

10-1-1965

Fair Fights and Foul, a Dissenting Lawyer's Life. by Thurman Arnold.

Alan A. Ransom

Buffalo Law Review

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal Biography Commons](#)

Recommended Citation

Alan A. Ransom, *Fair Fights and Foul, a Dissenting Lawyer's Life. by Thurman Arnold.*, 15 Buff. L. Rev. 249 (1965).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol15/iss1/23>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact law scholar@buffalo.edu.

applies Pound's theory to the problems of the new emerging nations. The difficulties of formulating jural postulates are even more obvious in these nations than in the West, and it is even difficult to locate *de facto* interests in countries that are changing so rapidly. Thus the time-and-place limitations of Pound's theory become obvious.

Chapter 10 and 11 are almost completely new. In Chapter 10, Stone, classifying the issues among theories of justice, finds four instead of three, the new one being natural law vs. "positivism." He also adds selections on language analysis and the sense of justice. His own theory in Chapter 11 is also new. The other chapters, 3, 5, 6, are largely unchanged except for occasional brief additions and improvements in wording. For example, in Chapter 3 the awkward heading "Natural-law individualist wines in new metaphysical bottles" is replaced by the more elegant and appropriate "New metaphysical individualist wines in natural law bottles."

The most pervasive change is the great increase in number of footnotes. An average of one-third of each page is devoted to footnote arguments and citations, and the total number in the book runs over 1600. Consequently the book really moves on two different levels, one a straightforward discussion of the subject and the other a scholarly commentary on commentaries, exploration of detailed issues, and lists of references and cross-references. At its worst, as occasionally in the first two chapters, this dualism produces a text so condensed and superficial that it is nothing more than an introductory survey, and footnotes so complex and abstruse as to be of interest only to classical scholars. At its best, as in the rest of the book, it produces both a solid, rich text, and an opportunity to pursue almost every point further in the footnotes. But if one wishes to read both text and footnotes, one must be prepared for very slow going. This is a highly condensed book, packed with arguments, by a scholar usually in full command of a very wide range of materials, materials which have been so well organized that the central issues of justice remain always in focus.

PAUL DIESING

Associate Professor of Philosophy

State University of New York at Buffalo

FAIR FIGHTS AND FOUL, A DISSENTING LAWYER'S LIFE. By Thurman Arnold.
New York: Harcourt, Brace & World, Inc., 1965. Pp. vii-xi, 3-292. \$5.95.

In this short, peppery book, Thurman Arnold has collected some sage observations concerning legal practice and social policy. The work is an attempt to use the great changes in our social and legal thought—from the dogmatic "theologies" of early 19th century economists, through the desperate changes wrought by the Depression, up to the current economic uncertainty and experimentation—as an autobiographical basis.

The author ranges over a wide variety of topics. One of the best chapters, whimsically entitled "The Practice of Law Is a Profession of Great Dignity the Pursuit of Which Requires Great Learning," is a comparison of American and British legal practice and legal education. The contrast may be characterized as one between American Books and Legal Theology on one hand, and British Robes and Dignity on the other. A large part of this contrast is due to the differing roles of counsel in the two systems. British judges look to briefs of counsel for a truthful exposition of relevant law, while their American counterparts expect (and get) lengthy, partisan obfuscation, then go and do the research themselves. This, plus the sacred American tenet that "Research Can Solve All Legal Problems," results in our courts spending long months researching, writing, and engaging in "the maturing of collective thought,"¹ which Mr. Arnold contends is merely the furtherance of legal confusion. He believes this same reliance on long, positional briefs and judicial research has contributed in large measure to the decline of oral advocacy in the United States. Conversely, the British, using counsel as a help rather than a hindrance, have gotten along admirably with oral opinions delivered shortly after argument and without the benefit of excessive "maturing of collective thought." Still, the author concedes the British system would not comport with our highly aggressive adversary technique, nor with our "Research Can Solve All Legal Problems" theology (which he wryly notes also serves to keep Law Reviews in business). However, one gets the impression the British come out a little ahead.

The discussion of criminal trials centers around conviction and acquittal as a moral problem:

Trials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that cannot be done by logical formalization. Civil trials perform this function as well as criminal, but the more important emotional impact upon a society results from a criminal trial.²

The influence of the *Durham*³ and *Gideon*⁴ cases, both of which were argued by the author's partner, Abe Fortas (recently appointed to the Supreme Court) is viewed primarily as one of inducing a more compassionate public attitude toward crime, thus fostering greater understanding of its causes, leading in turn to penal reform. His solution to the crime problem is to spend whatever is necessary to remove its causes, as cost is completely irrelevant. One might ask: "Irrelevant to whom?"

The author uses several well-known cases⁵ handled by his firm as a basis for

1. This phrase first appeared in an article by Professor Henry Hart, entitled *The Time Chart of the Justices*, 73 HARV. L. REV. 85, 100 (1959). Mr. Arnold's reply, *Professor Hart's Theology*, appeared in 73 HARV. L. REV. 1298 (1960).

2. P. 231.

3. *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954).

4. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

5. *Peters v. Hobby*, 349 U.S. 331 (1955); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *affirmed by an equally divided court*, 341 U.S. 918 (1951); *Friedman v. Schwellen-*

a scathing denunciation of the McCarthy hysteria. His indignation at secret informers producing secret information to be reviewed by (at times) secret tribunals is eloquently expressed, and readers may (and should) wince at the thought that such proceedings were encouraged by our government and sanctioned, for a time, by our courts. The detailed treatment of these sordid cases serves as a potent reminder that in a democratic society, "The ominous theory that the right of fair trial ends where defense of security begins is irrelevant."⁶

On the lighter, but no less important side, the author, using briefs and opinions as his vehicle, discusses at length (too much length, perhaps), the never-never land of obscenity and the law, coming to the questionable conclusion that the open sale of pornography is "a step forward."⁷

The shortest chapter in the book is also one of the most perceptive. Entitled "A Brief Career on the Federal Bench," it is a concise analysis of the problems of our judicial appointments system, and points out the vast difference between the partisan argumentation of counsel and the objective deliberation of the judge, as well as the difficulties of switching from the former to the latter.

One of the book's more valuable assets is a liberal sprinkling of some devastating one-liners. Witness his pithy dissection of client *Playboy* as a magazine "a large part of the contents of which was designed to prove that women are mammals."⁸ Again, ". . . legal learning is the art of making simple things complicated, which should be an easy task for anyone. Paradoxically, the great lawyer is frequently one who can make simple and intelligible matters which lawyers and judges regard as complex."⁹ On the casebook method: "No more time-wasting system of studying law has ever been devised."¹⁰

The chief fault of Mr. Arnold's work lies in repetition and occasional organizational lapses. For example, we are told time and time again, often with little difference in language, how conservative monetary policy was incapable of dealing with the changing economic scene in the United States prior to the Depression. Partially at least, this fault is due to incomplete integration of previously published segments into the new work. Chapters devoted to "A Lady From Colorado" (Evalyn Walsh McLean) and "The Education of the Educated Voter" (an ad for the Great Society) detract from the continuity of the book. The former doesn't belong in it; the latter is again repetitive. But this is a small flaw in an extremely readable book, well spiced with anecdotes of scenes familiar to those acquainted with the law. It is the sort of work one can read at his

bach, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947), *reh. denied*, 331 U.S. 865 (1947) and the Fort Monmouth and Owen Lattimore episodes.

6. Bailey v. Richardson, *supra* at 74, (Edgerton, J., dissenting).

7. P. 186.

8. P. 170. It was in a brief involving this client that the author included his now-famous footnote: "The only way to avoid such repellent descriptions is to hold that no nudes is good nudes." P. 184.

9. P. 252.

10. P. 263.

leisure and put down for a few days without a guilty conscience, and yet from which it is possible to learn a great deal. In it, one of America's greatest advocates has given us some welcome light reading with a point.

ALAN A. RANSOM
Note Editor
Buffalo Law Review