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The Folklore and Symbolism of Authorship in American Copyright Law

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ARTICLE

THE FOLKLORE AND SYMBOLISM OF AUTHORSHIP IN AMERICAN COPYRIGHT LAW

Shyamkrishna Balganes^{*}

ABSTRACT

Despite its formal commitment to “authorship,” American copyright law pays surprisingly little doctrinal attention to understanding the concept. Originality, taken to be modern copyright law’s proxy for authorship, has come to assume a life of its own, with little regard to the system’s supposed ideals of authorship. What role then does authorship play in modern American copyright law? This Article argues that authorship is best understood as a form of folklore and symbolism in copyright law. Drawing on the anthropological strand of Legal Realism advanced and developed by Thurman Arnold, the Article argues that authorship serves an important symbolic purpose within copyright thinking, which enables the institution to develop around idealized accounts of individual creativity even when those accounts are hard to anchor in reality. Arnold famously argued that in numerous contexts, legal rules and devices serve the role of mediating between an institution’s practical manifestations and society’s beliefs about the proper objectives of that institutional framework. Rather than advocate for their abolition, Arnold argued that these devices enabled the rationalization and legitimation of an institution, when worthy of being reformed from the inside. Authorship, in this understanding, functions as an

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all-important framing device for the institution of copyright. The Article develops this symbolic account of authorship, and shows how it allows copyright law and jurisprudence to make sense of various anomalies within the system.

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I. INTRODUCTION

Authorship is the real sine qua non of copyright law. Regardless of whether one's theory of copyright is normative or descriptive, explanatory or justificatory, or consequentialist or deontic, authorship occupies a central place therein. The author—the individual that the law ascribes the production of the creative work to—occupies an especially exalted place in Anglo-American copyright law.¹ Initially introduced into the text of the Statute of Anne,² and later expressly incorporated into the

1. For a useful history, see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1–66 (1993).

2. Statute of Anne 1710, 8 Ann. c. 19 (Eng.) (“An act for the encouragement of learning, by vesting the copies of printed books in the *authors* or purchasers of such copies, during the times therein mentioned.” (emphasis added)).

U.S. Constitution³ and every federal copyright statute since,⁴ the author and the associated phenomenon of authorship are today a mainstay of copyright jurisprudence and its constitutive vocabulary. As some scholars observe, the idea of authorship maintains a “hold” on the “American legal imagination,” rendering it the “most central” and “most resonant” concept in American copyright law.⁵

Histories and historiographies of the idea (of authorship) abound in the literature.⁶ Some argue that the idea was received from other domains of study, where a Romantic conception prevailed;⁷ others argue that the idea evolved internally within American copyright doctrine much later, and by incorporating other Enlightenment ideals.⁸ Yet, none of these histories provide an explanation for a problem that confronts modern American copyright jurisprudence to this day, despite the putative prominence of the author and authorship therein: the complete absence of a legal definition/account of the author, and of authorship. Unlike jurisdictions that offer such a definition, or instead operationalize the idea through rebuttable presumptions that are premised on contributions during the creative process,⁹ American copyright law—both statutory and common law—dodges the question altogether. Case law addressing authorship is scattered and fragmented (at best), and originality—often treated as a proxy for authorship—has evolved to perform a largely different analytical role within copyright doctrine. The obvious questions that this trend therefore raises are: why this is so, whether this avoidance actually serves some hitherto unidentified purpose, and what that unstated purpose might indeed be. My objective in this Essay is to answer all three questions, which I

3. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* and Inventors the exclusive Right to their respective Writings and Discoveries” (emphasis added)).

4. See, e.g., 17 U.S.C. § 102 (2012) (limiting copyright protection to “works of authorship”).

5. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 455; Peter Jaszi & Martha Woodmansee, *Introduction* to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 10 (Martha Woodmansee & Peter Jaszi eds., 1994).

6. See, e.g., CONSTRUCTION OF AUTHORSHIP *supra* note 5; ROSE, *supra* note 1; MICHAEL NEWBURY, FIGURING AUTHORSHIP IN ANTEBELLUM AMERICA (1997); JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS (1991); LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (2007); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192 (2008).

7. See, e.g., Jaszi, *supra* note 5, at 466–68, 470.

8. Bracha, *supra* note 6, at 188–92.

9. See, e.g., Copyright, Designs and Patent Act 1988, c. 48, § 9 (UK).

argue together shed important light on salient aspects of the copyright system.

It is, of course, unclear whether American copyright law's decision to avoid offering a legal account, or mechanism for determining authorship was in any sense deliberate.¹⁰ The legislative history accompanying the copyright statute of 1976 is largely silent on the contours of authorship.¹¹ All the same, this omission and its consequent production of a more amorphous and evanescent understanding of the idea can be seen to play an important expressive role in the working of the system.

To understand this role, I draw in this Essay on the psychological/anthropological strand of Legal Realism famously advanced in the 1930s by Thurman Arnold.¹² While Arnold joined with the other prominent Legal Realists of his era to show the emptiness of legal concepts, he at the same time broke with them to argue that such concepts, devoid as they were of autonomous meaning, played a symbolic role in the legal system.¹³ As symbols, these concepts exerted a reflexive influence on the psyche of the public and on participants within the system. The law's symbols mediated the public's idealized accounts of an institution—which were incapable of being realized—and the actual operation of the institution, and thereby helped preserve the legitimacy and respect that were critical to its effective functioning.¹⁴ Symbols

10. For recent efforts to recast authorship within American copyright doctrine, see Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. (forthcoming 2017); Christopher J. Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016).

11. H.R. REP. NO. 94-1733 (1976) (Conf. Rep.) (showing no reference to the definition of authorship in any of the discussions).

12. See generally THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) [hereinafter ARNOLD, *SYMBOLS*]; THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) [hereinafter ARNOLD, *FOLKLORE*]; Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 BUFF. L. REV. 1053 (2003).

13. See ARNOLD, *SYMBOLS*, *supra* note 12, at 34–35.

14. Arnold's account of the role of law in legitimating power bears a stark resemblance in this regard to the work of Antonio Gramsci, whose work on the idea of "hegemony" is well-known, and has been used to account for the way in which law operates. See, e.g., Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515 (2000). Gramsci's work influenced the thinking of the Critical Legal Studies (CLS) movement, most prominently through the writing of Duncan Kennedy.

According to Kennedy, hegemony consists in "the exercise of domination through political legitimacy, rather than through force" and entails "the acquisition of the consent of the governed." Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982). The idea thus took shape under the rubric of "law and ideology." See Robert W. Gordon, *Law and Ideology*, TIKKUN, Jan.–Feb. 1988, 15 ("Legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just."). Kennedy himself described this idea as that of "legal consciousness." DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 2 (2006) (observing that legal consciousness mediates the influence of ideology, economic interest and political power on "particular legal results").

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thus played an important “social role” for an institution, and operated as “anthropological subterfuges erected to protect cultural taboos,” which allowed an institution to balance continuity and change.¹⁵

The law’s symbols therefore contributed to a folklore, which allowed the participants in the system to rationalize the irrationality of their activities, and to find “order out of chaos.”¹⁶ It is this process of rationalization that resulted in elaborate rituals within the legal system, which in turn served as forms of “consolation,”¹⁷ by bridging ideal formulations of legal and market institutions with their actual practice in reality.¹⁸ The folklore thus generated, to Arnold, allowed government institutions to reach their ideals by closing the obvious psychological gap between illusion and reality. Arnold’s work thus exhibited both psychological and anthropological strands, and was at once both cynical and constructive of legal institutions. It embraced the pragmatism of law as a functional enterprise that sought to achieve certain goals, and at the same time recognized the need for change when an institution’s credibility—despite its folklore—fell into doubt.¹⁹

As such, Arnold’s account provides us with an interesting new way to think about the role of authorship in copyright law. In this understanding, authorship might be fruitfully understood as a *legitimizing* and *mediating* symbol for the copyright system. Ever since its origins, copyright jurisprudence has struggled to articulate a coherent theoretical and justificatory rationale for the institution. While the ideal of “progress” is taken to guide the working of the system, the normative parameters of that construct

Arnold does not appear to have placed overt reliance on the work of Gramsci. Indeed, in attempting to justify aspects of the status quo, his arguments placed him apart from the Legal Realists at the time, who formed the intellectual forebears of the CLS movement. Nevertheless, some have seen a Gramscian strand in some of his writing on the role of symbolism in American law. See Wolfgang Kaupen, *Comment*, in EUROPEAN YEARBOOK IN LAW AND SOCIOLOGY 140, 141 (B.-M. Blegvad, C.M. Campbell & C.J. Schuyt eds., 1977). I do not explore here the intellectual connection between Arnold, Gramsci and the CLS movement, despite these similarities.

15. Warren J. Samuels, *Legal Realism and the Burden of Symbolism: The Correspondence of Thurman Arnold*, 13 LAW & SOC. REV. 997, 1005 (1979) (quoting VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 61 (Gene M. Gressley ed., 1977)).

16. See Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 689 (1938); see also ARNOLD, FOLKLORE, *supra* note 12, at 356–61.

17. See Lerner, *supra* note 16, at 690.

18. See ARNOLD, FOLKLORE, *supra* note 12, at 356–57.

19. See *id.* at 360–75.

have remained deeply contested.²⁰ Social welfare maximization,²¹ inducement of creativity,²² the protection of creative labor,²³ the protection of individual autonomy,²⁴ and the realization of distributive justice,²⁵ are justifications that have all found a home in the copyright system, under the rubric of progress. Yet, the fact remains that every last one of these principles finds it impossible to explain significant swaths of the copyright landscape, much of which has remained immutable since the institution's very origins. In addition, they also remain fundamentally incompatible with each other, so as to be collectively subsumed into the system. This poses an obvious legitimacy challenge for the copyright system.

The idea of authorship plays a crucial role here, relying on the "author" as an important symbol, which allows the copyright system to gloss over the inadequacies of each of these individual principles, as well as the absence of a coherent justificatory account for its overall functioning. The author, in short, becomes a symbol through which each of copyright's justifications mediates the inadequacy of its explanatory power, or of its empirical basis. Authorship, in essence, operates as a viable middle-level principle that at once allows the system to mask its conflicting goals, while at the same time offering outsiders a coherent and psychologically palatable picture of the institution's legitimacy.

Connecting the copyright system's myriad—and complex—machinations to the folklore of authorship, which revolves around the image of an actual human agent benefiting from the working of the system, anchors the institution in society's deeply held intuitions about individualism, creativity, fairness, autonomy, markets, and ownership, while glossing over their abstract

20. See U.S. CONST. art. I, § 8, cl. 8. For accounts of the term "progress" within copyright law, see Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTEL. PROP. L.J. 3 (2001); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003).

21. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (explaining copyright as a "means for promoting the efficient allocation of resources").

22. See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009) (attempting to understand copyright in terms of its theory of incentivizing creativity).

23. See, e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523–24, 536–37 (1990).

24. See ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 17–18, 57, 59 (2015).

25. See, e.g., Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. (forthcoming 2016).

inconsistencies. It allows courts creating copyright jurisprudence to implicitly rationalize their decisions in terms of an illusory version of reality, which allows the system to continue functioning, and realizing its myriad—and incommensurable—goals.

This Essay is divided into three parts. Part I begins with an overview of how American copyright law embodies a fundamental mismatch in its reliance on authorship. While courts and agencies routinely use the author and the ideal of authorship, either directly or indirectly, as rationalizing mechanisms, copyright jurisprudence contains an incoherent account of both (i.e., the author and authorship). Part II then offers a symbolism- and folklore-based account of authorship, which explains the legitimating role that it plays. It begins with an overview of Thurman Arnold's core anthropological and psychological ideas for legal institutions (II.A.), and then applies them to copyright law and the symbols of the author and authorship therein (II.B). Part III then unpacks the consequences for copyright thinking and reform that flow from this understanding, both positive and normative.

Before proceeding further, a few observations about the nature of the account offered herein, are in order. First, the account of authorship offered here is by no means a historical reconstruction of how/why authorship came to influence copyright thinking. It therefore does not seek to add to the rich literature that exists on this topic. Instead, it grapples with the role of authorship in the contemporary copyright system. And in so doing, it offers an explanation for the mismatch between copyright doctrine, which embodies a fleeting understanding of authorship, and the principal author-centric justifications for copyright law. Second, and much like Arnold himself, the account is consciously ambivalent about the virtues and vices of authorship as a form of symbolism in copyright thinking. While on the one hand the symbolism certainly distracts from a clearer theoretical elucidation of the system, it at the same time serves a crucial pragmatic purpose that allows the system as a whole to continue functioning, albeit with myriad imperfections that are each capable of being individually remedied.

II. THE AUTHORSHIP MISMATCH

Copyright law purports to care about the “author” and “authorship.” Yet, copyright doctrine and jurisprudence lack a coherent understanding of both. Despite this, the most common efforts that seek some consilience in copyright law, whether explanatory or justificatory, operate by focusing on the author.

This Part unpacks this mismatch; first by looking at the doctrinal omission and then by examining the analytics of copyright rationalization seen within the system. While the authorship discourse in copyright law embodies a variety of different paradoxes, it is this fundamental mismatch that concerns the argument here.

A. *Authorship in Copyright Doctrine*

A focus on the “author” permeates the modern doctrinal discourse of copyright in a variety of different ways: Copyright protection attaches only to a work of “authorship,”²⁶ the “author” is treated as the presumptive first owner of the copyright in a work,²⁷ two or more authors can jointly create a work of joint authorship,²⁸ lawful fixation requires the “authority of the author,”²⁹ national origin looks to the “domicile of the author,”³⁰ and certain categories of “authors” are accorded the rights of attribution and integrity.³¹ The list goes on. Yet, copyright doctrine and jurisprudence are striking in their refusal to offer an analytical definition for the “author” and “authorship.”³²

The omission as such is hardly unique to American copyright law,³³ but it remains fairly noticeable given that several of copyright law’s doctrines make reference to authorship without an analytical basis for the idea. Indeed, when one digs deeper into copyright’s specific doctrines, their understanding of authorship is seen to be ephemeral. Consider in this regard the doctrine of originality, often taken to be the law’s proxy for authorship.³⁴ In *Feist Publications, Inc. v. Rural Telephone Service Company*, the Supreme Court crystallized the American understanding of originality, by locating its roots in the Constitution and declaring it to be the sine qua non of copyright protection.³⁵ The Court’s standard for originality thus emanated as “independent creation plus a modicum of creativity.”³⁶ Independent creation in turn has

26. 17 U.S.C. § 102(a) (2012).

27. *Id.* § 201(a).

28. *Id.* § 101 (defining “joint work”).

29. *Id.* § 101 (defining “fixation”).

30. *Id.* § 104(a).

31. *Id.* § 106A.

32. See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1069 (2003) (describing the sparseness of judicial decisions and definitions of these ideas).

33. *Id.* at 1069–72.

34. *Id.* at 1078 (describing originality as “synonymous” with authorship).

35. *Feist Publ’ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 345–48 (1991).

36. *Id.* at 346.

been understood as requiring that the expression at issue “owe its origin[s]” to the individual claiming authorship.³⁷ The author is therefore the person to whom a work owes its origins. But what does it mean for a work to “owe its origins” to someone? And here, one might have hoped that *Feist* and its progeny would have developed a standard that adds meat to the bare idea of owing, and thereby produced a workable standard for authorship. The reality is to the contrary and somewhat disappointing. Under current jurisprudence, a work is presumed to “owe its origins” to someone as long as it is “not copied.”³⁸ This negative formulation strips the “owing” thread of authorship of any real significance.

A further complication inherent in the originality-authorship connection is the reality that with *Feist*’s rejection of the “sweat of the brow” doctrine, the law has come to focus on the modicum of creativity as manifested in the work itself and never beyond.³⁹ Thus, an exceptionally creative process that produces an altogether uncreative outcome in the work, would find no basis for protection. Authorship as a process—rather than as a result—is never the basis of independent scrutiny under the modern originality standard.⁴⁰ This is not to suggest that originality is performing no other role within the system credibly, just that its authorship-role is at best nominal. Just as a work of authorship may fail the demands of originality, so too a work of expression may exhibit significant creativity on its face to qualify as original, and yet fail the law’s demand for authorship, quite independently—e.g., a photograph “taken” by a monkey.⁴¹ Originality is hardly copyright’s stand-in for authorship.

The same story is just as true for some of copyright law’s other doctrines, each of which pays lip service to authorship (seen in judicial rhetoric), but as a functional matter focuses on other considerations. The joint works doctrine is another good example, where courts emphasize the need for both contributors to each be

37. *Id.* at 363.

38. *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 n.3 (2d Cir. 1977); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01[A][1] (Matthew Bender rev. ed. 2016) (“[A] work is original and may command copyright protection even if it is completely identical with a prior work, provided it was not copied from that prior work but is instead a product of the independent efforts of its author.”).

39. *Feist*, 499 U.S. at 354–56.

40. *See* Balganesch, *supra* note 10, at 4.

41. *See, e.g.*, Samuel Gibbs, *Monkey Business: Macaque Selfie Can’t Be Copyrighted, Say US and UK*, *GUARDIAN* (Aug. 22, 2014), <http://www.theguardian.com/technology/2014/aug/22/monkey-business-macaque-selfie-cant-be-copyrighted-say-us-and-uk> [https://perma.cc/2FGX-867E]; Danny Cevallos, *When a Monkey Takes a Selfie*, *CNN* (Aug. 18, 2014), <http://www.cnn.com/2014/08/08/opinion/cevallos-monkey-selfie-copyright/> [https://perma.cc/3BCQ-FP8S].

authors and yet, provide no clear basis on which to assess such authorship beyond conclusory or impressionistic observations. Their ultimate finding of joint authorship turns on more pragmatic considerations relating to the interaction between the collaborators, almost none of which deals with authorship as such.⁴² Or, consider the work made for hire doctrine, wherein copyright law treats a work prepared by an employee during the course of employment as authored—not just owned—by the employer.⁴³ As a rule of authorship, the doctrine might be thought to embody a plausible account of authorship, and yet a deeper scrutiny reveals that it simply doesn't, but instead employs the language of authorship in purely consequential terms, i.e., as a pathway to ownership.

Modern copyright doctrine therefore contains no discernible common understanding of authorship, or indeed the activities or their attributes that qualify for this status. When the law makes decisions (usually of denial) in terms of authorship, it usually is an indication that some underlying intuition about the claimant, the nature of the subject matter for which protection is being sought, the context of its creation, or the connection between the claimant and the expression (e.g., causation) is at play in the determination.

B. Authorship as Rationalization

Contrary to common perception then, copyright doctrine (and jurisprudence) embody no coherent analytical understanding of the author, or of the process of authorship. The term is used within doctrine largely as a referent for the first-claimant of copyright protection, and then in a conclusory fashion beyond that. Yet none of this stops copyright's principal institutions from relying on authorship as a method of rationalization for their outcomes and decisions.

"Rationalization" is not just a reference to the copyright rhetoric commonly seen in the academic discourse about the institution. It is in addition, a reference to the methods of justification and explanatory consilience that participants within the system—principally courts and judges, but also the relevant governmental agency (i.e., the Copyright Office), and occasionally Congress—use to justify individual and collective aspects of the system. The exclusion of theoretical literature by copyright academics from the domain of this inquiry is not to suggest that

42. See Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1699 (2014).

43. 17 U.S.C. § 201(b) (2012).

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such authorship-driven reasoning is absent therein; it is instead merely in furtherance of the core purpose of this Essay, which is to examine how the institution of copyright justifies and mediates itself from within, through the symbolism and folklore of authorship.⁴⁴ Such rationalization can be seen to occur in two distinct forms, both of which are equally intriguing.

The first is what we may call *contextual* (or direct) and it represents efforts by individual decision-makers to arrive at a doctrinal conclusion in an individual case and then explain the analytical logic of the doctrinal outcome using the nebulous concept of authorship, on the unstated assumption that it contains determinate meaning. Here, authorship is doing the work of integrating the individual outcome at hand with the presumptive focal logic of the institution as a whole, i.e., authorship. Consider a few examples of this practice. In one case, the Seventh Circuit denied copyright protection to an aesthetically appealing garden, concluding that it was not copyrightable expression that satisfied the law's "fixation" requirement.⁴⁵ According to the court, the garden was not a method, process or system, but instead was "not the kind of authorship required for copyright."⁴⁶ A few years earlier, the same court had also considered whether an actor's persona or likeness might be a protectable under copyright.⁴⁷ And it concluded that "[a] person's likeness—her persona—is not authored" in a sense relevant for protection even though fixed.⁴⁸ It was found not to be a "work of authorship" under this logic.⁴⁹ In both cases, authorship rationalized individual subject-matter decisions.

Such contextual rationalization is seen in the logic of non-court actors as well. A photograph orchestrated by a wildlife

44. As we shall see later, Arnold recognized that the academic discourse too played an important role in conforming the rationalizations of courts, through the production of what he called an "abstract jurisprudence" that operated behind court decisions. *See infra* note 129 and accompanying text. In his account, however, it readily appears that the academic discourse, especially to the extent that it is critical rather than supportive of the institution, takes a secondary place. *See* ARNOLD, SYMBOLS, *supra* note 12, at 48–59.

45. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303–04 (7th Cir. 2011).

46. *Id.* at 304. The court further noted:

[G]ardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed. Most of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not in the mind of the gardener. At any given moment in time, a garden owes most of its form and appearance to natural forces, though the gardener who plants and tends it obviously assists.

Id.

47. *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005).

48. *Id.* at 910.

49. *Id.*

photographer by luring wild monkeys to play with his camera was deemed unprotectable under the law, because it was “taken by a monkey” and did not evince “human authorship.”⁵⁰ Again, the logic of authorship rationalized the conclusion that the photographer’s involvement was insufficient to be worthy of protection. Such contextual rationalization is in contrast to what we may call *systemic* (or indirect) rationalization, wherein the decision-maker arrives at an individual doctrinal decision using analytical logic unrelated to authorship, but then connects it to the role of authorship in the working of the system as a whole. In so doing, the decision-maker is attempting to justify (rather than integrate) the decision within the overall skein of the system. The principal difference is therefore that the rationalization in the systemic version relies less directly on the individual concept of authorship as such, and more on the implicit rationale for the system as a whole, which in turn connects back to the author and to authorship.

Deriving from the logic of “progress”⁵¹ and the “encouragement of learning,”⁵² much of the copyright system is today justified and explained internally in terms of inducements to create. Under this theory, the institution of copyright exists to encourage individuals to produce original expression, through the promise of marketable exclusive rights in the expression so produced.⁵³ This inducement account, as should be obvious, pivots around the idea of encouraging authorship by incentivizing authors. Focused as it is on the creation of original expression, it presumes significant social value in the production and distribution of work emanating from the author’s actions. Put another way, the author is crucial to the inducement account, and without who the edifice of the theory falls apart. It is this authorial emphasis that keeps property-ideas somewhat at bay in the copyright discourse, since arguments about the efficient allocation of resources⁵⁴—independent of where they originate—become somewhat secondary. Thus, even if it may well be that copyright in practice incentivizes non-authorial participants in the system,

50. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §313.2, at 22 (3d ed. 2014).

51. U.S. CONST., art. I, § 8, cl. 8.

52. Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

53. See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

54. But see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 457, 480–81 (2010) (arguing that copyright law developed by analogy to physical property).

such as distributors and other intermediaries, these participants are treated as unequivocally secondary to authors, whose interests/incentives are seen as central to the system.⁵⁵

The Supreme Court's most direct—and recent—benediction of this reasoning occurred about a decade ago in the now infamous *Eldred* decision.⁵⁶ Validating the constitutionality of a retroactive extension of copyright by Congress, the Court rather quickly moved its reasoning to the interests of the *author*: first, by noting that equality in protection as between authors who create at different points in time was important as a matter of fairness and equity;⁵⁷ second, by emphasizing that longer protection in the U.S. would indeed induce more authors to create and disseminate their work domestically;⁵⁸ and third, that in promoting authorial creation, copyright law was furthering free expression.⁵⁹ It mattered little to the Court that the real benefit of the extension may have accrued to the non-authorial participants, who through assignments and transfers, had become copyright-owners under the law, a point that Justice Breyer's dissent forcefully brought out in noting that it was “not the author” but rather “distant heirs” or the “shareholders” of a corporation who would see the putative benefits.⁶⁰ Falling back on the benefits—incentives and monetary—that would accrue to the author was thus central to the majority's logic, even though it might have found more plausible justification elsewhere.

Eldred is in many ways just the tip of the iceberg as far as this form of author-centric rationalization goes. The use of authorship as the primary justification for individual copyright decisions arrived at using myriad non-authorial doctrines, is a fairly pervasive phenomenon that is seen in judicial reasoning within the system.⁶¹ Creating and preserving the author's

55. See generally Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1645–47 (2001) (“The control the nonauthor right holders enjoy derives from the rights the Constitution ensures to creators.”); Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2014).

56. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

57. *Id.* at 204.

58. *Id.* at 206.

59. *Id.* at 219–21.

60. *Id.* at 254–55 (Breyer, J., dissenting).

61. For a small sample, see *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1264 (D.C. Cir. 2005) (upholding the validity of the Uruguay Round Agreement Act on the ground that it provides an extra incentive to authors); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 805 (5th Cir. 2002) (noting the incentives for authors argument in relation to the protectability of standards created by private parties); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 839 (10th Cir. 1993) (“Copyright policy is meant to balance protection, which seeks to ensure a fair return to authors and inventors and thereby to establish incentives for development, with dissemination, which seeks to foster learning,

incentive to create has become a common metric that courts use to explain and rationalize their decisions to accord/deny copyright protection to works—whether as a category or individually. They trace their answers to questions of copyrightability, fair use, substantial similarity, joint works, and the scope of individual rights rather routinely back to this idea, wherein the author—as originator of the creativity—is seen as the principal protagonist of the entire system.

This focus on authorial incentives is hardly unique to federal courts interpreting and applying copyright doctrine. Executive branch proposals and descriptions of the system contain similar rationalizations of the system. A recent Department of Commerce Green Paper, focused on extensions of copyright to the digital environment, echoed the incentives rationale for authors as well, noting at the very outset that “copyright law gives creators incentives to produce new works and distribute them to the public.”⁶² Analogously, a Copyright Office description of the country’s earliest copyright law described it as having “provided authors with exclusive rights as an incentive to create original works.”⁶³

My point here is not to question the empirical validity or explanatory virtues of copyright’s theory of incentives. It is to suggest, quite simply, that as contemporary copyright’s dominant form of systemic rationalization, the incentives account isn’t just one about the inducement of creative works in the abstract. It is instead a rationalization that focuses on *authors’* incentives, and on the system acting as an inducement for *authors* to produce creative works. The author (and authorship) are both critical features of the incentives story.

Herein lies the mismatch. Whereas copyright doctrine and jurisprudence shy away from defining the author, or of providing an analytical framework for identifying an author or assessing whether there has been authorship as a precondition for protection, courts routinely rationalize their decisions—occasionally directly, but more commonly indirectly—using the

progress and development.”); *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003) (interpreting the fourth fair use factor in terms of the “author’s ability to capture the fruits of his labor and hence his incentive to create”).

62. DEPT. OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, at i (2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> [<https://perma.cc/EVG8-XQDW>].

63. U.S. COPYRIGHT OFFICE, STRATEGIC PLAN 2008–2013, at 4 (2008), <http://www.copyright.gov/reports/s-plan2008/s-plan2008-2013.pdf> [<https://perma.cc/32R3-CUDN>].

logic of authorship and the incentives that author's need for their activities. This rationalization therefore exhibits a clear disconnect from its actual doctrinal content.

III. THE FOLKLORE OF AUTHORSHIP

Having examined how the putative emphasis on authorship in copyright rationalization has little doctrinal correspondence, this Part develops a rationale to explain this mismatch. In doing so, it draws on Thurman Arnold's theory about the role of symbolism and folklore in American legal thinking and governance, to argue that authorship represents a form of symbolism that performs a legitimating role for the copyright system. III.A begins with an overview of Arnold's general theory; III.B then applies the theory to authorship.

A. *Thurman Arnold on Symbolism and Folklore in American Law*

Within the world of Legal Realism, a movement that identified itself with seeking to reveal the indeterminacy of legal doctrine in producing individual decisions,⁶⁴ Thurman Arnold is routinely treated as an outlier.⁶⁵ While he joined with many of the other Realists to criticize the naïve belief in the autonomy of doctrinal thinking (associated with "Legal Formalism"),⁶⁶ he at the same time resisted being seen as just another Legal Realist.⁶⁷ And this was for one central reason: he believed that legal doctrine, and its constitutive devices, ideas, and rules, played an important instrumental role in legal thinking, which the traditional approach to Legal Realism had failed to fully appreciate. It enabled the legal system—through its myriad participants—to preserve its legitimacy, while nonetheless striving for internal reform and perfection. Or, as he put it, efforts to eliminate such ideas and devices would render reformist legal thinking considerably impractical.⁶⁸

64. See, e.g., Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

65. Neil Duxbury, *Some Radicalism About Realism: Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. LEGAL STUD. 11, 12 (1990) (describing Arnold as belonging to the peripheral or radical strand of Legal Realism).

66. See, e.g., Thurman W. Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

67. See Fenster, *supra* note 12, at 1054 ("Unlike conventional realists, Arnold had little faith that mere reform would cure governing institutions and the public of their irrational investments in the symbols of government and capitalism.").

68. ARNOLD, SYMBOLS, *supra* note 12, at 6–10.

Between 1930 and 1938, Arnold was a law professor at the Yale Law School, a hotbed of Legal Realist thinking at the time.⁶⁹ While sympathetic to his colleagues, his own orientation towards Realism was heavily influenced by a pragmatic outlook; one that would result in his eventually leaving the academy to serve in the federal government,⁷⁰ then as a federal judge on the D.C. Circuit,⁷¹ and finally as a founding partner of one of Washington D.C.'s prominent law firms.⁷² This pragmatic outlook greatly influenced his approach to legal analysis, and his unwillingness to simplistically abandon the role of legal doctrine and principles because of their apparent vacuity.

In his first book, *The Symbols of Government*, Arnold referred to as “symbols” the “ceremonies and theories of social institutions . . . which condition the behavior of men.”⁷³ In his thinking, legal institutions originate in the pursuit of certain ideals, which they encapsulate as “fundamental principles.”⁷⁴ Yet in practice, those very institutions come to abandon these fundamental principles in individual cases, as they attempt to give effect to “conflicting ideals” in practice.⁷⁵ The Realists, in his understanding, wrongly used this to reveal the “foolishness” of the enterprise associated with the fundamental principles themselves, which they saw as largely deceptive.⁷⁶ Instead, Arnold claimed, these principles were essential to the institution in so far they anchored its “moral support” and triggered its own instincts of self-preservation.⁷⁷ In this vein, he had the following to offer by way of contrasting his approach to that of the ordinary (i.e., Realist) scholar:

Legal principles are [usually] discussed as things which govern a society which has never studied them, or else as meaningless ritual which has no effect, even upon the courts which use them. . . . On the other hand, if the discovery is made that no legal formulas can long retain any definite meaning, the assumption is that their pronouncement should not affect judicial conduct, and

69. For the authoritative account of Legal Realism at Yale, see LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (1986).

70. SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 76–78 (2005).

71. *Id.* at 111 (describing it as a “short unhappy judgeship”).

72. *Id.* at 124 (describing the founding of “Arnold, Fortas & Porter” today known as Arnold & Porter).

73. ARNOLD, *SYMBOLS*, *supra* note 12, at iv.

74. *Id.* at v.

75. *Id.* at 7–8.

76. *Id.* at 7.

77. *Id.* at 9.

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therefore something else should be substituted. The failure of the New York code to get rid of the distinction between law and equity is treated either as showing that these legal distinctions are fundamental to correct thought, or else as a proof of judicial stupidity, instead of as an example of reformers' lack of understanding of the mass psychology of the judicial institution from which not even judges can escape.⁷⁸

To Arnold, the law was no more than “a great reservoir of emotionally important social symbols.”⁷⁹ And therein lay the ultimate virtue of the law's symbolic content:

[T]he escape of the law from reality constitutes not its weakness but its greatest strength. Legal institutions must constantly reconcile ideological conflicts, just as individuals reconcile them by shoving inconsistencies back into a sort of institutional subconscious mind. . . . The abstract ideals of the law require for their public acceptance symbolic conduct of a very definite pattern by a definite institution which can be heard and seen. In this way only can they achieve the dramatic presentation necessary to make them moving forces in society.⁸⁰

A legal institution's various concepts, devices, and principles therefore played an important role in reconciling its conflicting ideals—as realized in practice—and thereby according it an element of “public acceptance.”⁸¹ They created “faiths and loyalties concerning governing forces.”⁸² Arnold interspersed his account with various examples of ceremonial rituals in the legal institutions, ranging from law enforcement to jury trials and administrative law.⁸³

Arnold's account received its more abstract elucidation in his follow up book, *The Folklore of Capitalism*, which he saw as a continuation of his project in the first.⁸⁴ While he built out the idea of the law's ceremonies, rituals and symbols further in this book, he at the same concretized it with examples. One such poignant example was the “personification of great industrial enterprise” through the idea of corporate personality.⁸⁵ “Courts,” Arnold

78. *Id.* at 28–29.

79. *Id.* at 34.

80. *Id.* at 44–45.

81. *Id.* at 44–45.

82. *Id.* at 45.

83. *Id.* at 128–49.

84. ARNOLD, *FOLKLORE*, *supra* note 12, at iii.

85. *Id.* at 185. For a recent theory, building on Arnold's views on corporate law, see Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997 (2014).

argued, “have made a living thing out of this fiction.”⁸⁶ This in turn had a critical symbolic effect on lay perceptions and “as men instinctively thought of these great organizations as individuals, the emotional analogies of home and freedom and all the other trappings of ‘rugged individualism’ became their most potent protection.”⁸⁷ The liberties of individuals became transposed to organizations, which deflected attention from their behavior. The initial symbolism eventually became self-perpetuating, as the “actual world” and the “mythology” began to diverge, in turn spawning a complex set of sub-ceremonies and rituals that built on the original one.⁸⁸ Ceremonies became “the only way of giving force to the creed.”⁸⁹

This is where Arnold disagreed with his other Realist contemporaries. When they encountered legal fictions such as corporate personality, which courts and legislators treated as capable of producing determinate outcomes on their own, the Realist impulse invariably attempted to jettison the concept altogether from legal thinking. Felix Cohen, for instance, describe corporate personality as emblematic of “transcendental nonsense,” and as representing a “supernatural entit[y]” with no “verifiable existence except to the eyes of faith.”⁹⁰ He thus advocated for its eradication from legal thinking, which needed to focus on the real social issues at stake.⁹¹ Arnold’s project, while principally diagnostic, was equally reformist in orientation; yet significantly more pragmatic than the traditional Realist response. He thus emphasized that “[w]e cannot be practical about social problems if we are under the illusion that we can solve them without complying with the taboos and customs of the tribe.”⁹² In his view the “corporate personality is part of our present religion” and therefore “[w]e must continue to refer to corporations as individuals in public discourse so long as the words have emotional relevance.”⁹³ Instead of jettisoning the fiction altogether, Arnold advocated understanding its outward purpose and reforming it from within, which allowed the practice to realize its attempted legitimation.

Arnold was thus fairly contemptuous of academic efforts to deride the formal structure and logic of the law, when in the

86. ARNOLD, FOLKLORE, *supra* note 12, at 185.

87. *Id.* at 190.

88. *Id.* at 192, 199.

89. *Id.* at 193.

90. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

91. *Id.* at 822.

92. ARNOLD, FOLKLORE, *supra* note 12, at 205.

93. *Id.*

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exclusive pursuit of any form of idealism.⁹⁴ An institution's folklore and symbolism—he believed—could never be understood from an outsider's point of view. What it needed instead was an appreciation of how the members of the institutions, i.e., the participants in its workings, derived value from those symbols.⁹⁵ In this respect, his approach to legal institutions was therefore distinctively anthropological. Yet, unlike traditional anthropologists, Arnold was quite willing to evaluate those practices to examine if they were in fact realizing the social goals identified for the institution. Recognizing that they did not embody an independent "truth" value did not commit him to an indelible relativism.⁹⁶ His diagnostic project thus had a reformist side to it, but one which demanded respect and deference to the insiders' identification of an important "emotional" role for the institution.⁹⁷

Distilling Arnold's framework down then, one may fruitfully identify the following general propositions in his account of the folklore and symbolism of legal constructs:

The symbolism of a legal institutions is an inevitable reality of their existence, drawn from the very way in which law and governance function in American society. An institution's symbolism represents its "greatest strength," from this functional point of view.⁹⁸

An institution's functioning contains two dimensions: the "temporal" and the "spiritual."⁹⁹ The latter represents its realm of universal, formal principles that its idealistic creators embody it with; while the former is the realm of the practical.¹⁰⁰

The spiritual, or idealist dimension of government is centered in the judicial system, since it is the "stage on which the ideal of society are given concrete reality."¹⁰¹ Courts were therefore tasked with reconciling the old and new, and rationalizing the working of the system in individual instances through the use of the law's various symbols.¹⁰² It is in the judicial rationalization of a legal institution then, that its symbolism and folklore take center-stage.

94. See ARNOLD, *SYMBOLS*, *supra* note 12, at 52–59.

95. ARNOLD, *FOLKLORE*, *supra* note 12, at 353 (describing the effect of folklore on the "members" or organization and institutions).

96. ARNOLD, *SYMBOLS*, *supra* note 12, at 9, 30 (criticizing the idea that beliefs underlying an institution as capable of being classified as true or false).

97. *Id.* at 37; ARNOLD, *FOLKLORE*, *supra* note 12, at 21.

98. ARNOLD, *SYMBOLS*, *supra* note 12, at 44.

99. *Id.* at 105–27; *see also* Fenster, *supra* note 12, at 1067–68.

100. ARNOLD, *SYMBOLS*, *supra* note 12, at 127.

101. *Id.*

102. *See id.*

The “creeds” of an institution, i.e., contained in the principles undergirding it, “must be false” for the institution to “function effectively.”¹⁰³ While this may seem heretical and paradoxical, it isn’t just a cynical framing of the issue. It instead reflects the reality that an institution needs to reconcile “contradictory ideals” as it functions, which routinely requires it to “suppress any facts which interfere with those ideals.”¹⁰⁴ The idealist goals and principles of any institution are therefore almost never borne out in reality, something that institutions self-consciously recognize. While the “[l]ove of consistency and devotion to realism” may be virtuous in the abstract, they are taken as functionally disastrous.¹⁰⁵

The need for this discontinuity—between creed and actuality—originates in an institution’s inability to reconcile conflicting ideals.¹⁰⁶ This is a profound observation, in that it underscores two important things about legal institutions and thinking. The first, is that legal institutions are routinely committed to a plurality of normative ideals, not all of which are openly endorsed in idealized accounts of the institution. The second, is that with such pluralism comes incommensurability, and the recognition that many of these goals are intrinsically incapable of co-existence or balancing within a single institutional framework. It is these realities that produce the discontinuity, which in turn trigger the solution of symbolism.

Relatedly, when the conflict (between the normative values) is deep and pervasive, and the discontinuity therefore obvious and direct, the ceremonies and folklore needed to bridge the gap become more elaborate and complex. Conversely, when the conflict is simple, and the discontinuity less significant, the ceremonies may be “very simple.”¹⁰⁷ In other words, the folklore/symbolism itself is dependent on the perceived discontinuity, given its remedial orientation.

These propositions represent the descriptive component of Arnold’s thinking—about the need for symbolism and folklore within an institution. Arnold also offered a series of additional remedial prescriptions for how, when, and why the folklore of a legal institution might develop and advance in a particular way. These are equally important for our discussion of authorship, as we shall see.

103. ARNOLD, FOLKLORE, *supra* note 12, at 356–57.

104. *Id.* at 357.

105. *Id.*

106. *Id.* at 358.

107. *Id.* at 358.

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Legal institutions are incapable of practicing what they preach, which is the very need for the symbolism. Indeed, if the institution's ideals "were followed" the institution would be incapable of functioning, given the vacuity of the ideal when translated into practice.¹⁰⁸

It is often the case that an institution's symbolism and ceremonial folklore produce inefficiencies of their own, in its functioning—especially in so far as they distract attention away from the real social goals of the institution.¹⁰⁹ In this, we see a core insight from Legal Realism. Nonetheless, this should not translate into attempting to remake the institution in the image of its ideals.

At the same time, this does not mean accepting the conflict/mismatch between the institution's functioning and its ideals as inevitable and irremediable. The key lies in recognizing that any social value that an institution is saddled with must also develop its own abstractions and folklore, which gain the acceptance of the insiders and over time come to replace the old ones. Arnold referred to this as the "propitiatory magic" that an institution needs to effect a change in its normative values.¹¹⁰

In summary then, Arnold's theory of symbolism and folklore provides a fairly compelling account of how institutions in different parts of the legal system come to terms with the mismatch between their professed ideals and the reality of their functioning. What distinguishes his account was first, the fact that he rooted the mismatch in the psychological effects of institutional practice and the anthropological role that institutional doctrines and practices played within that institution; and second, that he saw these doctrines as striving to realize a delicate balance between continuity and change, a perspective that in turn caused him to resist the Realist urge to simplistically abandon any role for abstract doctrinal mythology in the functioning of a legal institution.

B. The Symbolic Role of Authorship

In his magisterial historical account of authorship in American copyright law, Oren Bracha argues that authorship represents the dominant form of "ideology" within the institution.¹¹¹ He describes it as a form of ideology that constructs reality, but above all else as a "motivated mystification" that allows copyright to "maintain deeply

108. *Id.* at 375.

109. *Id.* at 377.

110. *Id.* at 379.

111. Bracha, *supra* note 6, at 195.

conflicting images, commitments, and modes of argument.”¹¹² What Bracha appears to allude to is a version of Arnold’s framework when applied to authorship. However, unlike Arnold, Bracha’s account is less concerned with explaining the psychological and anthropological dynamics of how the symbolism of authorship continues to influence the system, and exerts a latent influence on the direction of future change.

Extending Arnold’s argument about the symbolism and folklore of institutions to authorship explains why copyright law has long embodied the mismatch—between doctrine and rationalization—identified earlier. It explains why authorship is neither a contingent or accidental construct within the system, but instead its very rudimentary basis for internal and external legitimacy; one that reform efforts would do well to pay close attention to, before suggesting that it be purged from accounts of the system, or instead translated into doctrine.

1. *Symbolizing Human Agency.* For ages now, copyright law has been understood to embody a plethora of independent normative ideals. While the utilitarian account is today the dominant one, copyright law has routinely been associated with the values of desert, morality, autonomy, and corrective justice, all ideals that have been shown to play a functional (rather than a purely theoretical) role in the working of the system.¹¹³ And much like in other contexts, this pluralism presents the institution with an obvious and intractable problem: incommensurability.¹¹⁴ Several of these variables, especially the utilitarian and deontic ones are incapable of being traded off using a common metric. Should the efficiency gains from greater protection be traded off against the distributive gains of wider dissemination from non-protection? How might a creator’s autonomy interest in expression be weighed against the welfarist goals of greater reproduction and use? These are questions that arise rather routinely in discussions of copyright law, even when contextualized to the facts of individual cases.

Rationalizing these conflicting ideals is impossible at the level of theoretical abstraction (i.e., owing to their intrinsic incommensurability). All the same, admitting their functional inconsistency in the working of the institution runs the risk of

112. *Id.* at 266–67.

113. *See generally* Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 204, 242 (2012).

114. *Id.* at 233.

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undermining its very legitimacy.¹¹⁵ Authorship emerges as a powerful symbol within the copyright discourse that solves several of these problems. In an intriguing sense, its working within copyright law reveals strong parallels to the construct of corporate personality in the world of business laws.

As Arnold argues, corporate personality emerged as a powerful symbol that served to legitimate the market ideals of laissez faire capitalism, against the threats of excessive government intervention.¹¹⁶ It performed a two-fold role. On the one hand, it hid the identities of the actual owners of the corporation, which immunized the corporation from bearing responsibility for the actions of its owners; and on the other, it endowed the corporation itself with “rights” both legal and notional that protected its underlying ideology.¹¹⁷ As this progressed, “the symbolism [of corporate personality] got father and farther from reality,” which “required more and more ceremony to keep it up.”¹¹⁸ This made it seem that “not organizations but principles” were responsible for individual outcomes and that the law was dealing with “men, and not organizations.”¹¹⁹ The complexity of modern corporate law might in some ways be fairly said to represent the culmination of this process over time.¹²⁰

Authorship does something nearly identical for copyright law. As an abstract symbol, it masks the conflicting values that permeate the logic of copyright doctrine. Indeed, the simplicity of the symbol allows it to be deployed for just about any of copyright’s several normative values. Authorship can be seen to be about the author’s incentives, the author’s returns/rewards for valuable expression, the author’s expressive autonomy, the author’s distributive concerns, the ethical injustice to authors from copying, or the author’s need for corrective justice upon normative harm from copying.

Perhaps most importantly though, it frames the institution of copyright in terms of an identifiable *person*, albeit in the abstract. In more than just a metaphorical sense, copyright law could have been legitimately understood as a form of regulatory intervention

115. A point that Arnold emphasized. See ARNOLD, SYMBOLS, *supra* note 12, at 44–45.

116. ARNOLD, FOLKLORE, *supra* note 12, at 184–98.

117. *Id.* at 193–94.

118. *Id.* at 199.

119. *Id.* at 206.

120. See generally Kahan & Rock, *supra* note 85, at 2034–36 (describing how Arnold’s theory applies to the modern context of corporate governance).

in the domain of valuable expression, an intervention that is realized through the grant of exclusive rights once a set of threshold requirements are satisfied.¹²¹ Spectrum licenses might thus have been a useful framework to conceptualize the copyright system. Instead, copyright chooses to frame itself around the logic of rights. It focuses its analytical attention less on work qua abstract entity, and more on the work qua the product of authorship, which explains the phraseology “work of authorship.”¹²² The move is at once subtle and consequential, since through it, the law is according prime significance to the holder of the protection, rather than its basis/subject. The focus on authorship thus *humanizes* the working of copyright law. It signals that copyright is about a particular form of human agency, which is deemed worthy of protection. It is the agent and the agency, rather than mere consequence/artifact, that form the target of protection.

It is crucial to emphasize that this symbolization is more than just of rhetorical significance. It perpetuates a set of real consequences that attach to the rights of the individual protected through the institution. The logic of equality in *Eldred* is a prime example, where the Court based a large part of its holding on the idea that prior authors and present authors deserved parity of treatment under copyright law (as regards the duration of protection).¹²³ To the contrary, the Court would have been hard pressed to generate an argument for equality attached entirely to the works themselves. The argument that works from the last century deserve equal treatment with new works, seems both less persuasive, and potentially implausible. It is indeed, the same logic at play that raises potential Fifth Amendment concerns about unlawful “takings” whenever copyright reform that seeks to roll back protection is raised.¹²⁴ The author—as personified beneficiary of the system—is endowed with the protection of the institution against harmful governmental intervention, even though the author’s status is itself the product of such intervention.

Consequently, the personifying effect of authorship produces an obvious expansionary impulse for the institution—in terms of subject-matter, duration, scope, and limitations. The logic of

121. For an effort to characterize modern copyright along these lines, see Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 102–05 (2004).

122. 17 U.S.C. § 102(a) (2012).

123. See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

124. See Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 982–83 (2015).

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protecting a personified rights-holder, i.e., the author, takes obvious persuasive and psychological precedence over an amorphous conception of the public interest, or the “public domain.” Once the basic symbol of the author was in place, the institution complexified the folklore needed to sustain it, through a series of additional and interrelated symbols.

It is the culmination of this symbol that is embodied in the modern story about authorial incentives, which effects a deep and successful personification of copyright’s utilitarian logic, albeit in a one-sided form. Clearly not rooted in empirical evidence,¹²⁵ the incentives logic is but an overt confluence of copyright’s basic personification move with its modern market-oriented framing. Again, it bears emphasis that this is not a critique of the incentives logic, or of authorship—it is merely a descriptive account of how the two merge together to generate a powerful symbol for the copyright system.

2. *Rationalizing the Gap.* Regardless of whether copyright’s benefits—be it incentives, control, or monetary rewards—actually accrue to authors, or whether copyright doctrine even cares about authorship, the idea of “authorship” as the framing symbol for the institution legitimates the institution in the popular mind. It personifies the *raison d’être* of the copyright system, taking it outside the realm of just another regulatory intervention. All the same, discussion of rationalization requires unpacking the *agent*, as well as the *target*, of such rationalization.

While admitting that symbols served to rationalize conflicting ideas by gaining public acceptance for an institution, Arnold’s account of institutional rationalization appears to embody a few equivocations. On the one hand, his identification of “public” acceptance suggests that raising the legitimacy of the institution in the eyes of the broader public was a crucial role for the law’s symbols.¹²⁶ At the same time though, he insisted that the law’s ceremonies were always “addressed to its own members” and not outsiders, who would be naturally critical of them.¹²⁷ Further, on the one hand, the communication of these symbols is taken to happen principally through courts, where the government is seen to be “speaking *ex cathedra*” about its institutions.¹²⁸ And, he also insists that the legal academy play an important role in the rationalization,

125. Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 45 (2011).

126. ARNOLD, SYMBOLS, *supra* note 12, at 44–45.

127. ARNOLD, FOLKLORE, *supra* note 12, at 358.

128. ARNOLD, SYMBOLS, *supra* note 12, at 129.

by generating a set of abstract principles—jurisprudence—to reconcile the first-order rationalization developed by courts and other government actors.¹²⁹ How do these ideas carry over to copyright?

What these precepts together imply is that a legal institution's symbolism and folklore are at all times speaking to two audiences simultaneously, especially in the absence of any workable acoustic separation.¹³⁰ On the one hand, they are without doubt addressed to the public, to create legitimacy and respect for the institution. The powerful symbol of the author and his/her activities, i.e., authorship, are addressed to a lay audience to generate sympathy for copyright's overall utility and to guide behavior in particular directions. By conjuring up images of individual authors struggling to make a living using the market, the emphasis on authorship reaffirms the legitimacy and utility of the copyright system.

At the same time, the ceremonies surrounding the symbolism—such as the work-made-for-hire doctrine¹³¹—that are themselves built around the symbol of authorship, are meant to maintain the coherence of the particular symbol to participants within the system, who accept its functional logic. Once understood in this manner, Arnold's equivocation appears to fit the reality of legal reasoning within copyright, where judicial opinions (and government reports) appear addressed not just to specialists in the area (i.e., participants), but also the broader public that is committed to complying with the rule of law and ensuring a functioning social order.

Courts remain the primary channel of symbolic communication for Arnold, given the reality that the "settlement of disputes . . . furnish[es] the stage for the daily enactment of the miracle play of government."¹³² This is clearly the case with copyright law, especially given the prominent role that courts play in policing and elucidating otherwise vague directives.¹³³ Public adjudication plays a crucial palliative role for the system in that it "symbolizes . . . the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world."¹³⁴

129. *Id.* at 46–59.

130. For a general account of acoustic separation in the law, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984).

131. 17 U.S.C. § 101 (2012) (defining "work made for hire"); *id.* §201(b) (treating the person who commissioned a work made for hire as its author).

132. ARNOLD, SYMBOLS, *supra* note 12, at 128.

133. See generally Shyamkrishna Balganes, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1162–78 (2009).

134. ARNOLD, SYMBOLS, *supra* note 12, at 129.

Courts are therefore seen as the copyright system's first-order rationalizers, which explains why their reasoning is especially powerful within the system.

We see this dynamic at play rather prominently in the modern copyright system, where the judicial validation of a symbol is crucial. Consider a prominent example from within the idea of authorship. Recently, the Copyright Office concluded that a "photograph taken by a monkey" would not qualify for protection, since authorship required a clear human component.¹³⁵ In this, we clearly see the denial being rationalized in terms of authorship, albeit on the naïve belief that this independently means something. Yet, the issue was not considered final and was taken to the federal courts, where it continues to be litigated.¹³⁶ It is therefore only when a court finally rationalizes the emphasis on authorship that the issue is considered settled.

To Arnold, legal academics were not mere bystanders in the legal system. To be sure, when they demanded a conformity between an institution's ideals and its functioning, without recognizing the ceremonial and symbolic nature of the institution's doctrines, they were naïve idealists.¹³⁷ All the same, to him they could nonetheless play a crucial role in developing an abstract jurisprudence to further rationalize the various judicial decisions that validated an institution's symbols.¹³⁸ We might call this a second-order rationalization that emerges, from behind the symbolic reasoning of courts, which adds a second layer of legitimacy and acceptance for the symbolism itself.

There is an important sense in which this second-order rationalization of authorship is commonly seen in the copyright system today. Consciously or sub-consciously, much of the academic discourse in copyright law today accepts the idea of authorial incentives being the principal basis for the system. The "author's rights" are considered paramount to the system,¹³⁹ in one way or the other; and even when parts of the system are criticized or flayed, the core assumption about the centrality of authorship—in this manifestation—is rarely ever questioned directly. I am far from suggesting that the academic discourse is consciously towing the line of the system's dominant symbol. Instead, it is merely to

135. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2, at 22 (3d ed. 2014).

136. See *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016).

137. ARNOLD, SYMBOLS, *supra* note 12, at 46–59.

138. See *id.* at 56–59.

139. Bracha, *supra* note 6, at 265 (noting how copyright is justified using "author's rights").

show that Arnold's account of secondary reinforcement is suitably validated within the academic discourse of copyright as well. In an important sense, this is both pragmatic and in keeping with what Arnold's framework suggests for the future of copyright reform.

IV. CONSEQUENCES AND IMPLICATIONS

The Essay has thus far argued that authorship is best understood as a powerful mediating symbol for the effective functioning and external legitimacy of the copyright system. The gap between copyright doctrine's failure to develop an analytical framework for the idea, and its rampant use in copyright rationalization, is but an artifact of this symbolism. All the same, this symbolism is of significant utility to the sustenance of the system. Much like Arnold's theory, my point here is merely to suggest that to the extent that the copyright system merits functioning—for whatever set of values one ascribes to it—authorship plays a critical functional role in that endeavor. At the same time, the symbolism of authorship within the copyright system hints at a few important lessons for the future direction of the institution, especially reform efforts.

A. *The Futility of Real Authorship Doctrine*

As noted previously, a core tenet of Arnold's theory was the realization that the mismatch between the reality of a legal institution as seen in its doctrinal functioning, and its creeds or principles was inevitable.¹⁴⁰ He characterized as naïve, the belief that an institution's creeds could be converted into a reality manifested in its functioning. Indeed, he went further and claimed that if an institution became "too sincere" and sought to converge its symbolism and reality, it ran the risk of being ineffective and would "fail in action," since it would thereby squander public support.¹⁴¹

These observations are quite telling for copyright's reliance on authorship as a symbol. The ideals (and rhetoric) of authorship motivate the institution at a symbolic level, and yet find little instantiation in copyright doctrine and practice. This well-documented reality has caused many, including some courts, to search for a reality out of the symbolism of authorship, in the nature of rules, doctrines, and tests for authorship and for determining who an author is.¹⁴² In so doing, they attempt to bridge the gap between

140. See ARNOLD, FOLKLORE, *supra* note 12, at 376.

141. ARNOLD, SYMBOLS, *supra* note 12, at 44.

142. For some well-known judicial efforts in this direction, see Burrow-Giles

authorship as symbol and authorship doctrine. While such efforts may certainly be laudable in the abstract, from a practical perspective they fail to recognize that the symbolism of authorship requires a strong discontinuity from the reality of the institutions minutiae, for it to realize its functioning.

Consider in this vein, debates about whether computer-generated expression represents an act of authorship and the related issue of whether computers (or artificial intelligence) can qualify as authors, under copyright law.¹⁴³ At least some part of this debate revolves around the question whether copyright's commitment to authorship can be used to give meaning and content to that idea, which can in turn be used to generate a determinate answer.¹⁴⁴ This task is fraught with difficulty from the outset, in that it seeks to find a convergence of copyright's symbolism and its doctrinal precepts which, if Arnold's theory is correct, will never occur. In other words, even if an account of authorship were developed in order to answer the question,¹⁴⁵ the institution's symbolic ideal of the authorship—connected as it is to human agency—will deviate from the account in significant form, in order to maintain its legitimacy and mask its other considerations. This is hardly to suggest that the question/debate isn't valuable and important on its own. To the contrary, it is of extreme significance; yet, worthy of being answered by direct reference to the myriad normative goals and analytical ideals at stake within the issue,¹⁴⁶ rather than through a deductive application of any authorship logic.

Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (affirming the idea of the author as "effective cause" of the work at issue); Aalmuhammed v. Lee, 202 F.3d 1227, 1232–33 (9th Cir. 2000) (attempting to determine the boundaries of authorship under the joint works doctrine). For scholarly efforts in this direction, see Buccafusco, *supra* note 10, at 1255–77; Russ VerSteege, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1338–65 (1996).

143. For a recent review, see generally James Grimmelman, *Copyright for Literate Robots*, 101 IOWA L. REV. 657, 674–81 (2015) (discussing whether computers qualify as authors under copyright law).

144. See, e.g., Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 1, 28, <https://journals.law.stanford.edu/sites/default/files/stanford-technology-law-review/online/bridy-coding-creativity.pdf> [<https://perma.cc/P4SU-FQWC>] ("With respect to works of AI authorship, treating the programmer like an employer—as the author-in-law of a work made by another—would avoid the problem of vesting rights in a machine and ascribing to a machine the ability to respond to copyright's incentives.").

145. See Buccafusco, *supra* note 10, at 1255 (explaining that doctrinal challenges associated with the human perception of copyright law "are not fundamentally intractable").

146. For an approach along these lines, focusing on the policy issues involved in the question rather than the abstract doctrine, see Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185 (1986). See also Balganes, *Causing Copyright*, *supra* note 10 (attempting to understand such questions through the analytics of causation).

In short then, copyright thinking would do well to jettison its search for a determinate doctrinal framing of authorship, or the development of tests for determining who an author is, since that task assumes an internal meaning to the idea of authorship, which is at the end of the day more valuable to the institution as a symbol.

B. The Limited Effect of Empirical (In)validation

Connected to the futility of deriving determinate meaning for copyright's construction of the author/authorship, is the limited utility of relying on empirical data to validate/invalidate instantiations of the authorship logic within copyright, especially the authorial incentives framing of authorship. A good amount of recent scholarship has questioned the empirical basis for copyright's account of authorial incentives, which is used rather frequently to rationalize the system and individual outcomes therein.¹⁴⁷ An obvious assumption underlying this work is the belief that *if* the account is shown to be untrue (or false), the authorial incentives rationale can be rightfully questioned and potentially eliminated as a justification for the institution.

In essence, such approaches look for a truth-value in what is in large part, qua Arnold, the symbolism of the institution. To Arnold, “[t]he ‘truth’ or ‘falsity,’ or even the content of the fundamental principles to which the institution clings for moral support is completely immaterial.”¹⁴⁸ This is an exceptionally strong observation; but a more tempered version is worthy of our attention. Within the copyright world, there are some who argue that empirical validation/invalidation of the institution's core principles is the *only* way to achieve institutional reform.¹⁴⁹ A tempered reading of Arnold's theory however suggests that such empirical evidence is likely to be—at best—only partially successful in causing an institution to reassess its creeds.¹⁵⁰ Given that those creeds and principles are consciously divorced from reality, their falsification is likely to produce limited results.

147. See WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 50–51 (2011); Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 831–32 (2014); Zimmerman, *supra* note 125, at 55–56. For a policy effort in this direction, see *COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY* (Stephen A. Merrill & William J. Raduchel eds., 2013).

148. ARNOLD, *SYMBOLS*, *supra* note 12, at 9.

149. Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1344–45 (2015) (expressing skepticism towards theories of intellectual property that cannot be subjected to evidentiary validation).

150. See, e.g., ARNOLD, *SYMBOLS*, *supra* note 12, at 9.

Further, the institution's commitment to authorship is amorphous enough to withstand complete falsification, given that authorship is itself capable of melding multiple normative ideals into one construct.¹⁵¹ Efforts to invalidate its theory will produce claims of incompleteness, or instead begin with efforts to question what truth/falsity themselves mean, as the institution chooses to retain its legitimacy through its existing creed. In short, the symbolism of authorship (and authorial incentives) is largely impervious to evidence.

This is far from suggesting that empirical testing of the institution's authorship-based principles is futile on the whole. To the contrary, it suggests that we need to be realistic about what exactly such testing can produce by way of institutional change. If the idea is to achieve greater nuance within the institution's doctrinal functioning—rather than its symbolism as a whole—such testing is sure to bear fruit. The Arnoldian account thus points to a degree of pragmatism in thinking about the truth-value of copyright's putative relationship to authorship.

C. Incremental and Internal Reform

The two prior observations highlight an important reality embedded within Arnold's account of legal institutions. Legal institutions, including copyright, exhibit a significant degree of path dependence and status quo-ism that deserves acknowledgement. All the same, Arnold too did not believe that they were beyond the pale of evaluation, reform, and recalibration.¹⁵² Yet, any such effort had to pay attention to the symbolism that the institution would be unwilling to dislodge all at once. In a sense, Arnold's philosophy was fairly conservative, in so far as he believed that existing legal institutions had some value to society, which needed to be harnessed.¹⁵³ He was not, however, opposed to change. One scholar thus imputes to Arnold the philosophy that "[c]hange is to be gradual, but it must come."¹⁵⁴ To Arnold, legal reform therefore had to take account of the law's symbols, preserve those symbols when deeply entrenched within an institution, and re-direct those symbols towards appropriate social goals. In this

151. See generally Buccafusco, *supra* note 10 (discussing the association of authorship to the human mind as well as the flexibility of its definition within the courts).

152. ARNOLD, SYMBOLS, *supra* note 12, at 18.

153. As some have alluded to, Arnold's theory in this disregard manifest certain characteristics of "neo-conservatism," which in turn "limit[s] the rate and degree of change" within a legal institution. Warren P. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377 (1955).

154. Samuels, *supra* note 15, at 1002.

respect, he was a reform-minded Legal Realist, who was steadfast in his belief that social values ought to motivate the law; his only insistence was that the re-direction be pragmatic.¹⁵⁵

The Arnoldian account of authorship therefore suggests recognizing an important role for incremental reform within the institution and its commitment to its creeds.¹⁵⁶ Instead of finding true meaning in the creed, or attempting to purge the institution of its creeds altogether, a more pragmatic approach would lie in attempting to affect its doctrines towards the social goals that one identifies for it, while leaving its creeds in place for them to perform their symbolic function. A significant part of such an effort would lie in molding the institution's existing doctrinal devices in a particular direction through a gradual case-by-case process, driven by a focus on a normative social agenda, not just the creed. Much of this effort will have to come, one suspects, through judicial efforts, where the spiritual plane of the institution finds its fullest realization. Through individual decisions that are arrived at on a factual record, the symbolism can be steered in a particular direction.

Indeed, one might argue that we have—over the last decade—seen a version of this incremental movement underneath the symbolism of authorial incentives, within the “transformative use” doctrine.¹⁵⁷ Courts appear to now recognize, with some exceptions, that certain kinds of free speech ideals are legitimately outside the domain of an author's incentives to create; thereby rendering the doctrine compatible with institution's symbolism of authorship.¹⁵⁸ Projects such as the ALI's Restatement of Copyright are in keeping with this commitment to incremental reform.¹⁵⁹

155. ARNOLD, SYMBOLS, *supra* note 12, at 34–37.

156. For a prior account of incremental rule development in copyright and intellectual property law more generally, see Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1541 (2010).

157. For an excellent review of the evolution of transformative use, see Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 891 (2015) (noting how transformative use has a response to the incentives- and desert-based claims of “authorial labor”).

158. The idea of transformative use being outside the scope of copyright's authorial incentives can be traced back to its very genesis. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990). For some recent cases applying the idea to find fair use, see *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Bouchat v. Baltimore Ravens Ltd. P'ship*, 737 F.3d 932 (4th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

159. Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 764, 769–70 (2013).

D. Alternate Symbols

There will certainly arise times when the principles employed by a legal institution become so far removed from reality that no amount of symbolism and ceremony can salvage its public acceptance. Even Arnold admitted this possibility, and acknowledged that when the chasm becomes deep and pervasive, the institution might well have to jettison its old symbols.¹⁶⁰ When this occurs though, it is critical that the change in ideals—namely, the new ideals that seek to supplant the old ones—develop a philosophy and symbolism of their own.¹⁶¹ In short, it takes a new symbol to displace/defeat an old symbol.

Symbols therefore are to be judged “as good or bad on the basis of whether they lead to the type of society you like” and one should “not cling to them on general principles when they are leading in the wrong direction.”¹⁶² By the mid-1930’s, Arnold himself acknowledged that American society was in need of “new symbols,” though he refused to offer specifics about what these symbols might look like, other than that the old ones were not fulfilling their purpose.¹⁶³

There may well come a time (perhaps, it is here already!), when we conclude that copyright’s symbol of authorship and its ideal of author’s incentives and rights are proving to be a distraction, and directing attention away from the appropriate goals that society should choose to realize through copyright law. When this occurs—and we conclude that incremental change is insufficient—we might well need to eliminate the symbolism of authorship and turn the institution toward alternate values. Very importantly though, this will require replacing authorship as a symbol with an alternative one, that can achieve the same level of public acceptance, and perform a similar legitimating role.

To be sure, in the last few decades some have tried to develop such alternate symbols, with varying degrees of success. Free speech,¹⁶⁴ access to knowledge,¹⁶⁵ the commons,¹⁶⁶ and similar

160. Samuels, *supra* note 15, at 1005.

161. ARNOLD, FOLKLORE, *supra* note 12, at 378.

162. Samuels, *supra* note 15, at 1006 (quoting Arnold’s correspondence to Sam Bass Warner in VOLTAIRE AND THE COWBOY, *supra* note 15, at 200).

163. *Id.* at 1005.

164. See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 204–18 (2008); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 303 (1996).

165. See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (documenting the rise of the movement around the “access to knowledge” idea).

166. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A

symbols have galvanized copyright reform efforts at different points in time, each of which has met with varying degrees of success. Yet, none has received the level of acceptance needed to challenge the dominance of authorship as copyright's principal symbol. Perhaps one will indeed emerge in due course, if and when it is needed. The key is simply that for authorship to recede in importance as copyright's dominant symbol, it will need to find a worthy replacement.

V. CONCLUSION

Thinking about authorship through Thurman Arnold's account of symbolism in legal institutions brings a new perspective to understanding the unique role that the idea plays within copyright law. While commonly criticized for its doctrinal vacuousness, authorship is now seen to be a powerful mediating symbol for copyright, one that masks its conflicting ideals, and gains it public acceptance by personifying them in its principal beneficiary. In this understanding, its role is less doctrinal and principled, but instead overtly rooted in the broader nature of governance and political economy. Any discussion of reforming copyright's commitment to authorship would do well to countenance its critical symbolic role within the institution.

As a reform-oriented Legal Realist, Arnold brought a distinctively pragmatic attitude to bear on legal institutions, a perspective that at once recognized their external socio-political role in the governance landscape, and at the same time exposed their internal weaknesses in extremely forthright terms. Modern copyright thinking would benefit significantly from such an approach. Transposing Arnold's theory of "political dynamics" to copyright enables a better appreciation of the institution as an integrated system, one involving the interaction between multiple institutional actors, participants, and audiences, all around a multiplicity of conflicting substantive values. As debates over the source, content, and direction of copyright reform begin to gain momentum, looking back to Arnold's pragmatic advice—delivered as an academic, executive branch official, judge, and lawyer—will almost certainly prove to be of immense practical wisdom.

CONNECTED WORLD (2001); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1272–73 (2003); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 40 (2003).