

LOEWY ON IGNORANCE: A DIALOGUE REVIEW

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Arnold Loewy is both a friend and an influence. I admire him greatly. Thus, when asked to review the “plays” that he wrote, I jumped at the chance. As might be expected, these plays were not designed for the stage. Rather, they are academic dialogues put in various settings. Each of them illustrates an area of law that Arnold explored in his other writings. Despite opinions expressed by one of the characters below, Arnold’s plays are both entertaining and enlightening.

I read three of Arnold’s plays in order to make a presentation at the *Texas Tech Law Review*’s Criminal Law Symposium, which took place on March 29, 2019.¹ At his request, I concentrated on his criminal procedure play, which focuses on consent searches, and voluntary and involuntary statements to police authorities: *Police, Citizens, the Constitution, and Ignorance: The Systemic Value of Citizen Ignorance in Solving Crime*.² His other plays focus on hate speech and on flag burning.³

The setting for *Police, Citizens, the Constitution, and Ignorance* is a law school classroom.⁴ Different characters, with names that suggest their perspectives, make arguments from all sides of the issue.⁵ While I was envious of the exceptional classroom discussion depicted in the play, it took

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1. *Criminal Law Symposium*, TEX. TECH L. REV., <http://texastechlawreview.org/symposium/> (last visited Nov. 10, 2019).

2. Arnold H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systemic Value of Citizen Ignorance in Solving Crime*, 39 TEX. TECH L. REV. 1077 (2007).

3. 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, *Punishing Flag Desecrators: The Ultimate in Flag Desecration*, 49 N.C. L. REV. 48 (1970) [hereinafter Loewy, *Punishing Flag Desecrators*].

4. See Loewy, *supra* note 2, at 1077.

5. *Id.* at 1078. Loewy explains:

The simulated class consists of the professor and five students: Michael Sunshine, who typically puts a positive spin on Supreme Court decisions; Mary Downer, who typically puts a negative spin on Supreme Court decisions; Sam Sargeant, a former police officer who hopes to become a district attorney; Sybil Wright, who interned as a public defender and hopes to have a career as a criminal defense lawyer; and Margaret Middlebrooks, who typically takes a balanced view of the Supreme Court’s performance.

Id.

a mention from panel moderator Patrick Metz⁶ for me to realize the reason the debate was so strong: each of the students, really, was Arnold.

Because it was a dialogue, with arguments presented from various and conflicting positions, it seemed hard to engage with Professor Loewy's argument in a way that he had not already done himself. He had not advocated a position with this paper as much as he had animated and illustrated the various positions. That made reply difficult.⁷

As I thought about how best to present my review of a play that already anticipated and addressed various sides of the issues, and perhaps because I had just read three of Professor Loewy's plays, I decided to write my review as a play with two characters and one act. Therefore, I proudly present:

The Book of Loewy
A Review in One Act

Scene: A disheveled office in a law school. The presenter sits behind a desk as the assistant enters the room.

Presenter: Oh good, I'm glad you're here. Did you print those Arnold Loewy plays for me?

Assistant: The ones you wanted me to print, punch, and put in an appropriate notebook? Here they are.

She holds up a notebook. On the cover is printed, "Car Selling Made Easier."

Assistant, *noting the shocked look on the Presenter's face:* It's not Hollywood.

Presenter: Hey, that's not fair!

Assistant: Yes it is. These plays are boring. No violence, no sex, not even any romance. Not a single car chase. They'll never make it in Hollywood.

Presenter: Well, they're not made for Hollywood, and they're not that boring. They have hate speech, flag desecration, and the one I'm focusing on has cops pushing the rules, like Clint Eastwood and Bruce Willis do.⁸

6. Patrick Metz Professor of Law, TEX. TECH U. SCH. OF L., https://www.depts.ttu.edu/law/faculty/p_metze.php (last updated Dec. 18, 2018, 3:49 PM).

7. Professor Loewy and this author publicly debated the constitutionality of DNA collection at the University of Mississippi School of Law on September 5, 2017. See Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH L. REV. 261, 262 (2015); Arnold H. Loewy, *The Wisdom of Universal DNA Collection: A Reply to Professor Meghan J. Ryan*, 20 SMU SCI. & TECH. L. REV. 21 (2017); Ronald J. Rychlak, *DNA Fingerprinting, Genetic Information, and Privacy Interests*, 48 TEX. TECH L. REV. 245 (2015); Ronald J. Rychlak, *Genetic Information and Privacy Interests: The DNA Fingerprinting Act*, 8 ENGAGE 64 (2007).

8. See Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457 (1997) (referring to the Clint Eastwood movie, *Dirty Harry*); see also Russell Dean Covey, *Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761, 781 (2007) (providing a synopsis of the film, *Dirty Harry*).

Assistant: I'm not seeing it.

Presenter: It's a trilogy, like all the great movies: *The Lord of the Rings*,⁹ the original *Star Wars*,¹⁰ and *The Godfather*.¹¹

Assistant: *Sharknado* was also a trilogy, but okay.¹² Who are the recurring characters?

Presenter: Well, there are students, but really it's about a professor.

Assistant: A professor? That's the action character? A professor?

Presenter: Wait, lots of good movies have a professor as a central character, like Harrison Ford as Professor Indiana Jones in those movies.¹³ Tom Hanks played Professor Robert Langdon in *Angels & Demons* and *The DaVinci Code*.¹⁴ Patrick Stewart played Professor Charles Xavier in *The X-Men* movies.¹⁵ Tom Clancy's Jack Ryan is a professor, and has been played by Harrison Ford,¹⁶ Ben Affleck,¹⁷ Alec Baldwin,¹⁸ and Chris Pine.¹⁹

Assistant: Okay, maybe. What's his name?

Presenter: It's just "the Professor."

In *Die Hard*, actor Bruce Willis portrays New York Police Officer John McClane, who arrives in Los Angeles on Christmas Eve to spend Christmas with his estranged wife when the office building she works in is invaded by terrorists. See *Die Hard Plot*, IMDB, <https://www.imdb.com/title/tt0095016/plot-summary> (last visited Nov. 10, 2019). More recently, Willis starred in *Death Wish*, a 2018 film. *Death Wish (2018)*, IMDB, <https://www.imdb.com/title/tt1137450/> (last visited Nov. 10, 2019).

9. *The Lord of the Rings Trilogy*, IMDB, <https://www.imdb.com/list/ls072068350/> (last updated May 1, 2015).

10. *Star Wars: Episode IV - A New Hope (1977)*, IMDB, https://www.imdb.com/title/tt0076759/?ref=fn_al_tt_1 (last visited Nov. 10, 2019); *Star Wars: The Empire Strikes Back (1982)*, IMDB, https://www.imdb.com/title/tt0296869/?ref=mv_sr_3?ref=mv_sr_3 (last visited Nov. 10, 2019); *Star Wars: Episode V - Return of the Jedi (1983)* IMDB, https://www.imdb.com/title/tt0086190/?ref=mv_sr_1?ref=mv_sr_1 (last visited Nov. 10, 2019).

11. *The Godfather Trilogy: 1901-1980 (1992)*, IMDB, https://www.imdb.com/title/tt0150742/?ref=mv_sr_1?ref=mv_sr_1 (last visited Nov. 10, 2019).

12. See *Sharknado (2013)*, IMDB, https://www.imdb.com/title/tt2724064/?ref=fn_al_tt_1 (last visited Nov. 10, 2019). *Sharknado* is a made-for-television film about a waterspout that lifts sharks out of the ocean and deposits them in Los Angeles. *Id.* There are actually five sequels. See John Squires, "Sharknado 6" Will Be a Time Traveling Adventure; Art, Info, and Date!, BLOODY DISGUSTING (Feb. 19, 2018), <https://bloody-disgusting.com/tv/3484336/sharknado-6-will-time-traveling-adventure-art-info-date/>.

13. Jace C. Gatewood, *District of Columbia Jones and the Mosaic Theory—In Search of a Public Right of Privacy: The Equilibrium Effect of the Mosaic Theory*, 92 NEB. L. REV. 504, 505 n.1 (2014) ("The Indiana Jones movie series was created by George Lucas and directed by Stephen Spielberg and included four installments: Raiders of the Lost Ark in 1981, Indiana Jones and the Temple of Doom in 1984, Indiana Jones and the Last Crusade in 1989, and Indiana Jones and the Kingdom of the Crystal Skull in 2008.").

14. See generally *Robert Langdon (film series)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Robert_Langdon_\(film_series\)](https://en.wikipedia.org/wiki/Robert_Langdon_(film_series)) (last updated Oct. 2, 2019) (explaining that Tom Hanks played Professor Robert Langdon in three movies: *The Da Vinci Code* (2006); *Angels & Demons* (2009); and *Inferno* (2016)). Ron Howard directed each movie, and each movie was based on Dan Brown's books. *Id.*

15. See generally *X-Men (film series)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/X-Men_\(film_series\)](https://en.wikipedia.org/wiki/X-Men_(film_series)) (last updated Nov. 10, 2019) (explaining the origin, the creators, and the success of the *X-Men* franchise).

16. CLEAR AND PRESENT DANGER (Paramount Pictures 1994); PATRIOT GAMES (Paramount Pictures 1992).

17. THE SUM OF ALL FEARS (Mace Neufeld Productions 2002).

18. THE HUNT FOR RED OCTOBER (Mace Neufeld Productions 1990).

19. JACK RYAN: SHADOW RECRUIT (Skydance Media 2014).

Assistant: Oh, the Professor, like on *Gilligan's Island*?²⁰

Presenter (realizing that he was going to have to move on to the content of the plays): The oldest play on flag burning was published forty-nine years ago, but it's still relevant. There is much we can learn from this.²¹

Assistant: Do tell.

Presenter: Well, the issue is very controversial. Back in 1976, Rick Monday was a centerfielder for the Chicago Cubs, and they were playing the Los Angeles Dodgers.²² Two protestors ran onto the field with matches, lighter fluid, and a plan to burn an American flag.²³ Monday grabbed the flag before it could be destroyed.²⁴ Because of that act, Monday was a hero, and Adidas designed a special uniform for the Arizona State Sun Devils baseball team in his honor.²⁵

Assistant: Yeah, but Colin Kaepernick began his protest of the flag during the National Anthem in 2016.²⁶ He signed a multi-million-dollar deal

20. See Robert M. Jarvis, *Legal Tales from Gilligan's Island*, 39 SANTA CLARA L. REV. 185, 201–02 (1998).

According to the show's biography, the Professor was born in Cleveland, Ohio. By the time he reached the age of twenty-five, he had earned six college degrees. Interestingly, only four of the degrees were ever identified on the show: a B.S. from the University of California at Los Angeles (UCLA), a B.A. from the University of Southern California (USC), an M.A. (in psychology) from Southern Methodist University (SMU), and a Ph.D. from Texas Christian University (TCU). While we cannot be sure, it is quite possible that one of the Professor's two remaining degrees was a law degree, for UCLA, USC, and SMU all have law schools.

Even without a law degree, however, it is clear that the Professor knew a great deal about the legal system. Although principally a botanist (he boarded the *Minnow* to write a book to be called *Fun with Ferns*), the show's biography credits the Professor with being "accomplished" in law. In his book about *Gilligan's Island*, Joey Green noted: "He is clearly the castaways' guiding light and silent leader. He's unquestionably the most intelligent castaway, preferring to sit quietly in the background and let the others think the Skipper runs the island. But when it comes to *judicial affairs*, life-threatening matters or possible rescue attempts, the Professor unobtrusively assumes leadership."

Further proof of the Professor's acquaintance with the law can be gleaned from the fact that one of the texts he brought with him on the cruise was *The Criminal Law*.

Id. (footnotes omitted).

21. See Loewy, *Punishing Flag Desecrators*, *supra* note 3, at 48.

22. Tracy Ringolsby, *Monday Saving Flag Resonates 40 Years Later*, MLB NEWS (Apr. 24, 2016), <https://www.mlb.com/news/rick-monday-saving-american-flag-resonates/c-174266502>.

23. *Id.*

24. *Id.*

25. *Baseball, Adidas to Honor Rick Monday April 26*, SUN DEVILS (Mar. 30, 2016), <https://thesundevils.com/news/2016/3/30/210847195.aspx>.

26. See Adam Wells, *Colin Kaepernick Sits During National Anthem Before Packers vs. 49ers*, BLEACHER REP., <https://bleacherreport.com/articles/2660085-colin-kaepernick-sits-during-national-anthem-before-packers-vs-49ers> (last visited Nov. 10, 2019). Although he is known for kneeling during the national anthem, Kaepernick actually started his protest by sitting on the bench. *Id.* He later decided to take a knee to be more respectful. *Id.* At the time when he first sat, "he no longer [was] an established starter and [was] battling to remain part of the organization." Vinnie Iyer, *Colin Kaepernick Picks Worst Time to Take a Stand on National Anthem*, SPORTING NEWS (Aug. 27, 2016), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-sits-national-anthem-49ers-packers-preseason-blaine-gabbert-qb-battle/7fx1rpv3extl1qh6unilin7gy>.

with Nike and got his own apparel line with the company.²⁷ So what's the lesson?

Presenter: Well, Arnold's second play is on hate speech, and that's enormously important.²⁸

Assistant: Yes, they spoke about hate speech, but they didn't actually use hate speech directed at each other. That will never fly in Hollywood.

Presenter: Okay then, Arnold's third play argues that the Supreme Court permits police to prey on the ignorance of citizens.²⁹

Assistant: Yeah, I thought that had promise. Cops pushing the line, but it's all about how they got suspects to consent to a search or make a statement—no guns or fists, or anything.

Presenter: Well, this is pretty important stuff. Arnold suggests that the United States Supreme Court has intentionally let the police take advantage of the ignorance of citizens.³⁰

Assistant: You mean like corrupt judges?

Presenter, after thinking for a moment: Yeah, maybe.

Assistant: Go on.

Presenter: The play looks at tricks and pressure that police use to get suspects to confess or submit to a search.³¹

Assistant: Like by hanging them upside down off the side of a building?³²

Presenter: No. It's more about warnings than threats—or a lack of warnings. One point is about how *Miranda* requires warnings before an interrogation, but consent to search does not require a warning.³³ Consider this passage from the play:

Ms. Wright: That's just the point. His *Miranda* warnings told him that anything that he said would be admissible against him *and* that he had a right to remain silent. His search warnings told him that anything found would be used against him, but *not* that he had a right to prevent the search. That

27. Jennifer Calfas, *Here's How Much Colin Kaepernick Will Make in His Controversial New Ad Deal With Nike, According to Sports Experts*, MONEY MAG. (Sept. 4, 2018), <http://money.com/money/5386086/colin-kaepernick-nike-deal/> (detailing the Nike deal).

28. Loewy, *A Dialogue on Hate Speech*, *supra* note 3; see Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411 (1992) (providing this author's thought on free speech and hate speech); Ronald J. Rychlak, *Compassion, Hatred, and Free Expression*, 27 MISS. C. L. REV. 407 (2008).

29. See generally Loewy, *supra* note 2.

30. See *id.* at 1096.

31. See *id.* at 1085–86.

32. See Ryan Lambie, *Dangling People Upside Down from Buildings in Film*, DEN OF GEEK (June 4, 2013), <https://www.denofgeek.com/movies/rooftop-dangling/25784/dangling-people-upside-down-from-buildings-in-film>.

33. See *Miranda v. Arizona*, 384 U.S. 436 (1966); Loewy, *supra* note 2, at 1082.

dichotomy may not have gone unnoticed.³⁴

Assistant: So, I get the *Miranda* warning if an officer interrogates me, but not when an officer asks to search my car?³⁵

Presenter: Right. Your car, your purse, your home, whatever.

Assistant: So, I will know not to answer questions when I am interrogated, right?

Presenter: Well, maybe not. Lots of people talk despite the *Miranda* rules. Consider this passage from the play:

Ms. Wright: Let us assume . . . You are surrounded by four armed policemen. You have been arrested and handcuffed by one of the policemen, who has not given you *Miranda* warnings. You know that you are supposed to get the warnings, but instead you get a stern question from the armed police officer, asking “Where is the gun?” Wouldn’t you assume that this guy means business, and that if you know what’s good for you, you better tell him?³⁶

Assistant: Finally! Guns! A little action.

Presenter: Would you talk to him?

Assistant: Probably.

Presenter: Would you consider your statement to be voluntary?

Assistant: Maybe not. Had I just committed a crime?

Presenter: Does that matter?

Assistant: I think maybe. I mean, we ask police to catch criminals. The community is safer when criminals are in custody. I want the bad guys to be in jail.

Presenter: I suppose we all do, but don’t we also want people to know and assert their constitutional rights?

Assistant: I want to be able to do that, but I’m not sure that I want guilty people to evade capture by asserting their rights. I mean, I don’t want the police to beat a confession out of a suspect, but I’m sort of okay with some pressure. Moreover, I’m just not that sure that warnings matter. We make laws to keep order, but criminals want to beat the system, so they find ways around those laws.

Presenter: We also make rules to control police conduct, but the police are charged with catching criminals, and they will push the limits that we put in place.

34. Loewy, *supra* note 2, at 1082; see *Miranda v. Arizona*, 384 U.S. 436 (1966); Ronald J. Rychlak, *Baseball, Hotdogs, Apple Pie, and Miranda Warnings*, 50 TEX. TECH L. REV. 15 (2017); Ronald J. Rychlak, *The Right to Remain Silent in Light of the War on Terror*, 10 CHAP. L. REV. 663 (2007).

35. See *Florida v. Bostick*, 501 U.S. 429, 434–37 (1991); *United States v. Mendenhall*, 446 U.S. 544, 558–59 (1980).

36. Loewy, *supra* note 2, at 1090 (footnotes omitted).

Assistant: Some of that pushing is what people used to call good police work.

Presenter: Like Clint Eastwood and Charles Bronson?³⁷

Assistant: Who is Charles Bronson?³⁸

Presenter, shaking his head: Never mind. Consider this passage from the play:

Mr. Sargeant: . . . The point of the Fifth Amendment, and even *Miranda*, is not to eliminate all coercion. It is simply to reduce coercion to an acceptable level. The *Miranda* compromise certainly does that. There is hardly a need to go beyond *Miranda*. After all, this is criminal procedure, not a fox hunt, and we do want to convict the guilty.³⁹

Assistant: Yes, that makes sense to me. We want to tone down any abusive actions by the police, but we don't want to interfere with them.

Presenter: And if you request an attorney?

Assistant: Then by all means you should get one.

Presenter: What if you don't know that you have the right to an attorney?

Assistant: Ignorance of the law is no excuse. As citizens, we're expected to know and obey all of these laws. Is it unreasonable to also charge citizens with knowledge of their rights? Really, does anyone today not know their rights? And if you know your rights, it's kind of on you.⁴⁰

Presenter: You put a lot of faith in the system. What do you think about this exchange of dialogue from the play?

Interrogator: Did you kill Keith Shackleford?

Davis (really wanting an attorney): Maybe I should see an attorney.

Interrogator: I repeat, did you kill Keith Shackleford?

Davis: I'm thinking that maybe I should talk to an attorney before I answer you.

Interrogator (in a louder and angrier tone): I said, DID YOU KILL KEITH SHACKLEFORD!?

37. See Paulsen, *supra* note 8.

38. *Charles Bronson Biography*, IMDB, <https://www.imdb.com/name/nm0000314/bio> (last visited Nov. 10, 2019) ("The archetypal screen tough guy with weatherbeaten features—one film critic described his rugged looks as 'a Clark Gable who had been left out in the sun too long.'"). Bronson had a long career in Hollywood, with many films, including his *Death Wish* series, in which he played "an avenging angel eradicating evildoers." *Id.*; see *Death Wish Plot*, IMDB, https://www.imdb.com/title/tt0071402/plotsummary?ref_=tt_stry_pl#synopsis (last visited Nov. 10, 2019).

39. Loewy, *supra* note 2, at 1092 (footnotes omitted).

40. See *The Informed Citizen, Ignorance of the Law Is Not an Excuse*, N.J. ST. B. ASS'N (Apr. 23, 2018), <https://njsbf.org/2018/04/23/ignorance-of-the-law-is-not-an-excuse/> (explaining that citizens are held accountable to the content of laws, even if they do not have actual knowledge).

Davis (believing now that he must answer): Yes I did.⁴¹

Presenter: Does that seem fair?

Assistant: No, he wanted a lawyer and should have gotten one.

Presenter: So, this was unfair? Would you let a murderer go because of it?

Assistant: No, I don't think so. This is a hard topic. People don't have to cooperate or consent, but we wish they would, and we want the police to catch criminals.

Presenter: Right. It is tough.

Assistant: So how does the play end? I have to admit—no sex and no car chases, it's kinda boring—I did not get to the end.

Presenter: Well, it's wrapped up quite neatly.

Assistant: Would you read the end to me?

Presenter: Sure.

Ms. Wright: And how are you going to get knowledge to the populace if we don't run television or billboard ads?

Mr. Sunshine: Perhaps we could teach it in schools or as part of adult education taught at community centers. We can teach our citizens what their rights are without encouraging them to say "no."

Mr. Sargeant: I'd be loathe to do that until we drastically reduce rights. Otherwise, there will be too many people not consenting to searches or confessing when they otherwise would, and more guilty people will be walking the streets.

Ms. Wright: Yeah, but it will be a breath of fresh air to the innocent, who feel compelled to cooperate, when their cooperation should be voluntary.

Professor: Is there anything wrong with teaching citizens rights in civics class so long as we don't discourage cooperation with the police?

Ms. Middlebrooks: I don't think so. That seems like the best way to go.

Professor: Anyone disagree?

Mr. Sargeant: If they didn't have as many rights, I'd be fine with that.

Rest of Class: Sounds good to us.

Professor: Well, I'm happy to tell you that we've reached the end of the class and the end of the semester. Good luck in your future careers.⁴²

41. Loewy, *supra* note 2, at 1098 (footnote omitted).

42. *Id.* at 1106–07.

Assistant: Well, you're right. It is wrapped up quite neatly.

Presenter: So, you would agree that it has a *Hollywood* ending?

Assistant: No. I still think I chose the correct binder.⁴³

FIN

43. At the conclusion of my presentation at *Texas Tech Law Review's* Criminal Law Symposium on March 29, 2019, I presented Professor Loewy with a "Car Selling Made Easier" binder containing his three plays discussed herein.