ARNOLD LOEWY: SCHOLAR, CIVIL LIBERTARIAN, AND MENSCH: SOME PERSONAL REFLECTIONS

*Joshua Dressler**

I am pleased to have the opportunity to give today's lunch presentation, as part of the Thirteenth Annual *Texas Tech Law Review* Criminal Law Symposium. These Symposia are the brainchild of Arnold Loewy. He has organized and conducted them every year since 2007 after Arnold joined the Texas Tech University School of Law faculty as its first holder of the Judge George R. Killam Jr. Chair of Criminal Law.

Arnold has used these Symposia to invite criminal justice scholars to the school to discuss important issues of criminal law and procedure.[1] As a result, the *Texas Tech Law Review* has been the beneficiary of high-quality, often-cited scholarship. And those of us in the criminal law academy, as well as members of the judiciary and criminal law practitioners, have Arnold Loewy to thank for this. Today, however, we are using the Symposium in a very special way: to honor the lifetime scholarship of—and the person we know as—Arnold Loewy, and to thank him for all that he has done for the subject area that we, in this room, love so much.

One benefit for me, as luncheon speaker, is that I am not constrained by any specific scholarly topic. I can roam Arnold's entire scholarly field. The only demand that Arnold has placed on me is that I discuss his scholarship in *some* way. I will do this, but first I want to take a moment to say a few words about Arnold, the person. I have reached the stage in my life in which I now realize that, as much as we value our careers—our teaching, our scholarship, and perhaps even sometimes our service on the endless committees that require our attention—and as much as we are prone to measure our colleagues similarly, it is more important to value people as, well, people.

---

* Distinguished University Professor Emeritus and Frank R. Strong Chair in Law Emeritus, The Ohio State University, Michael E. Moritz College of Law. This is a version of my March 29, 2019 lunch presentation at the Thirteenth Annual Criminal Law Symposium at Texas Tech University School of Law.

1. It must be acknowledged that Arnold has also made these Symposia fun to attend. Arnold and his gracious wife, Judy, have hosted dinner at their home and capped off Friday nights with a Texas-style dinner, along with renowned country-musician Kenny Maines, in a private room at Cagle Steaks & BBQ. The restaurant, which to big-city folks seems located in the middle of nowhere, promises you that "[i]n West Texas, if the wind doesn't blow you away, the food should." CAGLE STEAKS & BBQ, http://caglesteaks.com (last visited Nov. 10, 2019). And it does. Speaking of country music, at times Arnold (dressed Texas-style) has sung a song of his own making at the closing dinner. I was the recipient of one such song, which he composed to honor—if that is the right word—my sixty-fifth birthday, which fell on the last day of the 2012 Symposium (please don't do the math).

In that regard, quite simply, Arnold Loewy is a mensch. On a personal level, I can say without qualification that I have deep affection for Arnold. He has been a good friend. He has offered me emotional support when I needed it to get through some tough times in my life, even as he has dealt, seemingly without complaint, with his own share of life's struggles. Arnold loves life, and he has made life a happier place for those of us who know him well.

Okay, now let's talk scholarship. Arnold has lots of it. Indeed, I didn't realize how much of it there is until I looked over his resume. Over the years I have read most of his articles in the Fourth Amendment field as I prepared to teach, write, or simply reflect on the topic, but he has so much more in other fields as well.[2] When one looks at everything Arnold has written from a distance, to see the big picture, two things stand out to me about his writings beyond the fact that I find his analysis of Fourth Amendment law particularly incisive, persuasive, and beneficial to my teaching and scholarship.[3]

First, is its accessibility. I am sorry to say that too often in our profession we value the opposite. If something is written so abstractly that we have to reread it multiple times merely to understand the author's point, we say that the author must be brilliant, which may or may not be the case. We are not so kind to those who express themselves reasonably clear. Apparently, clarity

---

2. *See generally* Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump's Model Laws of Homicide*, 109 W. VA. L. REV. 369 (2007) [hereinafter Loewy, *Critiquing Crump*]; Arnold H. Loewy, *A Dialogue on Hate Speech*, 36 FLA. ST. U. L. REV. 67 (2008) [hereinafter Loewy, *A Dialogue on Hate Speech*]; Arnold H. Loewy, *A Modest Proposal for Fighting Organized Crime: Stop Taking the Fourth Amendment So Seriously*, 16 RUTGERS L.J. 831 (1985) [hereinafter Loewy, *A Modest Proposal*].

3. *See* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983). The Fourth Amendment article that most comes to my mind in this regard is *The Fourth Amendment as a Device for Protecting the Innocent*. *Id.* In it, he intriguingly and controversially argues that the purpose of the Fourth Amendment is to protect the innocent and not the guilty, even though the latter are the immediate beneficiaries of the exclusionary rule. *See id.* Rather than use this footnote to discuss this article, I urge readers to look at two other essays published in this Symposium that focus to a considerable extent on this important article. *See* David Gray, *Arnold Loewy, Thought Leader, Champion of the Innocent, Prognosticator, Surveillant*, 52 TEX. TECH. L. REV. 107 (2019); Morgan Cloud, *The Fourth Amendment as a Device for Protecting the Guilty*, 52 TEX. TECH. L. REV. 91 (2019).

A second piece I especially admire, as much for its style as its substance, is Arnold's *A Modest Proposal for Fighting Organized Crime: Stop Taking the Fourth Amendment So Seriously*. Loewy, *A Modest Proposal*, *supra* note 2, at 831. I love how it starts. Written for a symposium on organized crime, he writes:

> This Article addresses the critical prosecutorial problem of obtaining evidence sufficient to convict these purveyors of evil whose misdeeds outrage the populace. Much of the difficulty in obtaining this evidence inheres in the misguided belief of some unfortunate police officers that merely because the [F]ourth [A]mendment is part of our Constitution, it is to be taken seriously. It is the purpose of this Article to establish that inasmuch as this antiquated notion has been rejected by the judiciary, it is time for the police to accept the invitation of those more learned in the law [primarily the justices on the Supreme Court] and stop taking the [F]ourth [A]mendment so seriously.

Id.

And from there Arnold acerbically dissects the Court's Fourth Amendment case law with panache. *Id.* at 831–45.

(accessibility) means that the author is oversimplifying an issue and would be better off writing for the general public and not for us, the "true scholars." The fact is that Arnold writes clearly, incisively, and often with wit.[4] Indeed, in this regard, Arnold's style of writing reminds me a great deal of the scholarship of Yale Kamisar, one of the true giants in the criminal procedure academy.[5] And yet, at least as far as I know, even Yale Kamisar has never explained some aspect of the law by reporting the conversations of two imaginary lawyers on an imaginary flight from Frankfurt, Germany to Washington D.C., but Arnold has.[6] And I can find no evidence that Kamisar, or anyone else, has found a way to discuss flag desecration—or any other constitutional topic—by including Roy Rogers, Dale Evans, and crazed 1970 "yippie" Abbie Hoffman in the same breath.[7] But, Arnold has done it. He has found ways, sometimes uniquely, to explain the law and make his observations of it.

The second broad point I want to make about Arnold's scholarship is one with which some scholars may disagree. Arnold may, too. In *this* regard, Arnold and Yale Kamisar are not at all alike in their writing. Kamisar once wrote that "quite a few people like to take the 'middle path'—to 'split the difference' between what they would call the extreme positions at either

---

4. *See, e.g.*, Loewy, *A Modest Proposal*, *supra* note 2, at 831.

5. See Kamisar, Yale, MICHIGAN L., https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=ykamisar (last visited Nov. 10, 2019).

6. Loewy, *A Dialogue on Hate Speech*, *supra* note 2, at 67.

7. Arnold H. Loewy, *Punishing Flag Desecrators: The Ultimate Flag Desecration*, 49 N.C. L. REV. 48, 51 (1970). For those too young to know who they are, cowboy Roy Rogers and cowgirl Dale Evans, described in the article, simply, as "patriotic movie stars," were the embodiment of the 1940s cowboy version of Americana. *Id.*; *see also* Dale Evans, Roy Rogers, http://royrogers.com/dale-evans (last visited Nov. 10, 2019); *see generally* Roy Rogers, ROY ROGERS, http://royrogers.com/roy-rogers (last visited Nov. 10, 2019). Another way to explain it: Roy Rogers and Dale Evans were the 1940s version of Ward and June Cleaver from the 1950s television show, *Leave It to Beaver*. But wait, maybe you don't know them, either? Okay, okay. Check out *Leave It to Beaver*. *See generally* Tad Dibbern, *Leave It to Beaver*, IMDB, https://www.imdb.com/title/tt0050032/ (last visited Nov. 10, 2019).

As for Abbie Hoffman, imagine a wild-haired anarchist—sometimes contradictorily accused of being a Communist—who formed the Youth International Party (the members of whom were, therefore, called yippies). He organized many anti-Vietnam War protests (when his members were not smoking things that were illegal at the time), and he led a protest at the 1968 Democratic Convention in Chicago that resulted in police overreaction described as "unrestrained and indiscriminate police violence on many occasions," which in turn led to his subsequent prosecution for supposedly conspiring to incite the riot. *See generally* Daniel Walker, *Rights in Conflict*, CHI. '68 (Dec. 1, 1968), http://chicago68.com/ricsumm.html. And, that incident deserves credit for helping Richard Nixon get elected that year. Thanks a lot, Abbie. *See generally* Abbie Hoffman, WIKIPEDIA, https://en.wikipedia.org/wiki/Abbie_Hoffman (last visited Nov. 10, 2019). Thus, it is fair to say that it takes creativity to put Roy Rogers, Dale Evans, and Abbie Hoffman in the same sentence.

Of course, now that I think about it, Bing Crosby uttered the words, "yippie yi yo kayah," in the song "I'm an Old Cowhand." Angela Tung, *A Brief History of Yippee-ki-yay*, WEEK (July 18, 2013) https://theweek.com/articles/462065/brief-history-yippeekiyay. I bet that cowboy Roy Rogers sometimes used that phrase, perhaps even in 1933 when a singing group of which he was a member was headquartered in Lubbock! Roy Rogers, ROY ROGERS, http://royrogers.com/roy-rogers (last visited Nov. 10, 2019). So maybe that connects Roy Rogers and Dale Evans to yippie Abbie Hoffman, after all. But I digress.

end."[8] Kamisar describes the middle approach as alluring but pernicious.[9] In contrast, with a few exceptions to which I will turn shortly, I see Arnold's criminal law and procedure scholarship, and thus Arnold, as a scholar who not only sees the point of view of the "other side," but sometimes agrees with it. Yes, of course, Arnold Loewy has a clear civil libertarian orientation,[10] but mostly he seems to find a way to show the reader that the other side is right some of the time, and that even if it is not right, its position is not unreasonable.

Take one example of his balanced approach: his *St. John's Law Review* article, *Cops, Cars, and Citizens: Fixing the Broken Balance*.[11] Arnold starts with what he characterizes as a real-life Fourth Amendment search and seizure nightmare[12] brought on by two then-recent Supreme Court cases.[13] He demonstrates that the recent cases created a serious imbalance between the privacy rights of citizens in their automobiles and the public's need for protection from crime, resulting in too little concern for privacy.[14] And yet, Arnold—perhaps too generously—states that "[m]uch of the Supreme Court's [car search] jurisprudence reflects a careful effort to balance the factors that make automobile searches different from other kinds of searches. While one may not always agree with the Court's balance, the effort to balance was almost always there."[15] Even as he focuses on the "*coup de grace* that made the nightmare a reality," he recognizes his responsibility as "one who challenges the balance drawn by the Supreme Court to develop a better one."[16] He argues—I believe wisely—for the Court to take two of its early

---

8. Yale Kamisar, *A Look Back On a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69, 78 (2004).

9. *Id.* at 80.

10. Interview with Anonymous Source (notes on file with author). Arnold's libertarianism apparently finds its way into the classroom as well, in odd circumstances. *See generally id.* One of Arnold's former colleagues, whom I will describe as an anonymous, but reliable source, remembers a time when Arnold was teaching class and a student sitting in the front row started "smoking dope" in class. *Id.* Arnold saw it, but did nothing about it, and went on with class while the student puffed away. *Id.* As his colleague put it to me, this was the "clear zenith of pedagogical determination." *Id.* Eventually, as it was put to me, one of the other students, "for some reason disturbed by the smoke wafting around the room, left and got the dean, who removed the evil puffer." *Id.* Arnold disputes what row the student was in. *Id.* He remembers the student being in the back row. *Id.*

11. *See generally* Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535 (2002).

12. *Id.* at 537 ("My God! The nightmare is real.").

13. *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (upholding the per se rule that allows officers to arrest individuals for misdemeanors committed in their presence); Arkansas v. Sullivan, 532 U.S. 769 (2001) (holding that a traffic violation arrest may, constitutionally, create a pretext for a drug search).

14. Loewy, *supra* note 11, at 537–38.

15. *Id.*

16. *Id.* at 538, 565.

car cases—*Carroll*[17] and *Coolidge*[18]—seriously and recognize that a vehicle, "be it a car or horse and buggy," must be subject to warrantless searches when mobile, but that, as Justice Stewart for the *Coolidge* Court famously pointed out (albeit only in a plurality opinion), "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."[19] A bit of idealism (and perhaps nostalgia for the Warren Court days) shows through, typical of people from Arnold's (and my) generation, when he writes: "[f]or the long term, the Supreme Court . . . is the best hope to fix the imbalance that it created."[20] I wonder if he would say that today. I sure wouldn't.

We see Arnold Loewy's balanced approach elsewhere. His play in which an imaginary German and American lawyer discuss hate crimes offers competing perspectives in an open and balanced way, allowing the reader to reflect and come to his or her own view on this difficult subject.[21] His analysis of Professor David Crump's generally law-and-order oriented proposals for new homicide provisions is that some of them "deserve widespread adoption," while "others . . . do not."[22] In cases of domestic violence, where the pendulum in recent years has swung dramatically toward punishing wrongdoers more severely, Arnold somewhat courageously,[23] given the pressure to swing with the pendulum, calls for "nuance and balance," asserting that "[s]ome cases of violence against women demand severe punishment, [but] others do not."[24] In cases of criminal law theory, Arnold does not appear to be a thoroughgoing retributivist or utilitarian, instead seeing a place for consideration of issues of culpability *and* dangerousness in determining guilt and punishment.[25] Indeed, he seems to be a bit of an agnostic on all of this.[26] And, in a sense, we see balance in Arnold's thinking because he sometimes balances Arnold against Arnold, by which I mean he has changed his views from a prior published position and admitted to his change of heart, which is something too few scholars are willing to do.[27]

---

17. *See* Carroll v. United States, 267 U.S. 132 (1925) (holding warrantless searches of vehicles constitutional if probable cause exists).

18. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (holding that automobiles seized at the same time a suspect is arrested at home cannot be searched without a warrant).

19. *Id.* at 461–62; Loewy, *supra* note 11, at 566.

20. Loewy, *supra* note 11, at 573.

21. *See generally* Loewy, *A Dialogue on Hate Speech*, *supra* note 2, at 75–76.

22. Loewy, *Critiquing Crump*, *supra* note 2, at 369.

23. Arnold H. Loewy, *Why* Roe v. Wade *Should Be Overruled*, 67 N.C. L. REV. 939, 944 (1989). Arnold has demonstrated courage elsewhere, too, given his civil libertarian proclivities, as when he calls for *Roe v. Wade* to be abolished, although he believes that *Roe* is good social policy. *Id.*

24. Arnold H. Loewy, *Punishing Violence Against Women: Seeking the Right Balance*, 49 TEX. TECH L. REV. 211, 211 (2016).

25. Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283, 285–87, 309–10 (1988).

26. *Id.* at 314 ("The purpose of this Article is not so much to answer questions as to ask them.").

27. Arnold H. Loewy, *Rethinking Search and Seizure in a Post-9/11 World*, 80 MISS. L. J. 1507, 1507 (2011) (observing that, in 2007, he presented a paper that "argued that 9/11 was responsible for many

But to be clear, although I am stressing Arnold Loewy's balanced approach to criminal justice matters, particularly in the Fourth Amendment, his scholarship *is* consistently civil libertarian in proclivity.[28] And nowhere do I see this more evident—indeed, not nearly as balanced—than when we turn from the Fourth to the Sixth Amendment.[29] Two of his articles here speak forthrightly and eloquently for the rights of the accused and the importance of retaining (or, perhaps, returning to) a fairly pure adversarial system of justice.[30] In one article, Arnold demonstrates that the Supreme Court has improperly allowed the watered-down *Miranda* right to counsel to override the "more serious" (and, I would note, the only textually-based) right to counsel, namely the Sixth Amendment right to counsel—the right that is critical to a properly functioning adversarial system.[31] As Arnold writes, once the adversarial system begins, "[i]t may not be the duty of the prosecutor or the police to 'supply a suspect with a flow of information to help him calibrate his self-interest,' but that is precisely the duty of a [defense] lawyer."[32] Yet, as he observes, the Court has increasingly treated the *Miranda*[33] and Sixth Amendment rights to counsel as one-and-the-same, and critically, has chosen to treat the singular right to counsel as the weaker *Miranda* version, which allows the police to avoid—perhaps even obscure—the suspects' ability to calibrate their own self-interest.

And, we see Arnold's commitment to a full-throated adversarial system in a second essay, in which he approvingly quotes the Supreme Court's now all-too-infrequent advocacy of a genuine noninquisitorial system.[34] He reminds the reader that the Court has intoned that our system of justice is one in which "the burden of proving [the government's] charge against the accused [should] not [come] out of his own mouth."[35] And, he quotes the Court's rare recognition that "the lesson of history, ancient and modern, [is] that a system of criminal law enforcement which comes to depend on 'confession' will, in the long run, be less reliable and more subject to abuses

---

of the significant post-9/11, pro-Government Fourth Amendment decisions"; but that, in 2011, "upon reflection," he has come to believe the decisions "may more likely be attributable to the proclivities of the Supreme Court, and, at least some may well have come out the same way if 9/11 had never occurred").

28. *See* Loewy, *supra* note 11 (emphasizing the need for a much stricter government regulation of Fourth Amendment searches and seizures).

29. *See* Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427, 435–37 (2007) [hereinafter Loewy, *Judicial Schizophrenia*]; Arnold H. Loewy, *Why the Supreme Court Will Not Take Pretrial Right to Counsel Seriously*, 45 TEX. TECH L. REV. 267, 268–71 (2012) [hereinafter Loewy, *Why the Supreme Court*].

30. *See* Loewy, *Judicial Schizophrenia*, *supra* note 29; Loewy, *Why the Supreme Court*, *supra* note 29.

31. Loewy, *Why the Supreme Court*, *supra* note 29, at 268.

32. *Id.* at 270 (quoting Colorado v. Spring, 479 U.S. 564, 576 (1987)).

33. Miranda v. Arizona, 384 U.S. 436, 471–72 (1966); *see* Loewy, *Judicial Schizophrenia*, *supra* note 29, at 428.

34. Loewy, *Judicial Schizophrenia*, *supra* note 29, at 428.

35. *Id.* (citing Watts v. Indiana, 338 U.S. 49, 54 (1949)).

than" one that relies on extrinsic evidence secured through careful investigation.[36]

In this second essay, Arnold calls on the Court to reconceptualize *Miranda* as a Sixth Amendment case.[37] He takes the rarely accepted position that *Escobedo v. Illinois* was rightly decided; that is, essentially that the adversarial system, and thus the Sixth Amendment right to counsel, is properly triggered before indictment and even before arrest.[38] Put starkly, Arnold seems to advocate for a full-fledged right to counsel—and *all* that it entails in the pretrial process—as soon as a suspect is taken into custody. Arnold would even require the police to add to the *Miranda* warnings the statement "that policemen like me frequently try to get people they arrest to confess. You should know there is a possibility that I, or one of my colleagues, will do that. *A lawyer can help protect you from that*."[39] Wow. *That* is pretty radical. *That* is not particularly balanced. To Arnold, the Sixth Amendment right to counsel, once triggered, lacks the on-the-one-hand-but-on-the-other-hand feel of the Fourth Amendment.[40] I am not sure if he is right about the Sixth Amendment from a historical perspective, but given my own civil-libertarian bias, I like it as a policy matter.

So, to conclude, whether one agrees with Arnold on everything he has written—and given the thickness of his scholarly resume, it is unlikely anyone would agree with everything, particularly because Arnold has not always agreed with himself—I can say without dispute that Arnold has offered the criminal justice field—*our* field—cogent observations on the way the American justice system should run. And, to my mind, the Arnold Loewy system of criminal justice looks a lot better than the one we have now.

So, thank you, Arnold Loewy.

36. *Id.* (citing Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964)).
37. *Id.* at 435.
38. *Id.* at 436.
39. *Id.* at 437 (emphasis added).
40. *See id.* at 435–36; *see also* Loewy, *supra* note 11, at 565.