prism of his own particular theory, finding that the defendant’s malicious act deserved punishment because it directly threatened “the order of things.” In Lee Kong, as in the doctrine of criminal attempt generally, commentators found evidence of the doctrine’s coherence by reference to their own efforts to form a conceptual frame that could explain it. Viewed together, however, their disparate explanations merely suggested collective confusion about a doctrine in search of a purpose and coherence.

Arnold would have none of this. He offered a prototypically realist take on the criminal attempt doctrine, one so bold as to proclaim in the article’s title that what had come before him established little more than an empty, incoherent “abstraction.” Yes, the doctrine was confused, he proclaimed, but the confusion emanated not from judges’ inability to parse the doctrine’s elements correctly or to conceptualize the doctrine’s purpose correctly; rather, the doctrine was confused because it assumed that “attempt” existed in the abstract, apart from the underlying crime attempted, and could be identified as such. Put more simply, the law of criminal attempts did not suffer from poor reasoning; criminal law suffered because of the existence of the criminal attempts doctrine. Indeed, by establishing the doctrine and thereby initiating the modern law of criminal attempts, Lord Mansfield—Professor Sayre’s hero for having established attempt as a distinct, independent doctrine—precipitated precisely the formalist parade of “analytical thinking” and “search for abstractions” that would confuse scholars and jurists for a century and a half.

Arnold offered a number of reasons to abandon the criminal attempts doctrine as confused and confusing besides his distaste for formalist reasoning. Because some attempts to engage in criminal activity are not criminal acts—it would make no sense, for example, to prosecute someone for an attempt to drive while intoxicated—the concept of attempt inevitably requires some context to define criminal culpability (63-64). It also makes no sense to prosecute someone for attempting to engage in a criminal attempt or an attempt to engage in a similarly

39 Beale, supra note 1, at 495. No later commentators could understand the distinction Beale made.
40 Sayre, supra note 1, at 839, 852 & n.99.
41 Strahorn, supra note 1, at 982.
42 Curran, Attempts Part II, supra note 1, at 333-34.
43 Thurman W. Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L. J. 53 (1930).
44 Id. at 59-60.
inchoate offense like assault. Many crimes already seem like attempts, insofar as they seek to prohibit certain acts that are assumed to be precursors to other, more blameworthy acts—violation of the Mann Act, for example, or indecent solicitation, or shooting dangerous firearms, or assault with intent to kill (64). Indeed, the very idea of prosecuting an attempt to engage in inchoate-like criminal behavior suggests either of two absurd results: an infinite regress in which all incipient behavior becomes punishable—though at what point is the attempt to attempt to attempt too attenuated to prosecute?—or a doctrine that refuses to punish attempts at inchoate offenses and thus turns a blind eye to well-developed plans to engage in aggressively threatening behavior.\(^45\)

Most important of all, viewing attempt as a separate crime leads to the foolish effort to define the intent to attempt as a general matter. Does someone who makes a mistake of fact—thinking the officer is perched at the peephole, for example—have the requisite “intent” to attempt to murder? (68-70). Presumably so, unless the mistake was so absurd as to throw the idea of intent into doubt—in which case is intent truly the issue? Even more telling in this context was the canonical fact pattern about which Arnold’s contemporaries disagreed, in which a hypothetical shooter fires at a tree stump confusing the stump with a person he intends to kill. Arnold mocked the various commentators on this scenario who disagreed with each other over culpability—one criminal law treatise suggested that there is guilty intent but no overt act (Wharton at § 225), Beale claimed the shooter lacks intent to murder because he’s shooting at a stump rather than at a person (494), while Sayre would have considered whether the act was a “reasonable” mistake (853). Their efforts merely demonstrated for Arnold that attempt and the element of intent, viewed in the abstract, were beside the point.

Arnold could find some satisfaction in the midst of all this foolishness in the courts, where judges understood these issues better than formalist commentators. They correctly punished especially blameworthy attempts and related crimes (such as aggravated assault) without engaging in analytical somersaults to sort and create a pure, consistent, trans-substantive doctrine of attempt (64-65).\(^46\) Courts resolved the issue before them in individual, concrete cases without recourse to highly abstract concepts of “criminal attempt” writ large. Doing so, the courts intuitively developed a distinct mode of analysis that promised a solution to the dilemma with which his contemporaries struggled. Following his reading of the case law and his suspicion of formalist concepts, Arnold proposed that attempts did not constitute a separate crime, but should be viewed within the ambit of the substantive offense the defendant allegedly failed to complete. Attempt to murder should be viewed and evaluated within the ambit of the statutory prohibition against murder, attempt to commit forgery should be evaluated under the forgery statute, and so on. Rather than create a separate crime, the prohibition against attempt should serve “as a power or discretion that has been given to the courts either by the legislature or by common law precedent to extend the limits of prohibitions against certain kinds of conduct which does not quite fall within the terms of those prohibitions.” (74) Understood this way, the criminal attempt doctrine constitutes a gap-filling device that allows courts to punish criminally culpable conduct not included within a statute’s specific language and not serious enough to

\(^45\) Arnold mocked one effort to sort different kinds of attempts to attempt. Id. at 65 (summarizing and critiquing Strahorn, supra note , at 963 (distinguishing between “direct” and “relative” attempts)).

\(^46\) Arnold also argued that all of the inchoate offenses, including attempt, assault, and solicitation, are sufficiently similar that classifying them as distinct makes little sense (66-67).
warrant the full penalty for violating statute (75-76). It is akin to a lesser included offense in those instances when the defendant’s conduct approached but did not quite meet the elements required to prove violation of the prohibited criminal act. Better, Arnold reasoned, to view attempted murder in its relationship to murder than in its relationship to attempts at other crimes.

The payoff, he claimed, is a more pragmatic means of deciding disparate cases, one sensitive and deferential to the trial court’s conclusions about the context in which the allegedly criminal act occurred. He rejected efforts to articulate clear doctrinal definitions and boundaries for criminal attempt, and abandoned the effort to establish formal elements and abstract concepts. In the process, he also dispensed with the search for legal clarity and predictability in favor of granting triers of fact the authority to evaluate a given attempt in light of the underlying though uncompleted substantive offense and statute (76-77, 80). For example, although Arnold did not directly address the Lee Kong decision described above, his approach would support the court’s conclusion for reasons other than its consistency with the idiosyncratic, complex readings of the doctrine his contemporaries offered. Instead, the trial record demonstrated that the defendant fired a deadly weapon at where he thought a policeman was located. The trial court had decided that this act was sufficiently dangerous that it fell within the policy of the substantive crime—prohibiting the intentional, unprovoked exercise of deadly force. In his brief application of his approach to other fact patterns, Arnold showed a concern above all with factual context: the danger of the defendant’s conduct and intent, as well as the defendant’s personal character as found by the trier of facts. The legal focus should either be on the crime itself—comparing and evaluating an incomplete attempt with a completed offense—or on other attempts to accomplish the same crime, when the comparison of facts and the trier of fact’s concern about the dangerousness of the defendant would actually have relevance. Far-flung analogies may give the appearance of logic and analytical rigor and predictability, but as Arnold’s realist critique demonstrated, they failed either to find consistency in the law or to articulate principles that could create it from abstraction.

This was not an entirely new idea, nor has it proved unique to Arnold. A generation earlier, Holmes had suggested that in deciding culpability for attempt, “[e]very question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help”; for this reason, he refused to analogize a failed effort to poison another to attempts to achieve “lesser crimes.” Writing a decade after Arnold’s article, Jerome Hall also suggested

47 Compare Arnold, supra note , at 76 (outlining Arnold’s “policy” for deciding criminal attempts) with Lee Kong, 30 P. at 800 (“He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but, very fortunately for the officer of the law, at the moment of attack he was upon the roof viewing the scene of action at an opening some distance from his contemplated point of observation, and thus no substantial results followed from the appellant’s fire. . . . That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant’s part.”)
48 A defendant who attempted forgery, for example, should not be prosecuted so long as no harm was caused “and we do not have the same desire to extend [a forgery law’s] limits as we do in the case of murder”; a child accused of attempted rape when he was below the minimum age required for criminal liability should be punished based on his physical and emotional maturity, not on arbitrary age distinctions established in the abstract; attempts at incestuous marriage that are foiled before completion should be exonerated where a court concludes “that nothing short of the completed crime should be punished.” Arnold, supra note , at 77.
49 Commonwealth v. Kennedy, 48 N.E. 770, 771 (Mass. 1897). In The Common Law, Holmes had written, Eminent judges have been puzzled where to draw the line [of culpability], or even to state the principle on which it should be drawn. . . . But the principle is believed to be similar to that on which all other lines are
that the attempt doctrine was sufficiently fact-specific and indeterminate as to require significant delegation to triers of fact in every case, albeit with “the best possible methods for guidance of judgment” from substantive law and an active appellate review for “irrational verdicts.”

Like Arnold, Hall called for shifting the focus in criminal attempts doctrine away from the “logical manipulation of propositions to try the consistency of theories” and towards concern with “the functioning of the system” of criminal justice. But Arnold appeared not to trust the doctrinal limitations that appellate courts would develop or, worse, adopt from academics or treatises; for him, deference to the courts’ response to a fact pattern and a particular defendant was sufficient. His approach seemed both superficially attractive in its criticism of its rivals, and subject to widely different, unpredictable results across cases. It was not a doctrine so much as a grant of authority. It rightly recognized and critiqued the excesses of doctrinal form but offered nothing in its place but potentially random, individualized judgments.

As critique, Arnold’s realist intervention rightly identified the slippery incoherence of formalist efforts to domesticate the unruly concept of criminal attempts. He could not, however, shame or shut down these efforts; nor did he propose an alternative scheme that would shift attention from a trans-substantive concept of attempt to what he saw as a more-grounded and fact-specific approach that would compare an alleged attempt to the specific crime attempted. In so doing, Arnold illustrated the core problem realists faced: They could see through formalism’s empty concepts and incoherence and they could demonstrate the failure of those concepts to explain what courts did and what they should do; but realists often failed to displace formalist concepts with significantly more functional approaches, nor could they displace the desire among academics and the legal profession for the concepts that formalists produce, and the “dream of predictability” that formalists claimed to offer (80). This failing would become the central question for his next article on criminal law, which foreshadowed the basic insight of his post-realist theory of law.

**Criminal Law as Administration: Law Enforcement**

Immediately following “Criminal Attempts,” Arnold published a similarly realist doctrinal article in 1931 in the Columbia Law Review that critiqued the new Restatement of the Law of Trusts. Again, he mocked formalist, elitist and academic efforts to tame an unruly doctrine, and again he advocated the pragmatic, functionalist approach taken by courts that focused on the facts in individual cases and privileged the ends sought by those who created trusts over the formal requirements for trust creation that a conceptualist approach would require. Two years later, Arnold returned to the topic of criminal law administration in an article that

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50 Jerome Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 YALE L.J.789, 827-28 (1940). Notably, Hall did not cite Arnold’s article, although he did cite Holmes. See id. at 822-23.

51 Id. at 831.

sought to investigate, or “dissect” the term “law enforcement” and to consider why scholars are unable to persuade courts and legislatures to adopt their great ideas.53 What are the “stimuli” to which courts respond, Arnold asked, and why do the “low-minded schemes” of pedestrian reformers and politicians succeed when the “high-minded” ones, put forth by those with the best of intentions and intellectual pedigrees, fail? This question departed from those he asked in his previous two articles, which focused instead on criticizing those bad, high-minded ideas that failed to persuade judges who rightly preferred their own intuitions about the facts of cases to the abstractions proposed by academics. Here, the question was not what or how but why—why do courts act the way they do, what forces affect their operation and decision-making, and what can reformers do to improve the performance of courts and legislatures?

At least on the surface, then, Arnold sought to “dissect,” rather than describe and prescribe reforms for, a particular legal issue. Here, that issue was “law enforcement” as a concept or ideal that “has its value in inducing a feeling that criminal justice is both impartial and impersonal” (6), and his dissection would in turn serve as a means to investigate the larger issue of law’s resistance to reform. The approach took a systematic view of the entire criminal justice system, and reviewed all of the relevant institutions: prosecuting and defense attorneys, the courts, the legislatures that create the substantive criminal laws, and the public whose moral commitments and prerogatives presumably constitute the basis for criminal law and whose support gives legitimacy to the state.

Arnold began with the ideal of the “law” to be enforced. Scholars during his time (as well as our own) decried the expansion of criminal laws—although especially relevant in 1932 was the federal prohibition on the manufacture, sale, and consumption of alcohol, which not only expanded the number of laws but also their violation by a broad swathe of the public. Arnold characterized criminal law doctrine as an “elaborate . . . attempt to reconcile and make more definite the implications of the vague public ideals that surround the criminal courts” (7). Because the body of criminal sanctions needing enforcement bore the weight of the nation’s cultural and social values, the law’s incessant expansion merely reflected the multiple and contradictory concerns it was required to address. When any existing law appears to be widely violated and under-enforced, legislatures pass new laws to address whatever issue the initial laws had not yet resolved (14). At the same time, some existing criminal laws are under-enforced and some minor violations by “respectable” individuals are under-prosecuted because neither the offenses nor offenders appear to be “criminal” (15). The law part of “law enforcement,” then, may represent a perfect ideal of a morally-based, coherent criminal code, but in reality it fails to constitute a mechanical, essential body of rules; instead, it ceaselessly spreads in response to the latest panic while society projects its incoherent and contradictory moral principles upon it.

The enforcement part of the phrase, also “a reverently held ideal,” presumes that prosecutors and judges mechanically, impartially, and impersonally apply all laws equally, no matter the relative merit of any one law (6, 11). During debates over Prohibition, for example, both the “drys” who led the charge for temperance laws and the “wets” who opposed them claimed a commitment to the ideal of law enforcement: for the drys, the Volstead Act could and should have been enforced universally and mechanically, while one of the wets’ most vociferous complaints was that the inevitable inability of prosecutors and courts to strictly enforce the

53 Arnold, Law Enforcement, supra note 1.
prohibition laws would perforce degrade the principle of law enforcement (11-12). No one sought strict enforcement of civil laws—such as tortuous negligence, breach of contract, regulatory ratemaking, and unfair competition—whose legitimacy survived their imperfect enforcement by courts. But the simpler, more widely applicable, morally-derived criminal prohibitions, whose violation was more likely to receive public attention through newspaper and radio, appeared to require perfect enforcement (11-12). The ideal view of “law enforcement” presumes an essential relationship between moral codes and the state: substantive laws establish norms of behavior, and it is the role of government to strictly police and punish those who violate these norms. For Arnold, it serves as “the dramatization of the moral notions of the community” (8).

The ideal runs aground, however, on the realist shores of administration. Rather than viewing their jobs as the lead actors in a moral drama, Arnold argued, prosecutors in fact attempt to achieve the functionalist end of a criminal justice system—an orderly community (8). To do so, they administer legislative laws in rational but imperfect ways outside of the public’s view, using their discretion to wield substantive criminal laws as “an arsenal of weapons with which to incarcerate certain dangerous individuals who are bothering society” (9). They cannot, and do not, prosecute everyone who violates a crime, because doing so would merely “clog the machinery” of justice “with relentless prosecution of comparatively harmless persons” (9). Law enforcement largely occurs in the decisions made by prosecutors to pursue certain alleged criminals, to strike bargains with some to gain guilty pleas, and to go to trial against some small number of others—all in order to best allocate limited resources while protecting the public from the worst and most dangerous criminals (17-18). Meanwhile, courts play only a minor role in the maintenance of public order, and the criminal trial, as Arnold’s later work would argue (and as the next section explains), is an almost entirely symbolic exercise that does little more than dramatize the ideals of law enforcement.

Arnold drew two conclusions from this wide gulf between the public ideal of strict and moral law enforcement and the “law in action” of administrative practice, one concerning the consequences of this gulf for criminal law and procedure and the other concerning strategies for reforming the criminal justice system—and, by implication, all areas of law. First, the distance between ideal and practice inevitably creates incoherent and largely meaningless doctrine, rather than the pure logical concepts that formalist academics would prefer, as the laws to be enforced cannot contain the ideals they are putatively intended to observe. In addition, the distance leads all of the knowing players in the system to protect the actual workings of the criminal justice system from public knowledge. The bargaining process that settles a majority of criminal prosecutions is driven underground because it emits “a bad odor,” while the ideal of criminally punishing all who violate the criminal law hampers the use of civil reparations to resolve disputes between defendants and victims (19). Second, the public ideal constitutes the conditions under which any effort to reform the criminal justice system must operate. The would-be reformer, Arnold argued, “should base his entire scheme of reform on a technique of public acceptance, which neither criticizes nor attempts to change general preconceptions, but rather uses them to accomplish the desired ends” (13). Formalist ideals about law enforcement cannot be merely swept away in the tide of reform; rather, realist, progressive interventions must work within or even manipulate those ideals to achieve piecemeal change. For example, psychology and psychiatry seemed to be chipping away slowly at the assumption of individual criminal responsibility, while one of the unintended consequences of Prohibition seemed to be an
expansion of individual constitutional rights, like the Fourth Amendment right against illegal search and seizure, as broader and stricter enforcement of the laws against otherwise upright citizens created a popular backlash (20-22). Incremental change from outside (imported, for example, from emerging fields of the social or medical sciences), or publicly supported changes from within the law, could accomplish reform. Thoroughgoing changes were unlikely to succeed, however, if they challenged, and could be seen as challenging, an ideal like law enforcement.

The Drama of the Criminal Trial

If Arnold viewed the ideal of “law enforcement” as masking prosecutor discretion with the false and impossible cover of mechanical perfection, he viewed the ideal drama of the criminal trial as masking the irrationalities and injustices of substantive law with the gloss of procedural fairness. In a characteristic argument that he made first in Symbols of Government and then repeated as late as a few years before his death, 54 Arnold claimed that the criminal trial is an essential practice in all stable societies, from the primitive to the medieval and the modern and from China to England, and that it is one of the fundamental operations that make the judicial system “[t]he center of ideals of every Western government” (Symbols, 128, 131-3). The criminal trial’s symbolic preeminence—observable during Arnold’s time in newspapers, film, drama, and popular novels, and today in those media and even moreso in television—derives as much from its ceremonial procedures as from its instrumental objectives and results. Indeed, for both the general public and elites, the fair and neutral processes of a criminal trial are at least as important as a resulting verdict. A properly conducted, formally fair trial that results in a guilty verdict for an innocent defendant is a less troubling consequence of a functional criminal justice system than a departure from the conventional ceremonies of the trial that nevertheless results in an objectively correct verdict (Symbols, 142-43). For the legitimacy of both the criminal justice system and the society whose values that system is supposed to uphold, doing it right is more important than getting it wrong. Public, dramatic, understandable procedure trumps substantive injustice.

To illustrate this dynamic, Arnold recounted the heresy trial of Joan of Arc, the transcript of which had recently appeared in an English translation. 55 With his typically outrageous irony, Arnold announced his great respect for a clearly “political” trial in which the accused was presumed to be guilty of a substantive crime by her judges, the faculty of the University of Paris sitting as a secular appellate body in the Castle of Rouen (Symbols, viii-ix). Surely, his contemporaneous reader must have thought, such a trial represents the relative savagery and ignorance of pre-modern conceptions of justice—after all, the defendant was executed by fire for the crime of heresy by a state controlled by occupying English conquerors. Indeed, contemporary historians would vociferously question Arnold’s hyperbolic description. 56 But Arnold claimed that the medieval show trial resembled a contemporary, well-run political trial. It could do

54 Indeed, his writings on the criminal trial were both so characteristic of his thought that he restated them a few years before his death, more than three decades after publication of The Symbols of Government. See Thurman Arnold, The Criminal Trial as a Symbol of Public Morality, in CRIMINAL JUSTICE IN OUR TIME 139 (Yale Kamisar, A.E. Howard et al. eds. 1965).
56 Need cites.
nothing but “represent the prevailing ideals and phobias of its era,” like those modern courts that outlaw obscene materials or punish vocal political dissent, but it applied the prevailing doctrines of heresy, belief, and ecclesiastical hierarchy with sufficient gravity, humility, and neutrality that it could protect its own prestige. (Symbols, 136-37). Despite the political pressures placed upon it, the court developed “a record of dignity and impartiality” and provided many of the requirements of modern due process (Symbols, 135-37). It even demonstrated its formal independence from the popular and political controversy surrounding the accused when it made plain that it passed judgment against the defendant with “real regret, because of judicial necessity” (Symbols, 138).

In short, the medieval court served its role as a mechanical “judicial machine” that did not, and indeed could not, “question the underlying assumptions of the government which it supports, however regrettable those assumptions may be” (Symbols, 140). It was savage and mechanical, a perpetrator of ideological injustice and a symbol of great fairness. The latter terms in those ironic dualities made the court an apparently neutral, symbolically significant and acceptable institution of justice, even as it applied primitive, superstitious beliefs and exacted a brutal judgment.

The modern criminal trial is little different, Arnold argued, as it offers the drama of procedural criminal justice, and as such constitutes a “great humanitarian ideal” (Symbols, 143), even as it frequently subverts the pursuit of substantive justice. Consider first the role of the zealous criminal defense attorney. To the extent that a guilty criminal defendant has imperiled the forces of law by his alleged actions, and also threatens future harm should he be released, then his attorney threatens to disrupt the moral order by providing him with a vigorous defense. But if defense attorneys fail to exploit any technical or procedural opening in the trial proceedings, they also threaten to disrupt a system of advocacy that positions them as agents of their clients (Symbols, 142-44). Defense tactics, in turn, lengthen the time and costs of criminal trials, and may subvert the cause of justice—as in the archetypal, if fairly rare, instance in which the defendant is acquitted or a trial dismissed due to a technical rule of evidence or trial procedure. Vigorous criminal defense may be essential to the drama of the criminal trial and to the ideal that a defendant should receive a fair hearing in which he is represented fully and fairly, but aggressive defense tactics (as well as aggressive tactics by prosecutors) appear to conflict with attorneys’ roles as officers of the court, and frequently prove costly to the administration of criminal justice.

These costs might be worth bearing if balanced by a rational, trustworthy adjudicatory system—that is, if we could have confidence that zealous advocacy on both sides led to more reliable verdicts, then perhaps the excesses of the advocacy could be more easily endured. Alas, Arnold argued, such is not the case. The jury is not a deliberative decision-making institution—it is “an unpredictable body,” Arnold wrote, “moved by emotional considerations, and not careful of the fundamental principles of the law because of ignorance, prejudice, etc” (Symbols, 144). It offers neither justice nor administrative efficiency. And yet, like the zealous advocates whose one-sided spels it is supposed to consider critically and weigh, the jury is also “the great symbol

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57 The due process rights afforded included medieval analogs to the preliminary hearing, the indictment, the presentation of evidence and the right to be heard, appellate review of a conviction, and a permanent written record (Symbols, 136-37).
of justice,” ideally serving the role of a deliberative assemblage of peers able to pass judgment on the defendant and thereby give dignity to the proceedings and uphold the rights of the accused (Symbols, 144-45). As a representative, democratic sample of the citizenry apart from the State, the jury serves as the “shock absorber” for systemic criticisms of the criminal justice system. It can withstand the inevitable criticism arising from unsatisfactory results in individual cases and inconsistent results across cases (Symbols, 144-45). The symbolic value of the citizen jury, and the procedural legitimacy it brings to the criminal trial, transcends the potentially inferior substantive results the jury will render in its verdict.

Meanwhile, the judge directs the various players in the drama through their necessary roles. As in Joan of Arc’s trial, a judge does not “question the underlying assumptions of the government which it supports, however regrettable those assumptions may be” (Symbols, 140). His responsibility is entirely procedural, only that “of an umpire” (Symbols, 145); when successful, the criminal trial judge allows all the circumstances to be considered by the jury and produces a record by which the “future” can judge “all of the facts” (Symbols, 140). The ideals of the criminal trial drama, then, embody the state’s effort to legitimate itself and its criminal justice system: the adversaries zealously advocate; the jury deliberates; the court enforces and referees. At the same time, the criminal trial emerges in Arnold’s description as an ideological mask over a system that malfunctions, with lying, conniving advocates seeking to free guilty defendants or punish innocent ones, manipulable, inattentive juries, and judges acting as little more than bureaucrats whose authority is limited to the stage directions of trial procedure.

To read Arnold’s description today is to meet a not unfamiliar ideological critique of the state and the criminal justice system. At first glance, Arnold’s description of the criminal trial appears to anticipate New Left and critical theoretical jeremiads against a criminal process—and a state—that seems more concerned with its own legitimacy than with substantive injustice. Curiously, however, it is unclear whether Arnold’s efforts to demystify the criminal trial’s socially symbolic functions is in fact critical—his voice certainly lacks the timbre of rage with which such demystification is usually made. Instead, in his work on the criminal trial and on other areas of law, he frequently analogized his work to that of an anthropologist seeking not to condemn or celebrate his subjects but to capture through thick description their peculiar folkways. He was a detached social scientist, not a hand-wringing prophet.

Suppose, then, that his project was merely descriptive rather than critical. It certainly does not seem out of the ordinary for a law professor to privilege ceremony and custom over consequence, and to value procedure over substance—after all, legal academics have a stake in defending procedural values, which the legal profession has long viewed as essential to modern conceptions of the rule of law. What are proceduralists but those odd, quintessentially lawyerly ducks who embrace process and institutional competence, and who like nothing better than perfect rules, flow charts, and taut rules?

But this, too, fails to capture Arnold’s voice—indeed, the clue that this role fits Arnold no better than that of the nascent Marxist is the outlandishness of his recognition that procedure trumps substance even when the substantive result is not simply wrong, but horrific! He either embraced or found tolerable the structural flaws in the criminal justice system, and seemed to view its imperfections not as targets of reform but as essential components—perhaps unexpected consequences, but necessary ones—of a system devised, populated, and acceded to by stupid
humans. He appears neither as a conservative seeking to uphold existing traditions and institutions nor a radical who rejects them. As ever with Arnold, then, we’re left with a burning, frustrating question: Was he making a normative claim in favor of popular sentiment and against justice and administrative efficiency, or were his sarcasm and irony components of a campaign to unmask and critique the paradoxes and contradictions of the criminal trial?

Post-Realism and Criminal Law

Part of this confusion comes from Arnold’s complicated relationship with legal realism, and from tensions within realism itself. As a means to enforce the law, the criminal justice system appeared to Arnold the realist as significantly less than perfect—a perspective that generations of law professors in realism’s wake have shared and explored in countless law review articles and books prescribing vigorous reform. Arnold identified the criminal trial’s weaknesses, comparing it unfavorably to the dispute resolution available through arbitration and the enforcement of federal laws and regulations by administrative agencies (Symbols, 128-29), while he berated both the sporting nature of trial techniques wielded by attorneys and the inability of criminal penalties and the penal system either to reform the guilty or make society safe (Symbols, 145-46). His critique of doctrine—from the narrow problem of criminal attempt to the broader ideal of the law to be enforced—and his characterization of the criminal justice process—from the broad delegation of prosecutorial enforcement to the criminal trial’s drama—at once embraced the law in action and noted its shortcomings. Like a good realist and good Progressive, he could have suggested a resolution for the problems he identified, some clever prescriptive fix—trust the judge’s intuition (for which he advocated in his doctrinal article), or trust the law in action rather than the law on the books (as he seemed to suggest in his article on law enforcement), for example. And of course he did do so. But realism’s narrative resolution realism offered to the crises or flaws that its proponents identified—study it and fix it!—did not altogether satisfy Arnold.

Instead, he mocked and snickered and sometimes enjoyed a good belly laugh. Because how can you reform the institutions and doctrines of the delusional? In fact, the criminal trial had endured from Joan of Arc’s day to Arnold’s, and even to our own—and not merely as a means to make determinations of guilt and innocence. It survives, Arnold proposed, because the administration of criminal justice is not a method of controlling crime but a popular drama of public morality, meant to provide “a series of parables which are a guide to the honest and a terror to the outlaw” (Symbols, 147-48). The criminal trial symbolizes the morality and rationality of governance, offering “the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world” (Symbols, 129). It may not provide an efficient and satisfactory resolution of the conflicts and contradictions between the individual and the state—indeed, perhaps it cannot do so, even if reformed and improved—but it validates both the state’s preeminence and the dignity of the individual within the dramatic spectacle that pits one against the other in a formally equal setting. The criminal trial is not a pragmatic tool subject to incremental improvement through the rational, pragmatic intervention of smarty-pants academics and reformers. It is an ideological symbol of a rational judicial system within a stable government and society, legitimating the substantive laws it is used to enforce and legitimating the state itself. Its symbolic authority overshadows the formal, procedural inadequacies that
Arnold and his colleagues and contemporaries who studied the criminal courts found. The criminal trial’s role as drama, in sum, is neither a reflection of the criminal justice system’s perfection nor an empty, manipulative tool by which the state controls its subjects. Rather, it is an essential institution by which the state enforces the law, protects the individual through seemingly fair and neutral procedures, and, of equal importance, portrays its law enforcement and fairness to its spectating public.

That said, Arnold offered the possibility for positive change in the criminal justice system in the institution of the prosecutor. Prosecutors make decisions that can best protect the public while efficiently managing scarce government resources, and need sufficient authority and deference they are given to achieve these goals. Implicit within his prescription for the criminal attempts doctrine article was the same commitment to expertise and the state. To evaluate a defendant’s culpability for attempt, Arnold would defer to the trier of fact who could develop and best evaluate the facts of a particular case—and while this figure might typically be a jury, Arnold seemed to suggest that his respect was for judges, presumably appellate judges, who were responding to their close review of a trial record. The ideal formal concept underlying an abstract doctrine is foolish, meaningless; the knowledgeable expert, closely evaluating the facts on the ground, is far better able to resolve the dispute effectively and correctly.

These two observations, the emptiness of ideals and the necessity of pragmatic, functionalist expertise, were linked: the Progressive, realist state can only operate in the shadow of a symbolic vision of the state as a perfect formal machine. The ideal of “law enforcement” suggests to the public that the state’s authority to choose how and when to enforce the laws, and the flexibility with which it does so, does not exist. Under the ideal, all laws are enforced, fully and equally. The ideal legal form, sought so strenuously by Arnold’s formalist contemporaries in the criminal attempts doctrine, needs conceptual clarity and consistency. Arnold’s “attempt at social dissection” of the law enforcement ideal thus proceeded as follows: He mocked general, formalistic principles, whether they were held by rival academics or the general public or, more likely, both; he noted the symbolic nature of these principles; he offered observations of how the law “really works” in practice in opposition to the misunderstandings that formalistic principles produce; but he asserted that efforts to reform the law to better reflect and accommodate the law in action are unlikely to succeed unless they respond to and accommodate the outdated, formalistic principles that he had earlier mocked.

A decade after he left Yale, Arnold had the opportunity to apply his theory of criminal law on the bench to an issue that his academic work had briefly considered: the relationship between criminal insanity and the element of mens rea, or the mental state required for criminal culpability. In the intervening years, as Judge Arnold recognized in one of his earlier D.C. Circuit decisions, a coordinated movement had developed that sought “to give courts the assistance of unbiased [psychiatric] experts who are not selected by parties to the proceeding” for purposes of judicial review of administrative bodies making decision regarding the criminally insane.58 Arnold’s realist embrace of the social sciences and of expert administrative processes, as well as his friendship with the Yale psychologist Edward Robinson, suggested that he would embrace this effort to bring psychological insights to the treatment of the mentally ill and, by extension, to the evaluation of criminal defendants.

58 De Marcos v. Overholser, 137 F.2d 698, 700 (D.C. Cir. 1943).
The D.C. Circuit’s then-prevailing standard for whether a defendant could be excused from criminal liability due to insanity had been established by the British House of Lords in the mid-19th century M’Naughten decision. The so-called M’Naughten rule limited consideration to the defendant’s ability to distinguish between right and wrong—those who could do so faced responsibility for their willful acts.59. The rule did not, of course, incorporate a complex, modern understanding of sanity that psychology and psychoanalysis would later provide; instead, it offered a fairly crude, moralistic conception of insanity based on what it assumed was an easily identifiable, essential baseline of moral behavior and cognition, as applied by a trier of fact based on a cursory examination of a defendant’s understanding of contemporary norms.

But law’s modernity could not simply replace moral conceptions of criminal responsibility with the breakthroughs of social and behavioral sciences. In order to remain legitimate, Arnold argued, the law was required to act as if it represented a separate, better realm of folklore and symbols than whatever currently prevailing scientific method and findings that experts espouse. In his 1932 “Law Enforcement” article, he wrote,

The search for definitions of mens rea since the McNaughton case [sic], while it may express public morality, is pathetic in its failure to solve the trial problem of keeping emotion out while letting science in. And now comes the latest and most entertaining development of all, the parade of psychiatrists and alienists before the bewildered jury. Since they are “scientists” every believing person expects them to agree, if not now, at least some time in the future when the court or some impartial body selects them. No practical person expects anything of the kind. In practically all cases where the issue is contested they serve only one function, which is to permit evidence of mitigating circumstances to be brought to the jury.60

Here again is the classic Arnold reversal, the strange mix of a conservative’s willingness to accept traditional morality with the cruel ironist’s insinuation that the conservative view may be wrong.

While on the bench, Arnold authored two significant decisions that considered the intersection of law and the modern sciences of the mind, Holloway v. United States61 and Fisher v. United States.62 Arnold’s opinion in Holloway held that the issue of whether a criminal defendant is mentally impaired and therefore not responsible for his actions is a jury question, and the testimony of licensed psychiatrists regarding a defendant’s mental state “cannot bind the jury except within broad limits.”63 Psychiatry applies diagnostic and therapeutic science, while the criminal law requires the juries apply the moral judgment of the community; the two are incompatible, Arnold concluded, and in the context of the criminal trial, science is merely evidence for the jury to consider rather than an authority to which the courts must defer—even when all three of the psychiatrists who testified at trial agreed that the defendant was psychopathic, and two testified that he was unable to tell right from wrong at the time of the

60 Thurman W. Arnold, Law Enforcement—An Attempt at Social Dissection, 42 YALE L.J. 1, 20 (1932).
61 148 F.2d 665 (D.C. Cir. 1945).
62 149 F.2d 28 (D.C. Cir. 1945).
63 Holloway, 148 F.2d at 667.
The decision Arnold authored in *Fisher* affirmed the district court’s refusal to give an instruction, proffered by the defense, that would have required the jury to consider a defendant’s “mental, nervous, [and] emotional . . . characteristics” in determining whether he murdered with premeditation.

At issue in both cases was the relationship between the claims of science and the commitments of the legal system. In his decisions, Arnold reasoned that because the legal system’s normative values operated in a realm distinct from the purported advances of modern science, the role of the judiciary is to enforce the boundary between law and science, while the role of the jury is to consider and decide the relevance of expert testimony regarding the defendant’s mental state. Psychology and psychiatry proceed from a set of assumptions regarding reason, instinct, emotion, and impulse that differ from the “instinctive sense of justice of ordinary men,” he wrote in *Holloway*; at the same time, “groups of distinguished scientists of the mind” frequently fail to reach consensus regarding the mental state of defendants because of their field’s complex, sensitive understanding of the mind. The problem of moral responsibility that the jury must resolve, by contrast, allows no such complexity.

Given this conflict, did Arnold view his decisions in *Holloway* and *Fisher* as an enactment of his own theory of criminal law and justice? In *Fisher*, he asserted that “age old conceptions of individual moral responsibility cannot be abandoned” when juries determine the guilt of a defendant, “without creating a laxity of enforcement that undermines the whole administration of criminal law.”

If those words had appeared in his academic work, they would have dripped with sarcasm—and indeed, recall that earlier he had ridiculed the “entertaining development” of a “parade of psychiatrists and alienists [appearing] before the bewildered jury.” To Professor Arnold, the jury was a symbol of all that was both perverse and necessary about the criminal trial; to Judge Arnold, forced to actually consider the implications of his theory for jury deliberations, the jury must rely upon “the instinctive sense of justice of ordinary men.” Accordingly, the jury—a vulnerable institution that Professor Arnold noted was limited in its decisionmaking and deliberation by its members’ inadequate intelligence and susceptibility to emotional appeals—required protection from the advances (and pretensions) of “the sciences of the mind.” This view of the jury departs strikingly from Arnold’s view of the capacity and responsibility of the judge in his earlier decision in *De Marcos v. Overholser*, in which the D.C. Circuit held that a court may at its discretion initiate a psychiatric evaluation of a prisoner who petitions for his release from confinement for his alleged insanity. There, Arnold concluded, “a fair trial cannot be given in a case like this unless the court is permitted to avail itself of every opportunity which the law allows to consult scientific experts.”

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64 Id. at 665-66.
65 *Fisher*, 149 F.2d at 29. *Fisher* was later overruled in *United States v. Brawner*, 471 F.2d 969, 999-1000 (D.C. Cir. 1972) (en banc), which held that courts may allow and instruct the jury regarding expert testimony on abnormal mental conditions that are insufficient for complete exoneration but relevant to rebut or establish a specific mental condition that is an element of the crime. *Id.* at 1002.
67 *Fisher*, 149 F.2d at 29.
68 *Holloway*, 148 F.2d at 665.
70 *De Marcos v. Overholser*, 137 F.2d 698, 700 (D.C. Cir. 1943).
71 *Id.* at 699.
jury in its determination of guilt, a judge could—and perhaps should—order and consider in determining a petition for a prisoner’s release.

In a sense, Judge Arnold had applied the ideas of Professor Arnold.\textsuperscript{72} Both jurist and academic trusted the insights of modern, progressive science while each stepped back from radical reform in order to protect the flawed but essential institution of the jury. Judge Arnold had donned the judicial robe, seated himself at the appellate bench, and played his predetermined role. He had left behind his ironic voice and his omniscient voice for the jurist’s gravitas and influence. No wonder he quit the role after only a brief time. It was left to his successors on the D.C. Circuit to experiment with the place of psychiatric testimony in the criminal trial and to grant juries more freedom to consider more complex, technical issues regarding a defendant’s sanity.\textsuperscript{73} In the end, confirming Arnold’s intuitive sense of the criminal justice system’s limits, the Circuit ultimately returned to a more traditionally moralistic definition of insanity.\textsuperscript{74} The popular drama could not bear the weight of imperfect, complex modern behavioral sciences, and, as Arnold predicted, the necessity of that drama trumped efforts to revise and reform it.


\textsuperscript{73} See Durham v. United States, 218 F.2d 862, 874-76 (D.C. Cir. 1954), rev’d, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (establishing the rule that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect,” providing a more technical, psychiatrically informed definition of “disease” and “defect” than in precedent and other jurisdictions, and citing Holloway’s approach to the roles of judge and jury in determining mental capacity and insanity as consistent with new rule)

\textsuperscript{74} See United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972) (adopting Model Penal Code approach that defines mental disease or defect that negates responsibility for criminal conduct where “such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 102-03 (1967). See generally RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, LAW AND THE MEDICAL HEALTH SYSTEM 518-24 (discussing the admissibility of expert testimony on the ultimate issue of a defendant’s sanity or capacity), 568-82 (similar, regarding mens rea) (4th ed. 2003).