

## BOOK REVIEWS

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

Thurman Wesley Arnold has had, over the last half century (and a bit more), a varied, successful, and eminently useful career at the bar. He has been an elected official,<sup>1</sup> a practicing lawyer, a professor of law, a high official of the Department of Justice, a federal appellate judge and again a practicing lawyer. His *cursus honorum* thus includes, as is no longer very common among American lawyers, most of the jobs in which a lawyer can advantageously employ his legal education. In each of them he has distinguished himself above the common, but in none could it fairly be said that he has stood in the very first rank. Were this all, this combination of autobiography and chrestomathy would be of interest only to sedulous graduate students delving into the minutiae of the Age of Roosevelt. But it is not all. In one art Arnold stands without a master or a peer: he is the ablest living teller of funny stories, many of them his own,<sup>2</sup> and, what is still more remarkable, most of them printable. What Boswell is among biographers, what Newton is among mathematicians, what Shakespeare is among playwrights, Thurman Arnold is among after-dinner speakers. Nor is this praise intended as a sneer; the splendid practitioner of a humble art is far rarer and far more deserving of public esteem than is the converse.

The history of post-prandial and other occasional oratory deserves more scholarly attention than it has received, for it must account for a high percentage of the sum of human misery, and a very much smaller fraction of the total of human joy, since Neolithic times. The Greeks, although partial to political oratory, as we all learn from Thucydides, seem to have discouraged monologues in other circumstances. The Romans, however, must have suffered abominably, for not only were they buffeted by gales of political and forensic oratory, but also every hopeful literatus compelled his friends, freedmen and clients to listen for hours and even

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1. Member of the Wyoming House of Representatives, Mayor of Laramie.

2. But not all. His story about the banker who wouldn't extend another loan to a large borrower ("My client replied, 'John, have you ever been in the sheep business?' 'No,' replied the banker. 'Well, you're in it now.'"), which appears on page 34, has been current for at least a century in New York, usually being set in the underwear business. No doubt its application to wine, pickled olives, salt fish, or amphorae raised guffaws in Periclean Athens.

days to public recitation of his tragedies, comedies, histories and epics.<sup>3</sup> The Roman after-dinner speaker, if he was not talented, was at least wealthy, and his audience was commonly consoled and sedated by several courses of sow's udder, dormice stewed in honey, peacocks' brains, and other classical delicatessen, washed down by a sound selection of Chian and Falernian vintages. No such Lucullan compensation is available to American audiences, whose agonies of boredom are more than likely to be compounded by dyspepsia. More than once I have reflected in such circumstances that the number of recorded discourses which a civilized man in his right mind might regret not having heard live is two: The Sermon on the Mount and the Gettysburg Address. To these morose meditations Mr. Arnold is a shining exception; I have heard him several times, and I would do it again tomorrow night if I had the chance. Many of Mr. Arnold's finest here<sup>4</sup> find a better preservative than the memories of his audiences, which is a boon to posterity.

The quantity and quality of Mr. Arnold's wit is particularly astonishing and gratifying when one realizes that he is, after all, at bottom a reformer and even a bit of a revolutionary. As a general proposition, Mohammed and Marx, Lenin and Hitler, Malcolm X and Mary Baker Eddy are united by their total lack of humor. Not only do they lack humor themselves, they distrust and dislike it in other people. The fate of the genuine humorist (as distinct from the laborious hacks whose dreary and sometimes nauseating output passes for satire in such publications as *Der Stürmer* or *Krokodil*) is likely to be harsh under their regimes. Most of their movements soon develop a repellent cant, usually an imitation and exaggeration of the stylistic peculiarities of the Founder. Communist cant, for example, is full of phrases ("dialectical materialism," "inner contradictions," "historical necessity," etc., etc., etc.) derived from Marx's version of the German polemic style of his day, further debased and made more banal by Stalin.<sup>5</sup> The cant of the English Puritans, to select a rather different example, was (like that of many religious cranks of less note) a vulgarization of the language of the King James version — "comfortable Scriptures," "sweet experiences," "unsavory discourse," "smite the Amalekites," etc., etc., etc.<sup>6</sup> I do not, of course, intend to carry very far the comparison between Cromwell's followers and modern Communists. It is none the less a fact that a reading of modern Communist homiletics and polemics leads to a better understanding of the unfeigned joy with which the population of England in 1660 exchanged the efficient and honest government of the Saints for the inefficient and corrupt regime of the

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3. See CARCOPINO, *DAILY LIFE IN ANCIENT ROME* 195-201 (Yale Paperbound ed. 1960); DILL, *ROMAN SOCIETY FROM NERO TO MARCUS AURELIUS* 172-74 (Meridian ed. 1956).

4. *E.g.*, pp. 28-34. I commend particularly the story about clockless cuckoos.

5. The coarseness of the current Communist *Schimpflexikon* ("lackey," "running dog," "hyena" and so forth) seems to be specifically Russian; at least it is not characteristic of Marx, nor of Engels (who in fact wrote very elegantly).

6. See 1 MACAULEY, *HISTORY OF ENGLAND* 125-30 (1856) for an account of some of the peculiarities of the Saints.

Stuarts. The likes of Titus Oates or the late Andrei Vishinsky become as fluent in such duckspeak as the true believers and rise high in the hierarchy of the elect. For a man like Thurman Arnold, such mimicry would be simply impossible.

It could hardly be otherwise, for a world-saver with a sense of humor would be almost a contradiction in terms. The foundation of true humor is a correct appreciation of the speaker's place in the universe. The underdeveloped George Washingtons who have been saving such countries as Cuba and (until recently) Ghana and Indonesia from the dangers of imperialism, capitalism, neo-colonialism, and overeating, are, if not fully divine, Messiahs to a man. Indeed, theophany and theocracy, which most people had supposed extinct since Diocletian's time or thereabouts, seem to be making a strong comeback, sometimes in previously civilized countries. Aside from Little League Mussolinis like Sukarno and Nasser, there is some reason to believe that the more sinister egomaniac who reigns as Son of Heaven and Chairman of the Chinese People's Political Consultative Conference may have begun to suspect that dogmatic atheism is one more error of the Russian *Untermenschen*, that there is a God, and that He is in fact incarnate in the somewhat tubby (but none the less imposing and even graceful) person of Mao Tse-tung. Is it possible that one whose Methods of Thinking permit even his dullest catechumens to arrive at Correct Conclusions, who holds the absolute power of life and death over six (or seven or eight) hundred million people, who writes, moreover, poetry of transcendent and unearthly beauty — is it possible that such a one is merely one more specimen of *homo sapiens*, scarcely exalted above common politicians like the President of the United States? Plainly not. Therefore. . . .<sup>7</sup>

It is obvious that such theomaniacs can neither make nor tolerate jokes; no tincture of humor can coexist with a persuasion that one is, if not God, at least one of His intimates and favorites. Certainly there is no record of the cracking of a joke by Hitler or Mao or even Nkrumah. Dr. Castro is only an apparent exception to the rule. Not many Latins are capable of the murderous seriousness of Himmler, Stalin or Mao, and I must in fairness concede that Castro (like the late Benito Mussolini, whom he resembles in a number of other respects) has demonstrated a talent of the highest order for political buffoonery. But it is intrinsically improbable that even his wildest antics, such as the discovery of a nefarious anti-Castro plot between the Chinese Dogmatists and the Yankee Imperialists, are intended to furnish amusement. No clown with even the most rudimentary

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7. I must in fairness concede what is obvious: that Fascists, Communists and religious cranks are not the only people who talk cant. The Babbity of the 1920's, for instance, had their own cant, though it was, on the whole, more ridiculous than sinister. See, e.g., BARTON, *THE MAN NOBODY KNOWS* (1924), which contains, among many other choice specimens, an entire chapter (VI) devoted to the proposition that Jesus was "The Founder of Modern Business." Barton, who is still alive, is a minister's son and full of *Reader's Digest* piety, but he must be classified as primarily an apostle of Babbitism rather than Christianity.

sense of timing would declaim for five or six hours at a stretch, as Castro does with dismal regularity. Similar comments apply to Colonel Nasser.<sup>8</sup>

All of these are, of course, unusual cases — reformers on a large and ruthless scale. But first-rate senses of humor are not common among even moderate and humane world-savers, perhaps because the humorist's view of man is likely, as in the case of Mark Twain, to lead to the conclusion that he and his lot are not really capable of improvement. When one does find an honest, warmhearted enemy of injustice who is at the same time a very funny man, he is worth hearing. Such a one is Mr. Arnold.

No one — least of all Mr. Arnold — would claim that *Fair Fights and Foul* is a heavyweight contribution to jurisprudence or history. Arnold is not by temperament or training a Profound Thinker. His devotion to the Sherman Act, for example, seems to be largely an outgrowth of old time Populism — a Westerner's fear and dislike of Eastern big business and big finance (*e.g.*, pp. 33-34, 50, ch. 14 *passim*) — what he terms "absentee corporate control over local industry by inexorable corporate empires" (p. 52), as if there were something intrinsically immoral about the corporate form of doing business. He is not at all troubled by the double-think implicit in advocating simultaneously free competition and the protection of Little Business from the effects of that competition. He seems indeed to regard the restrictive practices of big business as responsible not only for the stock market crash of 1929, but also for World War II (p. 52) — a belief which does far less than justice to the Satanic genius of Adolph Hitler.<sup>9</sup>

There are other passages which strike me as oversimplifications of very complex questions. Is it so crystal clear that "property" rights can readily be distinguished from "human" rights and that the latter are always to be preferred (*see, e.g.*, pp. 69, 72)? Communist politics seem to suggest that one set of rights is not worth much without the other. Historically, men have always been as strongly attached to their property as to their liberty, and sometimes more so; indeed, they have frequently been found ready to hazard their lives in defense of their property. It was not blind conservatism which caused the draftsmen of the fifth amendment to link

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8. Another possible exception to the rule that theomaniacs do not have senses of humor is Gaius Caligula, who had occasional flashes of a sort of sanguinary wit — *e.g.*, when asked why he had burst out laughing at a dinner he gave for the consuls of the year, he explained that there had just flashed through his mind the thought that "at a single nod of mine, both of you could have your throats cut on the spot." I Suetonius, *THE LIVES OF THE CAESARS* 455-56 (Loeb ed. 1914). But Caligula, aside from the fact that his wit could not have furnished much amusement to its hearers, was not in any sense a reformer, and so differed fundamentally from the Redeemers discussed in the text.

9. On the other hand, I am glad to find that I have distinguished company in my total inability to follow the reasoning of *United States v. Hutcheson*, 312 U.S. 219 (1941), and the rest of the decisions of the Supreme Court exempting labor unions from the antitrust and antiracketeering statutes. Mr. Arnold's comment on *United States v. Local 807 Teamsters Union*, 315 U.S. 521 (1942), which held that holding up trucks at the New York end of the Holland tunnel and demanding pay for unnecessary services, at the point of a gun, was not racketeering, exactly describes my own state of mind: "The decision puzzled me then and, after mature reflection, it still puzzles me." P. 117.

life, liberty, and property. Similarly, has Mr. Arnold really reduced the conservative ethos to an absurdity (his favorite and most effective polemical tactic) when he speaks of "the former conservative belief that poverty is due to lack of initiative on the part of the poor" (p. 97)?<sup>10</sup> The fact is that the poor resemble the rich in this much: some people inherit poverty which they do not deserve; some achieve it by their own merit; most can thank a combination of the two causes. By the same token, there is considerable evidence, historical and contemporary, that the proposition that relief, unaccompanied by jobs, is harmful to the recipients (p. 54) may not be totally absurd.<sup>11</sup> Nor do I find wholly convincing Mr. Arnold's reduction to absurdity of the deterrent theory of punishment (p. 231). He adduces as authority to support his position the shopworn allegation that "when men were hanged for picking pockets in England, pickpockets were busy plying their trade among the crowd witnessing the hanging" (p. 231). Maybe. But how many pickpockets? Were there more thieves then there are now? Neither Mr. Arnold nor I nor anyone else really knows. But I gladly concede that elsewhere Mr. Arnold's use of *reductio ad absurdum* shows that the master's hand has lost nothing of its skill<sup>12</sup> — although it hardly requires Mr. Arnold's finesse to reduce Eisenhower economics to absurdity.

It will be well for the industrious graduate student of the future to bear in mind that Mr. Arnold's autobiography is not intended as scholarly history, for some of his statements are excellent examples of the reason why lawyers are taught to check primary sources. Here is Mr. Arnold's version of the persecution of Theron Lamar Caudle, a former Assistant Attorney General in charge of the Tax Division of the Department of Justice:

He prosecuted and convicted a well-known person for tax evasion. He resisted all the pressures put on him to drop the prosecution. One day he learned that a certain oil interest of trivial value had been transferred to him by the defendant he was investigating. He immediately wrote an indignant letter and repudiated the gift. Nevertheless, he found himself prosecuted and convicted and sent to prison, his entire career ruined, and his family impoverished. (P. 148).

It fairly made my blood boil. The trial of Joan of Arc was nothing by comparison. But, alas, a check conducted *ex abundatia cautelae* showed that the martyred Caudle's relations with taxpayers whose affairs were under investigation were not quite as Mr. Arnold recalls them. The uncontroverted testimony was that these taxpayers lent Mr. Caudle money

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10. See also p. 275.

11. See, e.g., ORWELL, *THE ROAD TO WIGAN PIER* 77-85 (Berkeley paperback ed. 1961).

12. E.g., chapter ten.

which was not repaid;<sup>13</sup> that they furnished him a private plane for blithe-some little trips to Florida<sup>14</sup> and paid for a longer European junket;<sup>15</sup> that they gave his wife the mink coat which was then *de rigueur* in such cases;<sup>16</sup> and that they paid him "commissions" totalling \$6,000 for arranging the purchase of sundry oil interests and an airplane.<sup>17</sup>

In one respect, however, Mr. Arnold's contribution to history ought to be of the highest interest and value, for he has written a somewhat impressionistic but splendidly illuminating account of the Yale Law School in the thirties (*e.g.*, pp. 35, 57-68, 135-36). It may be that not the least of Mr. Arnold's claims to a place in history is that he<sup>18</sup> was one of that little band of serious and frivolous thinkers who made the Yale Law School — not what it is today, but something perhaps even better, fuller of experiments still more preposterous (*e.g.*, pp. 62-63) and professors even nuttier (*e.g.*, p. 62) than those who distinguish and adorn it today. In those days going to the Yale Law School took more imagination and nerve than I<sup>19</sup> had, but the product, if it did not take to drink or legal philosophy, or otherwise fly off the trolley, was often truly superb.

Mr. Arnold, and Mr. Arnold's book, really deserve much more space than I can give them here and now. His shrewd observations far outnumber the inaccuracies and naivetes, which I, being a book reviewer, have unfairly emphasized. In particular, his sixteenth chapter, "Why Government Service is a Dubious Career" is a remarkably penetrating critique of the American bureaucracy, particularly "that essential supplement to Parkinson's Law commonly known as Arnold's Corollary, the principle of which is as follows: No new government activity can possibly be effectively carried out by any established government organization" (p. 155). Whoever invests a modest \$5.95 will learn a great many things, some old, some new, about an intelligent, warm, generous, and above all witty, man. As legal autobiography goes, it is very hard to beat.<sup>20</sup>

*Joseph W. Bishop, Jr.\**

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13. N.Y. Times, Nov. 27, 1951, p. 1, col. 2.

14. *Id.*, Nov. 28, 1951, p. 1, col. 4.

15. *Id.*, Dec. 10, 1951, p. 1, col. 5.

16. *Id.*, Nov. 30, 1951, p. 1, col. 4.

17. *Ibid.*

18. A.B., Princeton, 1911; LL.B., Harvard, 1914. WHO'S WHO also discloses a Yale M.A., but I suspect that this is one of the fictitious degrees which Yale confers *privatim* upon any full professor whose background is so deprived as not to include a genuine Yale degree.

19. LL.B., Harvard, 1940.

20. Mr. Arnold has liberally availed himself of the opportunity to reprint articles, briefs and judicial opinions which he thinks — not always rightly — deserve more attention than they got when they first appeared. *E.g.*, chapters 5, 18, 20.

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