

2016

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Recommended Citation

Mark Fenster, *Mr. Peabody's Improbable Legal Intellectual History*, 64 *Buff. L. Rev.* 101 (2016), available at

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Mr. Peabody's Improbable Legal Intellectual History

MARK FENSTER†

INTRODUCTION

You may recall Mr. Peabody, a cartoon dog who had his own segment on *Rocky & His Friends* and *The Bullwinkle Show*. Mr. Peabody was the smartest being alive, the enormity of his erudition matched only by that of his ego. He spent each segment teaching his rather stupid boy Sherman about history by transporting them both back in time via the WABAC (pronounced “wayback”) machine he invented. The histories he walked into are fractured, as per the perverse logic of Jay Ward studio cartoons of that era, the studio that also produced *Fractured Fairy Tales* as a repeating segment in the same shows. The irrepressible and resourceful Mr. Peabody typically intervened to preserve history as we currently understand it from the foolish proclivities of the presumably great, but in fact flawed, historical figures that he and Sherman found in the past. Great men only became great because the great historian Mr. Peabody made them so. In a pre-postmodern take on the historian’s craft, the cartoon posited that history does not simply recognize great men—it transforms commoners into them.¹

Although his historical method challenged and even disrupted historical knowledge, Mr. Peabody did not engage in the history of ideas; his interest lay entirely in world-historical events that he found through his WABAC machine and that he manipulated to track the historical record. The foolish, confused, and often cowardly people he found could not contemplate or fully understand their own place in history, much less the ideas that surrounded them, while Mr.

† Cone, Wagner, Nugent, Hazouri & Roth Tort Professor, Levin College of Law, University of Florida. Thanks to Jack Schlegel and Rachel Rebouché for suggestions.

1. A recent film adaptation revived the same main characters and the WABAC machine, and relied upon the same general storyline. MR. PEABODY AND SHERMAN (DreamWorks Animation 2014).

Peabody was no more interested in intellectual or ideological context than the audience for his cartoons—even the audience for cartoons written to humor both children and adults. But the animated sequences that always introduced and concluded each *Mr. Peabody and Sherman* episode offer a character who I think represents the work of legal intellectual historians, and especially their relationship to those lawyers and legal academics who attempt to make substantive arguments about the present on the backs of the truncated version of the past that they tell. Herewith, a description of the opening sequence:

A trumpet sounds; flags introducing a parade appear. Two proud horses bearing knights in armor and blankets with the word “PEABODY’S” lead the parade; three identical lumpen Robin Hood-era soldiers on foot follow; then a Cleopatra-like figure borne by four Egyptian servants on a bed festooned with the word “IMPROBABLE”; then three goofy African-like savages with spears; then a soldier riding an elephant wearing a blanket with the word “HISTORY”; then Mr. Peabody and Sherman in a humble chariot pulled by a fearsome horse; then three lovely maidens leaping, absurdly pulling the petals off of flowers. Bringing up the rear is a lone street sweeper who cleans the petals (and, implicitly, the excrement that the animals must have produced).

Legal intellectual history, I suggest in this Paper, is the street sweeper in the parade of law’s history and its use of history. Lawyers and legal academics want great, important figures, cases, and theories with and against which they can do battle. The student-edited law reviews prefer bold, clear claims that explain why one answer to an historical question presented will bring justice, while a competing answer is manifestly unjust; why one past approach lacks principle or created worse consequences; or how one theory or another can explain all manner of thorny legal issues which bedevils academics and practitioners. Viewing an appellate decision, legislative enactment, or academic debate, the legal academic must travel back in time to set matters straight, redeeming the past to make certain that the future avoids its confused and unfortunate fate.

Intellectual historians trail behind the legal academy’s heavy-breathing and magnificent use of the past, cleaning up its waste by providing context, complicating narratives, and replacing bright trumpet horns with muted tones, vivid

colors with shades of gray. Well after the parade has dispersed and marchers have moved on, and often before the next “Big Issue” causes the celebrants to line back up, intellectual history can bring complexity and context back in to the frame. I illustrate this dynamic first by describing the use of legal realism in Brian Tamanaha’s recent monograph on what he describes as the formalist-realist divide in legal theories about judging and about legal doctrine, and in the debate over that divide.² In Part II, I describe a relatively minor figure in the pantheon of legal realists (as that pantheon currently exists), Thurman Arnold, and his realist critique of the criminal law and procedure.

I. INSIDE THE FORMALIST-REALIST DIVIDE

Tamanaha’s central purpose in *Beyond the Formalist-Realist Divide* is to correct the present tendency, which he traces to Grant Gilmore’s enormously influential *The Ages of American Law*³ and to the Critical Legal Studies (“CLS”) movement,⁴ to make vast overstatements about what judges who worked during the “classical era” believed and how committed they were to the beliefs they held.⁵ The prevailing historical narrative of doctrinal development and judges’ role in it presents a straight, progressive line of change from the foolish innocence of legal formalism to the wise experience of legal realism and realism’s aftermath.⁶ Tamanaha argues there was no such thing as “formalism,” the view that law is autonomous, comprehensive, logically ordered, and determinate, with judges applying that law mechanically to

2. See generally BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* (2010).

3. GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

4. A footnote on the relationship between legal realism and CLS could either be very long or mercifully brief. I choose the latter path. Duxbury’s description of CLS’s early days and its roots in various realist traditions and debates seems as good as any. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 435-50 (1995).

5. See TAMANAHA, *supra* note 2, at 17-21, 60-62.

6. See *id.* at 1-3.

the dispute before them.⁷ Realists and their later interlocutors—arguing in their strongest statements that the law is indeterminate, filled with gaps, exceptions, and contradictions, applied by judges who decide cases based on intuition, ideology, or personal preference—overstate their departure from the past as they sought to distinguish themselves.⁸ The traditional narrative of discontinuity and transformation is unsound and unsupportable.⁹ Legal theories and approaches to the study of judicial behavior based upon it merely repeat the error.

Tamanaha offers in its stead a tale of functional continuity in common law judging under the rubric “balanced realism.”¹⁰ Judges decide easy cases by the nearly mechanical application of existing rules and harder cases through a more complex process that considers the standards of the community.¹¹ In their institutional roles, judges therefore balance the two approaches of formalism and realism—hence, “balanced” realism.¹² Tamanaha provides an impressive and, at times, overwhelming inventory of judicial commentaries made during the “classical” or “formalist” era that recognize the gaps, uncertainties, and evolving nature of the common law and judges’ active role in making it.¹³ The approach that emerges from these general statements about the judicial process proves far more complex than the term “mechanical jurisprudence” that Roscoe Pound attributed to the era and that continues to be oft-repeated today.¹⁴ At the same time, however, he substitutes the reduction he has found with another one: reducing a century’s jurisprudence into the platitudes espoused by judges’ platitudinous statements about what they do in the abstract. The neat

7. *Id.* at 14-63.

8. *See id.* at 67-108.

9. *Id.*

10. *Id.* at 6-7.

11. *See id.* at 186-96.

12. *See id.* at 125-41, 197-99.

13. *Id.* at 28-51.

14. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

package of formalism becomes the equally neat, if more palatable, package of balanced realism.

My purpose in this Part is not to argue that Tamanaha is “wrong,” though, as with most clean and streamlined historical arguments, he gets some particulars incorrect or describes them incompletely, and he creates straw figures that he can easily tear apart. Reviews and mentions of his book attempt to separate the good from bad and the accurate from the overstated, and interested readers should consult them rather than this Paper for fuller consideration of his argument’s merits, especially for contemporary legal theory.¹⁵ Nor am I concerned that the balanced realism he promotes is at so abstract a level of generality to be thoroughly banal—even though it surely is, as Brian Leiter argues.¹⁶ I want instead to probe the narrative structure of Tamanaha’s history, to see how it fits into certain kinds of academic and professional arguments that pervade the legal literature and what it might tell us about the value, if there is any, of legal intellectual history.¹⁷

Indeed, if stated without the trappings of a legal brief and polemics, Tamanaha’s history is largely correct. Of course realism’s theory of law and judging did not emerge fully grown from nothing in the early twentieth century; of course a common law system produced cases and commentary that resist the stultification and implications of an excessively static, formal system of law. As Al Brophy has explained in his review of the book, Tamanaha was not the first to note this.¹⁸ Over the past several decades, intellectual

15. Compare Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383 (2013) (reviewing and challenging Tamanaha’s book for its historical account), and Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010) (questioning aspects of the book’s historical narrative and challenging its substantive jurisprudential theory), with Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011) (articulating a much more positive review of the book).

16. See Leiter, *supra* note 15, at 125-27.

17. On the role of narrative in history, see HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1973); HAYDEN WHITE, *TROPICS OF DISCOURSE* (1978).

18. See Brophy, *supra* note 15, at 388.

historians have added nuance to the picture that legal theorists and some legal historians have offered of “formalists.”¹⁹ But Tamanaha provides a useful and pointed rejoinder to legal theorists and jurists that the simple narrative of the “Classical Era Before Realism” is in fact more complex than a bunch of silly men in robes expounding on the wonders and beauty of legal rules.²⁰ Of course, as he notes, the academics denominated as “realists” constituted themselves as distinct from previous generations and contemporaries by establishing the narrative in the first place.²¹

The question of why they did so does not appear to interest Tamanaha. When he confronts the question of who and what these people were, he vacillates. Sometimes he acknowledges some thin notion that they “shared [a] skeptical take on the role of law in judging”;²² he makes statements and repeats arguments from others acknowledging diversity among the realists;²³ and he even suggests that “realism” might have sprung whole cloth from private correspondence between Llewellyn and Pound, and never emerged except in their imaginations.²⁴ He also considers who the realists themselves were, though not in great detail.²⁵ There were no card-carrying members or official meetings; their membership was contested, and some who clearly espoused “realist” ideas (like Leon Green) pointedly refused the label.²⁶ Their interests and

19. See, e.g., KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011); DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013); Stephen A. Siegel, *Historism in Late Nineteenth-Century Legal Thought*, 1990 WIS. L. REV. 1431.

20. See TAMANAHA, *supra* note 2, at 28-51.

21. *Id.* at 17-18 (noting that Llewellyn and Pound, as well as Gilmore, established the narrative).

22. *Id.* at 70.

23. *Id.*

24. *Id.* at 69-71.

25. See *id.* at 71-74.

26. *Id.* at 69. The full story of Pound and Llewellyn’s correspondence reveals the essentially random quality of the exercise. See N. E. H. HULL, *ROSCOE POUND*

methodologies varied, and while a core of them were in the early-middle of their academic career and approximately the same age during realism's heyday, they were as diverse in personality and temperament as one might expect of such a non-diverse group of white, male law faculty.²⁷ Tamanaha fails to offer a solution to the mystery of why the narrative began in the 1930s, rather than the 1970s, and barely considers the possibility. Instead, the "what" question is his focus—what the realists and their later interlocutors said that contributed to the received narrative, and what the so-called "formalist" judges said that undercuts it.

To distill from this tendentious and contingent assemblage of ideas, methods, and human beings a narrow theory of adjudication, as Tamanaha (and the many other contemporaries to whom he is responding) does, is to perform the same historical transformation that he rightly critiques regarding "formalism" and "formalists." Those associated with realism undertook their research and writing outside of Llewellyn's mind and correspondence. They may have espoused similar ideas about, among other things, the role of judges, law's politics, and law's political consequences, but they did so to differing degrees and in different voices, while focusing on different doctrinal areas and asking different research questions. They also worked in different law schools scattered around the country (or, in Jerome Frank and Felix Cohen's cases, in non-academic settings),²⁸ and therefore within distinct intellectual communities, institutional pressures, and opportunities. To transform this group into a "movement" requires some degree of imagination; to reduce it to a few PowerPoint slides is to conjure an efficient theory out of a small sample of publications from a motley group of

AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 173-222 (1997).

27. A brief account both of the coherent story of "legal realism" and of its undermining in the actual history of institutions, events, and personalities, appears in JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 15-21 (1995).

28. On Frank's career, see ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985); on Cohen's career, see DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

individuals who were plenty busy doing other things, and then to claim that they all agreed with the simplification.

The *Sturm und Drang* of that era begs for some explanation besides the arrogance or anxieties of a new generation of legal academics. If historical actors think they are engaged in an important intellectual project to overthrow an existing regime—and some of them at least clearly did—they were not simply fudging the historical record when claiming they were correcting the mistakes of their predecessors. We should not take them at their word as if they are fair and objective historians; but nor should we assume they are fantasists creating myth out of whole cloth. They established a narrative about themselves, their forebears, and doctrinal development, and as with any scholarly claims—including Tamanaha's—they produced that narrative in a particular institutional and political context. That narrative's survival and ongoing salience, too, requires some consideration, as its success can no longer be the direct result of CLS's rise and Gilmore's bewitching prose, if in fact it ever was. The continuing predominance of the narrative is a fascinating mystery, but solving it would require a degree of nuance, sympathy, and symptomatic reading, as well as research into the primary sources that reveal institutional and personal history. It would require the hard work and thought of intellectual history that do not seem to interest Tamanaha.

That those associated with realism presented an overly simplistic historical argument in their own platitudinous statements is no reason to believe what they said, to believe that they believed it, or to believe that their successors continue to believe it rather than merely repeat it unthinkingly as gospel. The predominant discontinuity narrative is at once a powerfully convenient story—powerful in its ability to distinguish between approaches, convenient in its ability to combine signifiers—and an historically reductive one. But so is Tamanaha's continuity narrative. In place of the realists' and their supporters' vision of intellectual struggle (as opposed to an unspoken or not quite as voluble, actual political, generational, and institutional one), Tamanaha's several parades of straw men dramatize an overriding genius-of-a-system common law tradition, one that can bear and incorporate intellectual struggles within

its capacious judicial process. Such parades are wonderful and useful, and they have sustained generations of intellectual debate among lawyers and legal academics. They continue to make teaching legal doctrine easier and more fun. They aid brief-writing and give the illusion of important stakes in otherwise sterile academic debates. They can even be called a kind of historical inquiry—after all, they demonstrate an interest in the past, and thank goodness for that. They can constitute a history of ideas and intellectual history of a thin sort. But they are neither careful, mindful of ambiguity, open to self-reflection and self-critique, interested in the complexity of institutions and individual biography, nor willing to seek out and confront contradictory sources. They are to history what philosophical debates among lawyers are to philosophy.²⁹

II. “REALISM,” REALISTS, AND REALISM’S MYTHMAKING: THE CASE OF THURMAN ARNOLD

WABAC machine to 1930 or so. Thurman Arnold, whom Tamanaha lists as a prominent realist,³⁰ arrived at Yale from the outer province of West Virginia (where he served as dean for a couple of years).³¹ He was hired first as a visiting professor to take part in Dean Charles Clark’s efforts to study the Connecticut courts.³² Arnold was not a typical legal realist, however.³³ His tenure in the academy lasted less than a decade, and he rarely engaged in scholarly debates after he left.³⁴ His prominent later professional career—as assistant attorney general in charge of antitrust enforcement, federal appellate judge, and then co-founder of a prominent D.C. law

29. Alas, self-issued licenses to practice history are cheaper than self-issued licenses to practice philosophy, which is a reflection of philosophers’ more successful and intensive efforts to police their discipline through obscure jargon and method.

30. See TAMANAHA, *supra* note 2, at 94.

31. SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 39-44 (2005).

32. *Id.* at 43-44.

33. As if such a thing existed, stuffed and set in a diorama on the Yale campus.

34. The exception is an important one: Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298 (1960).

firm—overshadows his brief academic one.³⁵ But he was an important figure at Yale when that school housed a large and prominent number of those associated with realism.³⁶ And in cycling through the gamut of realist methodologies and perspectives, from quantitative empirics through doctrinal critique and legal theory, Arnold's work both confounds and replicates Tamanaha's historical narrative. His was a far more varied and polyglot "realism" that anticipated the intellectual moves of succeeding generations, even if it did not directly inform them. Like several other realists, his interest lay in questions besides judicial decision-making and legal form.³⁷

Nevertheless, Arnold imagined himself setting both the law and academic debate right, offering his arguments (and those of his compatriots) as the end of a fairly simplified historical progression of ideas. His storytelling thus resembles Tamanaha's own mythmaking, as it does that of the endless parade of legal academics who invoke their historical forebears. To illustrate his work and considerable narrative abilities, I briefly summarize below Arnold's work on criminal law and procedure, fields that were not at the core of what Tamanaha identifies as realism's concerns. Arnold applied realist methods to reach distinct conclusions about the way forward for legal theory and reform.

* * *

Reporting on the empirical study on the criminal docket in the Connecticut federal courts he was engaged in with Dean Clark and the newly arrived William Douglas,³⁸ Arnold

35. See generally WALLER, *supra* note 31, at 78-180.

36. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 137-43 (1986); Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL* 75, 85-87 (Anthony T. Kronman ed., 2004).

37. I have extensively discussed Arnold's work elsewhere. See generally Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 *OR. L. REV.* 69 (2005); Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 *BUFF. L. REV.* 1053 (2003).

38. See SCHLEGEL, *supra* note 27, at 86-88.

published a “progress report” in a 1931 issue of the *A.B.A. Journal* in which he used realist terms that emphasized its study of the “law in action,”³⁹ while it rejected the formalist study of the “formation of principles.”⁴⁰ Having obtained “mass statistics” of the actual procedures that courts used, the study found courts engaged in an “almost too efficient” process of overseeing plea bargains for prosecutions for the production, sale, and possession of alcohol under the federal Volstead Act.⁴¹ Like similar studies undertaken around the same time, Arnold and his collaborators had discovered the emergence of the modern system of criminal justice—the exercise of prosecutorial discretion to avoid criminal trials.⁴² Tamanaha and others marginalize the empirical strain of realism as strange and naïve, if they recall it at all. But it was in fact more important than jurisprudential realism to many of those identified with realism in the late 1920s and early 1930s, as well as to the deans at Yale and Harvard,⁴³ and it foreshadowed the academy’s current fixation with quantitative methodology as well as the longer-lived “law and society” interest in the close study of law in action.⁴⁴

Empirical work was ultimately not to Arnold’s liking, however, and he soon abandoned it for the speculative pursuits of doctrinal critique and his own brand of anti-jurisprudential jurisprudence. And so, even before the completion of the Connecticut study, Arnold turned to substantive criminal law in an article titled *Criminal*

39. Thurman W. Arnold, *Progress Report on the Study of the Federal Courts—No. 7*, 17 *A.B.A. J.* 799, 799 (1931).

40. *Id.*

41. *See id.* at 800, 801.

42. *See* SCHLEGEL, *supra* note 27, at 89.

43. While Dean Clark had recruited Arnold to Yale specifically because of the latter’s empirical work on West Virginia courts, Dean Roscoe Pound was attempting to woo Arnold to Harvard on the same basis—to join an empirical project he was sponsoring. *See* Letter from Thurman Arnold to Roscoe Pound (Jan. 23, 1931), *in* VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 176-77 (Gene M. Gressley ed., 1977).

44. That the realists’ empirical methods are now viewed as primitive says as much about evolving, contingent means of unearthing truth through the collection of data and the numerical representation of that data as it does about the realists’ methodology.

Attempts—The Rise and Fall of an Abstraction,⁴⁵ where he critiqued the case law and scholarship that attempted to explain and systematize a notoriously complicated and incoherent area of law.⁴⁶ He attacked in particular the “formalist” Joseph Beale and the eminent criminal law scholar Francis Sayre, both of Harvard, who sought in different ways to construct a stable, mechanically applicable criminal attempts doctrine by categorizing culpable attempts and distinguishing the mens rea of inchoate acts and the theoretical consequences of non-actions.⁴⁷ Beale and Sayre were not alone; a number of learned scholars had more recently sought to tame the doctrine through fine distinctions and categories.⁴⁸

To Arnold, all of these distinct but similar approaches led only to the rise of the “abstraction” to which the article’s title referred. They made little sense in theory and proved impossible to apply, and taken together they were part of a tendency towards “analytical thinking” and “search for abstractions” which had confused scholars and jurists for generations.⁴⁹ Scholars and appellate courts could not make sense of the doctrine because its very principle made no sense

45. See Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930).

46. *Id.*

47. See *id.*; see also J. H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 491-92 (1903) (identifying four elements of the attempt crime: an act, the intent to “adapt[]” that step towards a purpose to complete the offense, nearness of success, and failure); Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 837-39 (1928) (consolidating 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).

48. See, e.g., John W. Curran, *Criminal and Non-Criminal Attempts, Part II*, 19 GEO. L.J. 316, 337 (1931) (arguing that that an attempt merited criminal punishment to the extent that it breached the peace and thereby challenged and harmed the state’s authority); John S. Strahorn, Jr., *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 971 (1930) (arguing that the law of criminal attempt should focus 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”).

49. Arnold, *supra* note 45, at 59-60.

and had no boundaries.⁵⁰ Indeed, Arnold argued, the absence of reported cases that consider the law of attempt, and the vanishingly small number of decisions that had relied on attempt as a standalone doctrine in the very recent past, proved that attempt was a largely meaningless abstraction.⁵¹ The current scholarly controversy over how to classify and apply the attempt doctrine, therefore, failed to reckon with the fact that courts largely ignored the doctrine and the debate it had engendered.

Arnold offered a functional alternative that he claimed was based on the work of judges who smartly adapted the law to particular cases in order to arrive at fair and administrable conclusions.⁵² They did so by suppressing the desire for a separate law of attempt and by focusing instead on the relationship between the alleged action in the particular case and the underlying substantive crime that the defendant allegedly failed to complete, using new attempt statutes to “throw all [the conceptual] machinery overboard.”⁵³ 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.⁵⁴ Understood this way, the criminal attempt doctrine constituted a gap-filling device that would allow courts to punish criminally culpable conduct not included within a statute’s specific language and not serious enough to warrant the full penalty for violating statute.⁵⁵

This looks like standard realist stuff, at least in Tamanaha’s reconstruction of realism’s rhetoric. While Arnold never used the word “formalism” and only once used the word “realistic” (in the context of praising trial courts for undertaking a “more realistic treatment”),⁵⁶ he might have employed those labels, or at least concepts, more freely if the

50. *Id.* at 63-64, 68-70.

51. *See id.* at 78-79.

52. *See id.* at 78.

53. *Id.*

54. *Id.* at 77-78.

55. *See id.* at 75-76.

56. *See id.* at 79.

article had been published one or two years later. Arnold aimed his criticism at the tendencies of commentators and appellate courts “to qualify and analyze the useless abstractions until they obtain at least an appearance of certainty.”⁵⁷ He continued:

They do not like to admit frankly that some situations where predictability is impossible can be handled more intelligently with less logical machinery, rather than with more, because the presence of an elaborate set of principles adds an additional and unnecessary element of uncertainty by diverting the court’s mind from the real question to the rules.⁵⁸

He fought a seemingly unseen enemy whose transgressions were defined by an ideal of mechanical jurisprudence, perpetrated most egregiously by scholarly efforts to tame a doctrine that need barely exist at all.

The true villain of the piece, however, was not a diffuse “formalism” but a particular approach to a specific set of arguments made by prominent legal academics and published in leading law reviews. Although implicitly part of a broader theoretical and jurisprudential critique of some broader phenomenon, Arnold’s was not a scattershot attack on an amorphous school of judging or thought. It was a narrow, technical unveiling of a vapid way of handling what he viewed as a silly doctrine. Arnold did not see himself as Tamanaha portrayed him and his peers—a would-be young turk allied with others who built a movement by fabricating an enemy who largely did not exist. To the extent that Arnold was a realist, he viewed himself on an actual battlefield engaged with real competition, among them the nefarious Beale.⁵⁹

57. *Id.* at 80.

58. *Id.*

59. For examples of the rhetoric surrounding Beale, see JEROME FRANK, *LAW AND THE MODERN MIND* 53-61 (1931) (discussing Beale as “representative of the conventional doctrine” of “legal fundamentalism”); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 833 (1935) (sarcastically listing Beale as one of the leading “classical jurists” and “masters of the law”); Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 *FORDHAM L. REV.* 272, 282 n.63 (1936)

* * *

The *Criminal Attempts* article merely marked a middle position for Arnold. His next article on criminal law, published two years later, critiqued the very functionalism which the legal realists seemed to uphold. In *Law Enforcement—An Attempt at Social Dissection*, Arnold sought to explain why scholars seemed unable to persuade courts and legislatures to adopt their great ideas.⁶⁰ Its primary motivation was not to criticize any particular ideas for their abstraction, but to explain to reformers the assumptions under which courts and legislatures work.⁶¹ They wrongly assumed that the criminal justice system was rational and functional. The substantive criminal law, he argued, is an “elaborate . . . attempt to reconcile and make more definite the implications of the vague public ideals that surround the criminal courts.”⁶² The resulting criminal code crams together an excessive and incoherent array of crimes in an effort to further contradictory and incoherent moral and cultural ideas.⁶³ The public expects that the enforcement of these laws will be strict, mechanical, and impartial, at least when the prohibitions are enacted.⁶⁴ Utilizing the insights gleaned from his early empirical work, Arnold explained that the public does not get what it wants and assumes is occurring. Prosecutors utilize their discretion and the relative invisibility of their work in most cases to decide not to prosecute everyone who violates a crime, because doing so would merely “clog the machinery” of justice “with relentless prosecution of comparatively harmless persons.”⁶⁵ When they do prosecute, they rely heavily on plea bargains, all in an effort to best allocate their limited resources in a manner that

(characterizing Beale as “the arch-disciple of conceptualistic dogma, say the realists,” in an extended, vitriolic critique of realism).

60. Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 24 (1932).

61. *See id.*

62. *Id.* at 7.

63. *Id.* at 7, 14-15.

64. *See id.* at 6-7, 11.

65. *Id.* at 9.

can still protect the public from the worst and most dangerous criminals.⁶⁶ As a consequence, quibbles over doctrine and efforts to establish logical categories of criminally culpable behavior will fail.⁶⁷ The action and power in criminal law reside in a largely lawless, purely discretionary system of law enforcement.⁶⁸

Arnold's argument appears to be a realist description of a failed formalist system. Rather than offer a transformative vision or technical reform to improve the system, he took his realist insights in a different direction. The ideal of mechanically-applicable criminal laws founded in moral and cultural principle, he argued, sits at the core of the criminal justice system and will not be displaced by calls for more realistic reforms.⁶⁹ Campaigns to reform must operate within the ideal of strict, morally righteous law enforcement—a necessary fiction that reformers must use “to accomplish the desired ends.”⁷⁰ The jurisprudence of criminal law (and of law generally) is a symptom rather than an explanation, part of a range of ideas that “people cling to as social values, and the kind of phrases to which they respond.”⁷¹ Though untrue, the ideals of law enforcement constitute the “personality” of the criminal justice system and establish its security by making it legitimate to “that part of the public whose acceptance is vital to [its] power . . . , and without which it fails.”⁷²

By this point in his intellectual trajectory, Arnold had departed from what is now considered the mainstream of legal realism in two respects. His writing no longer confidently suggested even the barest of programmatic normative outlines. The intuitive wisdom of the trial courts offered no significant relief; indeed, in his first monograph *The Symbols of Government*, his characterization of the criminal trial was wholly descriptive, critiquing and

66. *Id.* at 17-18.

67. *See id.*

68. *See id.*

69. *Id.* at 12-14.

70. *Id.* at 13.

71. *Id.* at 23-24.

72. *Id.* at 23.

satirizing all components of the adjudicative part of the criminal justice system, including the attorneys, judge, and jury, without providing barely a whiff of a solution.⁷³ All that the purely symbolic trial accomplishes is to present criminal justice as a procedural drama, one in which procedure itself stands as a “great humanitarian ideal”⁷⁴—even as it frequently subverts the pursuit of substantive justice. At the same time, the level of abstraction in his work ascended far beyond the technical, doctrinal issue that *Criminal Attempts* considered, and well beyond the formalist-realist divide in doctrinal debates. Instead, his concern was primarily sociological and anthropological, foreshadowing the New Left’s cultural and social critiques to come, but without their invocation of a radical, transformative political movement. Lacking a normative answer and the faith that any functional solutions would either win out politically or solve the problems they addressed, Arnold had moved beyond the realists’ progressive narrative to a kind of tragicomic eternal return of symbolic arguments over form and function.

* * *

Perhaps the outlying nature of Arnold’s work, and his departures from what we view now as the realist norm, make him largely irrelevant to all but intellectual historians. From our present view, the “realism” of Thurman Arnold (and of the other outliers, including Underhill Moore’s parking lot study, Llewellyn’s interest in legal anthropology, etc.) has simply disappeared in the Darwinian rush of legal theory and jurisprudence. In Tamanaha’s narrative, we have moved towards a narrower understanding and use of “legal realism” and “formalism” to assist us in far more important tasks, like developing a contemporary jurisprudence, an analytical theory of law, or a theory of judicial behavior. He would shrink those categories further, dispensing with them in favor of a balanced realism. We can read Arnold out of this legal history because the subject is only useful to the extent that it serves present concerns and debates. Any stray details

73. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 128-48 (1935).

74. *See id.* at 143.

about marginal historical figures, complicating institutional histories, or intellectual trajectories can appear in the marginal publications of those few who live in the dusky twilight thrown off by old bound copies of law reviews (or, more likely, the outer reaches of HeinOnline) or, worse, the dusty shelves of general university libraries.

Ironically, of course, the approach that renders Arnold superfluous to the realist narrative and to Tamanaha's rejection of that narrative was one of Arnold's own signature moves. He cared little about history too, except insofar as it might confirm or be useful for the present purpose of an argument he was making. He used the trial of Joan of Arc, which received renewed interest during the early 1930s, in his discussion of the criminal trial only because it was a wonderfully symbolic event, illustrating (at least as Arnold recounted it) precisely the argument he wanted to make about the empty rituals of criminal procedure.⁷⁵ Having left behind the specific debates of criminal attempt, he had no need to actually support his quite broad claims about conceptualists who fetishized abstract legal forms and reformers who wanted to ignore and sweep away all of the outdated doctrine that stood in modernity's way. He presented his own parade of the usable past.

Unfortunately for Arnold's reputation, the current, accepted version of this parade cares very little for his sort. Felix Cohen's *Transcendental Nonsense*,⁷⁶ Karl Llewellyn's work on the UCC,⁷⁷ and Jerome Frank's *Law and the Modern Mind*⁷⁸ are among the small number of canonical works that best represent what contemporary scholars want from Realism, perhaps alongside Holmes's *The Path of the Law*⁷⁹ and Cardozo's *The Nature of the Judicial Process*,⁸⁰ old

75. *Id.* at 135-41. The transcript of Joan of Arc's trial had recently appeared in an English translation. See THE TRIAL OF JEANNE D'ARC 1-2, 17-18 (G. G. Coulton & Eileen Power eds., W. P. Barrett trans., 1931).

76. Cohen, *supra* note 59.

77. Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995).

78. FRANK, *supra* note 59.

79. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

80. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

chestnuts from those considered either predecessors or proto-realists. These writings are included in course syllabi and name-dropped in faculty workshops, their ideals distilled to a particular analytical essence and their sources cited in law review footnotes when an editor requires support. More likely, recent and more probing secondary sources provide a summary means to invoke the parade float that realism—and formalism, for that matter—have become. And Thurman Arnold, part of the original parade and himself one of the era's better carnys, barely gets a mention. Rightly so, given the current parade's interests and purposes. This is what Tamanaha both critiques and perpetuates, refiguring the characters in his own jurisprudential parade of the past.

CONCLUSION

At the end of each Mr. Peabody episode, after the title character has gotten the last laugh with a terrible pun and the animation has faded to black, the transition to the rest of the show ran in this way:

Panning across the busts of famous but unnamed white men from various historical eras, the camera finds a live, anonymous looking man with a moustache, standing in a garbage can that resembles somewhat the pedestals on which the busts sit. It is the same street sweeper from the parade. Upon that recognition, he moves his face to wag his moustache, changes from his white uniform hat to a black bowler, grabs his umbrella, wags his moustache at us again in a kind of humorous salute, and then runs out—but not before reaching back with an absurdly long arm to flip a blank sign over so that it reads, "THE END."

The street sweeper is anonymous—a humble, unnoticed figure. He follows the great men, sweeping their detritus with a sense of purpose and humor. Taking a minimal evaluative perspective among self-proclaimed heavyweights of history and their self-important evaluator in Mr. Peabody—perhaps beyond noticing who is leaving the most refuse—the sweeper is empowered to note the parade's end, but even then does so almost as an afterthought.

Like the street sweeper, intellectual historians are not at the center of the legal parade, nor are they part of it in the way of traditional legal academics pronouncing on history from the perspective of the present and as part of a presently

relevant argument. We are marginal to the enterprise. Law is aware of and concerned with—indeed at times obsessed with—its history. But its understanding of its history, and especially of the role of ideas in that history, is ever in the service of some other project. At its best, intellectual history can clean that up. It does so unnoticed, after the parade has moved on.