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Reed Miller
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A MEMORIAL TO THURMAN WESLEY ARNOLD

REED MILLER*

Thurman Wesley Arnold, Dean of the College of Law of West Virginia University from 1927 to 1930, died at the age of 78 at his home in Alexandria, Virginia, on November 7, 1969. Thus ended the remarkable career of one of the most colorful men the New Deal brought to the nation in the 1930's.

Few men have packed so much living into a lifetime—lawyer, judge, mayor, legislator, teacher, dean, economist, author, trustbuster, defender of civil liberties, poet, raconteur—Arnold ranged over a wide span of activity, leaving his mark on many phases of American life.

Born in Laramie, Wyoming, June 2, 1891, the grandson of a Presbyterian missionary and the son of a prosperous lawyer-rancher, Arnold never lost his love for the rugged beauty of the Wyoming ranch country where he was buried, high on top of a hill on a cloudless November day. As his law partner, Paul A. Porter, described Arnold's resting place in his remarks at the memorial services at the Washington National Cathedral—"Thurman Arnold literally reposes on top of the world. And—as I shall ever remember him—he always did."

This was the image of the man—always vigorous, always accepting the new challenge, always cheerful, full of wit and whimsy, never depressed, a man of action whose wartime experiences in chasing Pancho Villa across the Mexican border seemed to leave him possessed of only one tactic and one command for living the full life—"Charge!"

Judge Arnold, as he was always called after his tenure on the United States Court of Appeals for the District of Columbia, was

*The author is a 1941 graduate of the West Virginia University College of Law and was associated with Judge Arnold in the practice of law. He is currently associated with Arnold and Porter, Washington, D.C.
a graduate of Princeton and the Harvard Law School. In his autobiography, *Fair Fights and Foul*, Arnold reveals the beginnings of what was to become a life-long running battle against the myths of the law and of economics which became the subject of both his incisive analysis and his ever present wit. Describing his law school days at Harvard, Arnold reminisces about the mental process by which the “legal mind” is developed:

Each individual endowed with free will by his creator had two little men in the top of his head. One was called Reason, the other Impulse. Reason was a highly reliable little man. Impulse on the other hand, was completely unreliable and untrustworthy. He was unable to follow any logical and consistent course of conduct. He was prone to be influenced by the blandishments of demagogues. He was a pushover for unsound schemes. It was, therefore, the duty and function of the little man called Reason to put his foot squarely on the back of the neck of Impulse whenever that individual began to err and stray like a lost sheep, as was usually the case. The law was the quintessence of human reason.

The result of this method of thinking I tried to express in a poem written at the Harvard Law School in 1914 about a typical law-school course:

**CONFLICT OF LAWS**

*CONFLICT OF LAWS with its peppery seasoning,*  
*Of pliable, scarcely reliable reasoning,*  
*Dealing with weird and impossible things,*  
*Such as marriage and domicil, bastards and kings,*  
*All about courts without jurisdiction,*  
*Handing out misery, pain and affliction,*  
*Making defendant, for reasons confusing,*  
*Unfounded, ill-grounded, but always amusing,*  
*Liable one place but not in another,*  
*Son of his father, but not of his mother,*  
*Married in Sweden, but only a lover in*  
*Pious dominions of Great Britain’s sovereign.*  
*Blithely upsetting all we’ve been taught,*  
*Rendering futile our methods of thought,*  
*Till Reason, tottering down from her throne,*  
*And Common Sense, sitting, neglected, alone,*  
*Cry out despairingly, ‘Why do you hate us?*  
*Give us once more our legitimate status.’*  
*Ah, Students, bewildered, don’t grasp at such straws,*  
*But join in the chorus of Conflict of Laws.*

* (Brook v. Brook)
CHORUS

Beale, Beale, wonderful Beale,**

Not even in verse can we tell how we feel,
When our efforts so strenuous,
To over-throw,
Your reasoning tenuous,
Simply won't go.

For the law is a system of
wheels within wheels
Invented by Sayres and Thayers and Beales***

With each little wheel
So exactly adjusted,
That if it goes haywire
The whole thing is busted.

So Hail to Profanity,
Goodbye to Sanity,
Lost if you stop to consider or pause.

On with the frantic, romantic, pedantic,
Effusive, abusive, illusive, conclusive,
Evasive, persuasive, Conflict of Laws.

Arnold's battle with the myths of the legal profession continued from his law school days throughout the years. Over fifty years later he observed:

[Legal learning is the art of making simple things complicated, which should be an easy task for anyone. Paradoxically, the great lawyer is frequently the one who can make simple and intelligible matters which lawyers and judges regard as complex. 2]

** Joseph H. Beale was Professor of Conflict of Laws at Harvard at that time.

*** Sayre and Thayer were distinguished professors in the Harvard Law School. 2

1 Arnold's pre-law experience at Princeton expresses a similar irreverence for some of the "trappings" of formal education. His observation of college teaching in the early 1900's indicates that either the students of today are little different from those of yesteryear or that Arnold's early thinking was avant garde. Of Princeton, Arnold says: "Particular studies were good for you and made you a well-rounded man.... The one thing that had to be avoided at all costs was the discussion of new ideas. Such an enterprise was useless because there were no new ideas worth discussing.... I can recall no other professor (except E. S. Corwin) during my stay in Princeton who said or did anything that had any relevance to the development of the social institutions that existed outside the college walls." T. ARNOLD, FAIR FIGHTS AND FOUL, 17-18 (1965).

2 Id. at 252.
After graduating from Harvard, a brief venture in private practice in Chicago and service in World War I, Judge Arnold returned to Laramie where he practiced law until 1927. During this period he served as Mayor of Laramie and later, following a Republican sweep in 1920, as the only Democrat in the Wyoming House of Representatives. His spirit is well caught by an amusing incident which occurred during his tenure as a legislator. He tells the story thus in Fair Fights and Foul:

On the fateful day the legislature assembled to elect a speaker, there were a number of flowery speeches made for the leading candidate. After they were over and the question was about to be put to a vote, I rose and said, 'Mr. Speaker, the Democratic party caucused last night, and when the name of Thurman Arnold was mentioned, it threw its hat up in the air and cheered for fifteen minutes. I therefore wish to put his name in nomination for speaker of this House.' I then sat down, but I got up immediately and seconded the nomination. I said, 'I have known Thurman Arnold for most of my life, and I would trust him as far as I would myself.'

Everybody laughed except the Speaker pro tem. My nomination was not on his carefully prepared agenda, and he did not know what to do. People were waving at him from all directions. So I rose a third time, and said, 'Mr. Speaker, some irresponsible Democrat has put my name in nomination and I wish to withdraw it.' After that, the train got on the track again.

In 1927, Judge Arnold left Laramie and the West to pursue his teaching career and professional life in the East. The forces that drove him from his native Wyoming were the same forces to which he devoted a major portion of his legal skills and talents in the years to follow. Absentee ownership and the growth of corporate monopoly exerted economic strangulation upon the West and Laramie. Arnold writes that in the 1920's the antitrust laws were virtually suspended. Local lawyers were ignorant of them. "Respectable and sound economists might have heard of the Sherman Act", says Arnold, "but they did not believe in it." Local clients, such as the motion picture theatre and the small oil refinery were taken over by absentee corporate giants. The small town Western lawyer was caught between the agricultural depression of the mid-twenties and a growing monopoly economy.
Leaving the troubled economy of the West, Arnold joined the College of Law of West Virginia University as its dean for three years. His contemporaries there described him as a "crusader against false gods." He came to the University determined to dispel the notion that a law school dean must be a "stuffed shirt"—a task in which it is said he quickly succeeded. Though little is recorded of his tenure at West Virginia, he is remembered in the minds and hearts of his colleagues and former students at the College of Law. It is recalled that his successor, Dean T. Porter Hardman, always referred to Dean Arnold as the most "unforgettable character" he had ever met. It is also said that he instituted innovative techniques and a fresh approach to the classroom dialogue between professor and scholar. His keen interest in economics brought a practical insight to otherwise pedantic legal subjects. For Arnold, above all, was a practical, "can-do" lawyer. His ability to cut quickly through large masses of facts and complicated circumstances to the heart of the legal problem was one of his greatest talents. In the process, the cliches, the myths, the facades of both law and economics were hacked away. He was the expert in making "simple and intelligible" those matters "which lawyers and judges regard as complex"—his own definition, of the "great lawyer." And young lawyers who learned from him were taught that it was the lawyer's duty not only to protect his client from running afoul of the law, but affirmatively to seek ways in which the client's interest could best be served and his objectives best accomplished—a task not necessarily suited to the logical legal mind, but rather to the imaginative legal mind such as Arnold possessed.

In 1930, Judge Arnold left West Virginia to accept a position on the law faculty at Yale. There he joined William O. Douglas, now Justice of the Supreme Court, Walton Hamilton, a lawyer-economist who had headed the Brookings Institution, Arthur Corbin, the contracts expert, Dean Charles E. Clark and others in an exciting teaching career which lasted until 1938. At the memorial services for Judge Arnold after his death, Justice Douglas recalled Arnold at Yale as a man who was "constantly at war with orthodoxy". It was during this period of his career that Arnold wrote two books, *The Folklore of Capitalism* and *Bottlenecks of Business*, legal-economic treatises striking out at what he saw as the myths of capitalism and the dangers of restraints upon free com-
petition. *Folklore of Capitalism* became a best seller and soon brought Arnold national attention.

The New Deal under President Roosevelt had sought to overcome the depression of the early 1930's by government-industry cooperative efforts through the NRA Codes. When the Supreme Court held the National Industrial Recovery Act unconstitutional in 1935 the President turned to other means to control concentration of economic wealth and power.

Arnold, who had seen government service with the Agricultural Adjustment Administration and the Securities and Exchange Commission during several summers while on the Yale faculty, was appointed by President Roosevelt in 1938 as Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice. Thus began the reincarnation of the Sherman and Clayton Acts and the most vigorous and sweeping prosecution of the antitrust laws that the nation had ever seen. In five years, he instituted 230 suits designed to strike down monopoly practices, restraints of trade and price fixing. Actions were brought against virtually every major facet of American business—the oil companies, the glass industry, the railroad industry, the Associated Press, the American Medical Association, and the labor unions. Over 1000 businessmen were placed under criminal indictment. Arnold describes the resulting consternation in *Fair Fights and Foul*, at 114, thus:

> As indictments of respectable people began to pour out from the Justice Department in unprecedented numbers, cries of outrage could be heard from coast to coast. I was pictured as a wild man whose sanity was in considerable doubt. One major newspaper referred to me as 'an idiot in a powder mill.' Letters of protest poured into the White House.

Undaunted, Arnold pursued his prosecutions with customary vigor. Over half of all the antitrust actions brought during the then 50 year history of the Sherman Act were instituted during Arnold's "trust-busting" career as Assistant Attorney General—and almost every major case was successful, with the notable exception of the

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field of labor-union activity where Arnold sought to prove that certain labor practices exceeded labor's exemption from the Sherman Act accorded it by the Norris-LaGuardia Act.5

When restraints upon big business began to conflict with war production efforts after Pearl Harbor, Arnold was appointed by President Roosevelt to a seat on the United States Court of Appeals for the District of Columbia Circuit, a post which he held for a brief time from 1943 until 1945. But the bench was too quiet for Arnold, the advocate. As his friend George Wharton Pepper once said of him, he would "rather make his living talking to a bunch of damn fools, than listening to a bunch of damn fools." His innate sense of humor nevertheless helped prevent life on the bench from becoming too dull. His wit shone through his opinions. In *Esquire, Inc. v. Walker, Postmaster General,*6 Judge Arnold struck down a ruling by the Postmaster General which revoked Esquire Magazine's second-class mailing privilege, not because the magazine was obscene but because the writings and pictures were in a borderland zone of material "morally improper and not for the public welfare and the public good." After setting out verbatim lengthy and amusing portions of the transcript to demonstrate the confusion caused by "the age old question when a scantily clad lady is art, and when she is highly improper," Judge Arnold concluded his opinion with this token of solace for the Post Office Department:

We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that "neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

Reversed and Remanded.7

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6 151 F.2d 49 (D.C. Cir. 1945).
7 Id. at 55. In later years, while in private practice, Arnold was again at war with the laws of obscenity. In one suit, he defended *Playboy* magazine against obscenity charges in the staid Supreme Court of Vermont. His brief shocked the Attorney General of Vermont who took particular exception to a footnote which suggested that the only way for the Court to avoid using language to describe the pictures more repellent than the pictures themselves was to hold that "no nudes is good nudes." As Arnold's brief observed: "The spectacle of a judge poring over the picture of some nude trying to ascertain the extent to which she arouses prurient interests, and then attempting to write an opinion which explains the difference between that nude and some other nude has elements of low comedy. Justice is supposed to be a blind Goddess. The task of explaining why the words 'sexual relations' are decent and some other word with the same meaning is indecent is not one for which judicial techniques are adapted."
In 1945 Arnold left the bench for the private practice of law in Washington, D.C. He was soon joined by Abe Fortas, who had just left his post as Under Secretary of the Interior, and Paul Porter, the former head of the Office of Price Administration and Chairman of the Federal Communications Commission. From six lawyers, the firm of Arnold, Fortas & Porter grew steadily over the years. At his death, the law firm which he created, now Arnold & Porter, had some 70 lawyers on its staff.

Arnold pursued his role as an advocate in private practice with the same zest that had characterized his service as a trustbuster. But now both sides of the coin felt his impact. For he was as effective in counseling the large corporation as to its rights in effecting a merger as in representing the plaintiff in a treble damage action. He was soon immersed in antitrust litigation and loved nothing more than the courtroom battle and appellate argument.

Though his roster of corporate clients and cases grew, he also became deeply involved in defending the civil rights of those who were subjected to the star chamber tactics which characterized the McCarthy Era. He never shirked the unpopular cause if an important civil right was in jeopardy. Thus, when Dorothy Bailey, a civil servant, was charged with disloyalty but denied the right to examine the secret file that was used against her by the government, Arnold carried the case to the Supreme Court. In the Peters case, Arnold placed before the Court the plight of a Yale medical professor and special consultant to the Public Health Service, who had been denied the right to confront his accusers.

In 1958, Judge Arnold rose to the defense of the noted poet, Ezra Pound, in a proceeding which demonstrated the flexibility of justice to adapt to conflicting political, legal and moral values. Pound was indicted for treason in 1945 because of his considerably deluded broadcasts during the war for the Italian government attacking the entry of the United States into the conflict as a conspiracy between President Roosevelt and the Jews. A board of psychiatrists found Pound mentally unfit to stand trial. Thus, he languished in the criminal ward of an institution for the insane for some thirteen years to the dismay and consternation of the literary

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world. During his confinement, he won a distinguished prize, awarded by the Library of Congress, for a new collection of poetry. Though it became obvious that the Department of Justice had no desire to prosecute Pound at his advanced age of 72, it could not, with political grace, dismiss the indictment against an alleged wartime traitor and anti-Semite. At the request of the noted poet, Robert Frost, who was supported in his efforts by Ernest Hemingway, Carl Sandburg and other eminent literary figures, Judge Arnold moved to dismiss the indictment—not on any legal grounds because there were none—but only because it was ridiculous to permit the insane Pound, who was nevertheless harmless, to die in an asylum. When the motion was presented in court, the Department of Justice did not object. The court, however, troubled by the failure of the prosecution to move to dismiss, asked if it would consent. Government counsel consented, whereupon the Court granted the motion which had thus become a back-handed motion to dismiss by the prosecution. The law bent, justice was done and the aged poet left the courtroom to go home with his wife.

In 1955, Arnold won perhaps his greatest victory in the civil rights field when he obtained a dismissal of the indictment of Johns Hopkins professor Owen Lattimore, the China expert, who was charged with perjury in denying Communist links in testimony before the “McCarthy Committee.” The New York Times’ obituary of Judge Arnold points out that he regarded Congressional loyalty investigations as intrusions on free speech. “Once you admit as a debatable question that the investigation is instituted to expose the views and associations of individuals to the public,” said Arnold, “you have lost the cause of free speech.”

But the law student who reads this article should not be misled in believing that Arnold’s defense of civil rights was limited to the poor, the oppressed or those who were wrongfully pilloried upon untested allegations of disloyalty. Arnold’s concern for the protection of legal rights was all encompassing as it must be. The rights of a large, corporate business were to be as jealously guarded as were those of a civil servant or college professor. Thus, in June of 1969, a few short months before his death, a professor of chemistry and molecular bio-physics at Yale wrote Arnold that, in

10 For an intriguing account of this litigation, seen through the eyes of the defendant, see O. LATTIMORE, ORDEAL BY SLANDER, (1950).
view of the health hazards of smoking, he found it "shocking" that the firm of Arnold and Porter would represent the tobacco industry. The professor concluded his letter with the observation that he saw "little hope for achieving a decent society in this country as long as clever lawyers will do anything for money." Arnold's reply lectured the Professor on the constitutional right to counsel with his usual touch of humor. The reply is quoted in part below:

Dear Professor

* * * *

I was myself a professor at Yale for eight happy years. I know from experience some of the consequences when a professor gives up hope for a decent society. He becomes morose and irritable. He exhibits a tendency to thumb his nose at people with whom he disagrees under the delusion that this will put them in their place and make them ashamed of themselves. His point of view becomes narrow and even may effect his teaching. I feel, therefore, an obligation to Yale to give you such mental therapy as I can; hence this letter.

One of the great achievements of American constitutional law is the fact that every litigant either before a court or before Congress is entitled to be represented by an attorney. The duty of an attorney is not towards society but towards his client. An attorney is not ethically permitted when presenting his client's case to give his own opinion as to the merits. His duty is solely to make the best presentation he can. The tobacco companies are as much entitled to representation by counsel as the lowest criminal is. The duty of an attorney is to act as an advocate, not as a judge. The theory of American constitutional law is that better results are obtained from a system which requires each side to be represented by counsel of his own choice. When he is too ignorant to make that choice an attorney is appointed by the court.

Your position seems to be that a litigant has no moral right to adequate representation by counsel if he represents a cause in which you do not believe. That idea has been repudiated in American constitutional law. The great advance made by the Warren Court has been to insure adequate representation for the poor as well as for the rich, for the guilty as well as for the innocent.

* * * *

Whatever be the ultimate solution of the cigarette problem it will not be furthered by establishing the principle that in any sort of legal controversy either side should be deprived of the services of the best counsel he can obtain. Your idea is
a dangerous doctrine. Once established, it will sap the very foundations of the American ideal of a fair trial.

Letters like yours which attack the theory of adequate representation by counsel on both sides without judgment as to the merits represent a dangerous tendency which reached its height in the McCarthy era when even University presidents refused to support professors in their right to a fair hearing.

I doubt very much if this letter has any therapeutic effect in curing you of your present abandonment of 'hope for achieving a decent society' if a tobacco company is given the right to be represented by counsel. Nevertheless, it is the best I can do. I suggest that you read it over at least twice, then take a couple of aspirins and see if that doesn't make you feel better about the role of a fair trial in American jurisprudence.

Sincerely,
Thurman Arnold

And so he remained the vigilant advocate to the end, blessed with the retention of his keen mind and sharp sense of humor. As Abe Fortas, his former law partner, described him at the memorial services in his honor, Arnold was "a man of the law, a warm, vibrant, open man, perhaps the last of freedom's great fighters."

Arnold's penchant for whimsy touched his personal correspondence at every turn. A good example is his reply to a friend, John S. Miller, a Chicago lawyer who asked Arnold to move the admission of his partner to the Bar of the Supreme Court:

Dear John:

Your letter has just the proper touch of humility and recognition of merit which is adequate to induce me to undertake the hazardous enterprise of moving the admission of your partner to the Supreme Court of the United States. Hitherto I have had an almost unprecedented success in inducing the Court to grant the admission of those whom I have undertaken the responsibility of sponsoring. It may be that this has been just a matter of luck but my friends all tell me that it proves that the Court has unbounded faith in my judgement as to who should be and who should not be admitted to that select little coterie known as the Supreme Court Bar. I would therefore have reasonable anticipation of success, which is illustrated by the betting odds in the office which are 8-to-5 that I get your partner in.

However, I think we should take no chances with a matter as important as this. Will you, therefore, ask your partner meticulously to observe the following instructions:

(I) He should wear a full dress suit, white tie, and a large chrysanthemum in his buttonhole. This will single him out from the less imaginative applicants.

(2) It is important, and I wish you would particularly emphasize this, that he appear in a reasonable state of sobriety. This business of having to prop up the applicants for admission whom I introduce so that they will
Yes, the old fighter is dead. But we may not have heard the last from him. In a recent sermon, Dr. George M. Docherty, Pastor of the New York Avenue Presbyterian Church in Washington, D.C., made the point that when Christ chased the money changers from the temple it was not because they were conducting business on holy grounds but rather because they had a monopoly on sacrificial doves and were exacting therefor an exorbitant price. With this kind of thinking in the High Court in whose jurisdiction Arnold now resides, those who knew Arnold would not be surprised to learn of the adoption of an Eleventh Commandment reading “Thou Shalt Not Restrain Competition”. If such a Holy Writ should issue, the stone tablet upon which it is carved may well bear the legend in the lower left corner: “Of counsel, Thurman Arnold.”