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A Brief Biography of
Judge Richard S. Arnold

John P. Frank and A. Leon Higginbotham, Jr.*

Before Richard Arnold was born on March 26, 1936, the good fairies gathered and agreed to bestow upon him three gifts: a silver spoon for his mouth, an uncommon brilliance for his mind, and a profound sense of spirituality for his heart. Thus encumbered, Richard S. Arnold came into the world where he soon added three qualities of his own: an extraordinary diligence, a mix of playful humor and modesty, and a sense of personal grace.

These blessings gave him a start, and an extraordinarily good one. The crowning blessing, however, came twenty-four years later, when a clerkship for Justice William Brennan of the United States Supreme Court began a close and lasting friendship. The clerkship gave him a Weltanschauung, a vision of the law, the world, and life, which has made him one of America's great federal judges for the past fifteen years. At the age of fifty-seven, Judge Arnold, now Chief Judge of the Eighth Circuit Court of Appeals, is enjoying the height of his power. The completion of fifteen years as a federal judge warrants a moment of salute.

Arnold was born in Texarkana, on the Texas side of the line because that was where the hospital was, but the Arnolds made their home in Arkansas. His father, as well as his grandfather before him, had practiced law in Texarkana; where an Arnold firm has existed for well over one hundred years. The family

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firm, with which Arnold himself would later be associated, was small but enjoyed a lucrative practice in this town of some 25,000, which included the major utilities; hence, the silver spoon. His grandfather, also named Richard, married Janet Sheppard, daughter of Texas United States Senator Morris Sheppard, so that Arnold was born into not only a legal, but a political family as well. When Senator Sheppard died, Arnold’s grandmother married again, this time to Tom Connally, the other senator from Texas. Both his paternal and maternal grandfathers were delegates to the 1924 Democratic Convention where they cast their early votes for Alabama’s Senator Oscar W. Underwood.

Family life in Texarkana was comfortable and pleasant. Five years separated Richard from his younger brother, Morris, universally known as “Buzz,” with whom Arnold has formed his closest personal relationship outside his marriage. Richard’s was a Democratic boyhood, with family members leading the Democratic Party in the Texarkana area for generations. Buzz, in contrast, became a Republican and served both as that party’s counsel and state chairman. Except for politics, the brothers usually agree. A Democrat appointed Richard to the district court and a Republican later appointed Buzz; they now serve on the same court. Each regards the other as a best friend. Although Buzz recalls dropping a brick on Richard’s head one day in the sandbox, both agree that it did no permanent damage.

Childhood in Texarkana provided the usual medley of boys’ activities. Arnold attended private school for two years and public school for seven, went to see his hero, Gene Autry, in the movies from time to time, and played basketball and football. Arnold also took on golf when he was seven years old and has enjoyed it ever since. He suffered the typical childhood diseases and an unusual extra; malaria was all too frequent in Texarkana, and it did not leave Arnold unscathed. An intensely bookish streak in the man began in the boy; the family library was substantial and Arnold put it to good use. By the time he was thirteen or fourteen, he had written a paper, for some now forgotten purpose, on the incorporation of the Bill of Rights as applied to the states; he believed at that early age that a citizen’s privileges and immunities included civil liberties.

It was a warm family life. Texarkana was a small enough town that Arnold’s father could come home for lunch. There was adult talk and fun talk at the table, including spelling games. Arnold’s father possessed, to put it mildly, a strong personality.
Papa went to Exeter for prep school, Yale for college, and Harvard for law school. Richard went to Exeter for prep school, Yale for college, and Harvard for law school. At Exeter and Yale, Arnold's scholarly impulse could give itself full vent. Latin and Greek were his main subjects at both institutions and to this day he can read Latin, but Greek has gotten a little harder. He has maintained his interest in languages and in his adult life set out to learn Hebrew. The local rabbi was a good friend and the rabbi's wife a teacher; Arnold can pick up a Bible in Hebrew and piece out some of what it says.

Arnold made lifelong friends at Exeter and celebrated his fortieth reunion there in the summer of 1993. He spent enough extra time with the books to graduate second in his class at Exeter (his roommate was first), but spent the bulk of his spare time at the golf course; he was captain of the junior varsity golf team. On the other hand, success was not unlimited; there were six on the varsity golf team and Arnold never achieved a ranking higher than seven. Arnold did graduate first in his class at Yale, and he worked hard at it. He joined one of the senior societies but remembers, with particular fondness, his membership in The Lizzy, the students' name for the Elizabethan Society. A literary club, The Lizzy had a safe with a first folio of Shakespeare and what was at least purported to be a lock of Lord Byron's hair.

The years spent at Exeter (1949-53) and Yale (1953-57) were racially turbulent times in the history of the United States, and particularly in Arkansas. The Arnold family in Texarkana was sufficiently strong and independent to do as it pleased and Arnold's mother publicly supported the right of blacks to vote. The fifties and early sixties were Arnold's formative years in thinking about racism. Although he initially thought that the Southern states should deal with segregation themselves, once the Supreme Court decided Brown v. Board of Education,¹ he felt it imperative that it be obeyed. During this period, Arkansas's governor, Orval Faubus, forced President Eisenhower to send troops to desegregate Little Rock's schools. All this turbulence on the home front happened in Arnold's absence, but he was nonetheless appalled at Faubus's defiance of the law. A solid Democrat, Arnold voted for Faubus's Republican opponent in the next election.

During his summers, Arnold worked for a local Texarkana newspaper, occasionally writing editorials, including a scathing

¹ 347 U.S. 483 (1954).
editorial attacking a segregationist judge who sought—and won—a seat on the Arkansas Supreme Court. By the 1960s, he was a four-square civil rights supporter and became a member of the Lawyers Committee for Civil Rights Under Law, a major civil rights group to this day.

The mammoth intellectual challenge in Arnold's young life came when he entered Harvard Law School in the fall of 1957. Again he succeeded, graduating first in the class and serving as case editor of the *Harvard Law Review*, but the mental stretching exceeded anything he had known before. The *Review* set a standard for him that has guided him ever since: everything had to be right, not ninety-nine percent right, but right.

In his senior year, Arnold received the offer of a Brennan clerkship from Professor Paul Freund. The ensuing year with Brennan formed a turning point in Arnold's life and began a close friendship that has endured. Although Arnold's points of view generally coincided with Brennan's, the law clerks' points of view assumed less importance with a forceful Justice like Brennan. At the same time, Brennan's freshness of view precipitated a shake-up and change of place among the household gods. For example, Justice Brennan did not agree much with Henry Hart, the great Frankfurter protege and Harvard's federal jurisdiction specialist. This came as something of a shock to Arnold, who, until this point, had supposed that everyone agreed with Hart. Similarly, Brennan took issue with some Harvard viewpoints on constitutional law that had found a platform at Yale.

In short, Arnold learned to question what had been the Harvard point of view during his law school and law review years. Nonetheless, Justice Frankfurter maintained a pleasant personal relationship with the ex-Harvard law clerk. From Brennan, Arnold learned that law comprises a great deal more than running a meat grinder into which one can toss a sack full of precedent, turn a handle, and serve whatever comes out. Rather, Arnold worked at the law, writing memoranda for Brennan, discussing cases, and penning early drafts of opinions. Except for those documents Brennan has released to the Library of Congress, however, Arnold declines to discuss them. These experiences, particularly Brennan's influence and tutelage, intensified Arnold's devotion to individual liberty, justice, and all those things he hopes have accompanied each day of his judicial life.

Upon leaving the Supreme Court, Arnold spent three years
with the Washington law firm of Covington & Burling during which time his close association with Brennan continued. At Covington, Arnold worked principally on antitrust cases for Gerhardt Gesell, who later became a federal judge for the District of Columbia. This great corporate law firm encouraged Arnold to take on pro bono work for the American Civil Liberties Union, which he joined in 1961 immediately after completing his clerkship. Several cases came to him directly, including a successful effort to win a Black Muslim a measure of religious freedom while imprisoned.

After three happy years at Covington & Burling, Arnold returned to the family law firm in Texarkana, principally because he wanted to run for Congress. When he returned to Arkansas, contact with Justice Brennan necessarily became less frequent. Nonetheless, they corresponded and Arnold saw the Justice when in Washington, and annually attended dinners the Justice held for his small band of clerks and ex-clerks. Arnold spent ten years in the family firm, mixing his role as corporate defense counsel with public interest work. When Congress passed the National Environmental Policy Act, the Environmental Defense Fund engaged him for some significant cases, one of which contributed to the present requirements for environmental impact statements.

Arnold spent the years between 1964 and 1966 both practicing law and preparing to run for Congress. Five Democratic candidates participated in the 1966 primary, including David Pryor, who subsequently went to the House and presently resides in the United States Senate. Arnold garnered enough support to force a runoff in the primary, but not enough to prevail. Although there were substantive issues in the race, they were secondary in a campaign that was largely one of personalities. Arnold learned to walk across fields to talk to the farmer on a tractor and to arrive early at the factory gate to shake hands at the shift change. Despite these efforts, on election day, Arnold had a pretty good idea that he would be second best and called Pryor to find out where he would spend election night. That evening, on television, he called Pryor to congratulate him and to pledge his support in the general election; they have been good friends ever since.

After the 1966 election, Arnold returned to the practice, but kept a strong hand in politics. He was a Humphrey delegate to the 1968 Democratic National Convention, a member of the Arkansas Democratic State Committee, and chairman of its
rules committee. In short, Arnold became a party regular and consequentially served in the state constitutional convention of 1968-69, an accomplishment in which he still takes pride. He ran for Congress again in 1972 against Ray Thornton, who remains in Congress, but this time there was not even a runoff. In 1970, Dale Bumpers was elected governor of Arkansas and, for the next two years, Arnold juggled his law practice with a stint as the governor's legislative secretary, which meant lobbying for bills the governor favored and keeping him apprised of the rest. Arnold served as legal counsel to Bumpers's 1974 campaign against William Fulbright and, when Bumpers went to Washington as a United States senator in 1974, Arnold spent four years as his legislative director. His support for Bumpers was personal, political, and professional.

At the level of personal development, the great blessing for Arnold was to have had Brennan, Gesell, and Bumpers as his three chiefs. There was nothing stiff about any of them and Arnold's talent for casual camaraderie comes from having had just that kind of relationship with these three remarkable men. Being a federal judge can exacerbate a person's preexisting inclination to be stiff and formidable, but Arnold's three chiefs vanquished that impulse in him, if it ever existed.

Meanwhile, there was Arnold's personal life. He married Gale Hussman in 1958, but the two divorced in 1975. Arnold maintains a very close relationship with their two daughters, Janet and Lydia. In 1979, he married Kay Kelley and has enjoyed a superbly happy home life ever since.

In 1978, Senator Bumpers asked President Carter and the relevant officials at the Justice Department, Griffin Bell and Mike Egan, to appoint Arnold to a federal district judgeship in Arkansas. The appointment swept through unopposed. Only a year and a half later, Bumpers again proposed Arnold for a vacancy on the Eighth Circuit Court of Appeals. As a practical political matter, the Carter Administration and then-Attorney General Griffin Bell wished to appoint a black district court judge. Senator Bumpers easily made an arrangement whereby Arnold moved to the court of appeals and the Administration filled the district court vacancy as desired. Before going to the circuit, Arnold quit clubs that did not admit women or had a men's dining room, and one that had no black members; he rejoined one ten years later after it changed its policy.

Sentencing presented the district court's most difficult task for Arnold. As a circuit judge, there is, inevitably, a certain re-
moteness from people. In all likelihood, a circuit judge never sees the human beings, the real life winners and losers, but a district judge faces these people all the time, and never more so than at sentencing, when the one-on-one relationship takes on a very personal dimension. On the second day of his district court tenure, Arnold had to sentence four people. Today on the circuit, he affirms sentences longer than he would mete out, because the law so requires and he carries out the law. As a sentencing judge, Arnold was never a moralizer, although he did try to make minor offenders realize that it was in their own best interests not to do it again.

The succeeding years have been judging years and writing years. Enough is now in the books for us to draw a portrait of a strong and fearless judge. The work product is definitely Arnold's own; he copies no one. The law clerks are helpful, but no substitute for the judge himself. Until he became chief judge, Arnold either prepared for arguments himself or the law clerks studied the cases and then discussed their "book reports" with the judge. Arnold learns by ear as well as by eye. Until more recent times, when administrative duties added their demands, he would dictate his own case memos or jot notes on the back of briefs.

In the Eighth Circuit practice, the panel decides cases in conference at the day's end. When cases are assigned to him, Arnold mentally divides them into three broad categories. If they are simple, he writes the opinions himself because they can be completed in a few minutes. If the case presents a difficult issue, he also writes the opinion himself because he is unsure what exactly to instruct the law clerk to do. The medium cases, he divides for first draft purposes among his four clerks. Some unpublished opinions come from the central staff office in St. Louis, a practice which Arnold does not like but which, in the pressure of duty, he is obliged to accept. In making up his mind, Arnold derives much benefit from oral argument, having found that many lawyers speak better than they write. In about one-fifth of the cases, oral argument changes his initial impressions of the merits.2

What Arnold learned from Brennan is the need to articulate the reason for his decision. If a clear authority governs, there is virtually no need for an opinion. Arnold's overarching goal is to craft a clear, plain and persuasive opinion; he does not employ

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literary phrases for their own sake and avoids great length whenever possible. If Arnold ever becomes a Supreme Court Justice, he will burn up far fewer pages than any of the present Justices, or, for that matter, Justice Brennan. Arnold is a trained classicist and a close student of English literature; the clerk who uses the wrong word or even the wrong spelling will be teased about it. Office legend tells that the clerks quickly refresh their grammatical skills, relearning, for example, the “unit modifier rule.” The judge reminds his clerks that when an adjective and a noun are put together to modify another noun, they must be hyphenated. Indeed, he asks his clerks to contemplate the difference between “purple people-eater” and “purple-people-eater.” The former means a purple eater of people, the latter an eater of purple people. Nor does the judge casually accept the clerks’ citations. One clerk remembers having been told to recheck a cite to see whether the Supreme Court had denied certiorari; it had, the previous afternoon.

When the clerks have finished the initial drafts to their satisfaction, they stack the files and the drafts in a fixed place in the judge’s office. The judge reviews them, makes whatever changes or suggestions he wants, and sends them back to the clerks for revision. Particularly with new clerks, little things will be discussed, matters of style or detail which need not be taught twice. The clerks do not receive the cases cold, nor are they sent out to find an answer. Rather, the judge tells them orally why the case is being decided as it is and discusses other judges’ thoughts so the draft can incorporate all points of view. The procedure is never quite as clean as this may sound; the case may present several issues and the minor issues, in particular, often require further discussion. The judge’s revisions are often handwritten; a draft may come back to the clerk with a note saying “see other side” where the judge will have written out an abbreviated version of his thoughts.

Arnold is not static; his life reflects a process of intellectual growth. If we may borrow from the classics, which he has studied so closely, Arnold did not spring full blown from the head of Zeus; his has been a growing mind whose evolutionary stages have left their individual marks. For a minute illustration, Arnold’s student law review note3 addresses federal court abstention: when and how a federal court should either leave a matter in the state court or send it there for an initial decision. A com-

prehensive comment, reflecting the Harvard Law Review at its best, it thoroughly lays out the relevant law; its sole flaw is that it presents a wholly impractical solution. As with much earnest student writing, the piece ends with a recommendation, unfortunately, of the worst possible solution: state questions should be litigated entirely in the state courts and the federal questions entirely in the federal courts, maintaining that perfect symmetry of the federal system at the expense of the litigants who must bear the increased costs of dual litigation and wait endlessly for an answer to their question.

Arnold, however, was not passive before the basic preposterousness of this dual system. Illustrating a forward vision, he embraced an alternative solution, certification, which at that time existed only in Florida. This procedure sends a puzzling state law question directly to the state's supreme court for resolution. Thus, in 1960, Arnold foresaw the wave of the future; today, certification is a standard device.

Arnold's student note reflects standard Harvard doctrine as developed by Justice Frankfurter, the Harvard demigod of Arnold's student days. By 1964, Arnold, now writing frequently, was following his own intellectual star. Discussing the power of state courts to enjoin federal courts, he considered the problems arising when the same parties file identical cases in state and a federal court.4 Arnold acknowledged that the state court cannot enjoin the federal courts, but went further to urge what is now standard practice: whichever court gets the case second, whether state or federal, ought to voluntarily stay the proceeding until the first court renders its decision. Arnold noted that "[i]nter-court conflict, though it may be particularly undesirable in the federal and state context, is always undesirable to some degree. If there is some other adequate remedy, it should be used."5

What is of interest in the article is Arnold's emancipation from Frankfurter's intellectual grasp. Although Arnold did cite a Frankfurter dissent, which he clearly respected, it was equally clear that he declined to follow it. By 1967, he had overtly added Justice Black to his pantheon of intellectual heroes, and to this day, insofar as he has any model for his opinions, he deliberately follows Black's style of concise clarity.6

5. Id. at 73.
6. Richard S. Arnold, The Supreme Court and the Antitrust Laws, 1953-
The Black model presents a more profound parallel in terms of intellectual growth. These are two Southern judges; Birmingham and Little Rock sit on virtually the same latitude. As a young man, before he ran for the Senate, Black was a member of the Ku Klux Klan. In his mature years, Black grew, becoming one of the foremost civil libertarians and racial egalitarians in the nation's history. Arnold was never such an extremist, but when *Brown v. Board of Education*\(^7\) came down, Arnold, then a college student, was not sympathetic to it. In his later years, he too, by virtue of his intellectual growth and deep conviction, has become one of the firmest supporters of civil liberties generally and equal rights specifically of any judge on the bench. A little Brennan, a little Black, and a little growing up have gone a long way.

A great contemporary civil rights issue of Arnold’s judicial years has been the drive to achieve equality for women.\(^8\) The most colorful of the early women’s rights cases came before Judge Arnold at the district court. The case presented a suit by a fourteen-year-old ninth grade girl who wanted to play basketball under boys’ rules.\(^9\) At that time, Arkansas was one of the few remaining states that “protected” girls by permanently stationing them in only half the court. Arnold, a district judge, confronted the fact that both the Sixth Circuit Court of Appeals and an Oklahoma district court had held this basketball classification to pass constitutional muster.\(^10\) Never one to be intimidated by authority—Arnold had previously declined to follow an opinion of his own circuit that he felt had been eroded by time\(^11\)—Arnold ruled, “Arkansas girls simply do not get the full benefit and experience of the game of basketball available to Arkansas boys.”\(^12\) As a result, he stated, “[t]hose whose ambition it is to play basketball in college, perhaps even on scholarship, are at a marked disadvantage.”\(^13\) Arnold laid out his fundamental thesis on equal rights for women: “Simply doing things

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\(^7\) *347 U.S. 483 (1954).*

\(^8\) In this survey, I overlap a little with the companion essay by Judge Patricia M. Wald, who takes up these matters comprehensively.


\(^10\) *Id.* at 398.


\(^12\) 468 F. Supp. at 396.

\(^13\) *Id.*
the way they've always been done is not an 'important government objective,' if indeed it is a legitimate objective at all. . . . [T]radition alone, without supporting gender-related substantive reasons, cannot justify placing girls at a disadvantage for no reason other than their being girls."14

In the women's rights field, Arnold has authored one opinion that has raised criticism, United States Jaycees v. McClure.15 At issue was whether the Junior Chamber of Commerce had to admit women members. Arnold's opinion held that they did not, although he made clear that he thought the Chamber's judgment unsound.16 Nonetheless, because much of the Jaycees's activity focused on political expression and legislative advocacy, Arnold held that they enjoyed a right to free association, however distasteful.17 He added, "We have no doubt that if the Jaycees operated a swimming pool, a bar or a restaurant, the facility would have to be open to women as well as men."18 He found the practice offensive, but not illegal, although he believed the states could instruct their employees "not to join such a club."19 Judge Donald P. Lay dissented, and the Supreme Court found that he had the better argument, and reversed Judge Arnold's decision in Roberts v. United States Jaycees.20

Women's issues arose in many contexts. In one instance, a woman filed both a federal and state action alleging that she had been wrongfully discharged for refusing to have sexual relations with her foreman.21 The federal claim was time-barred, and there was no clear Arkansas law on the point. Arnold led the way in formulating some. Arnold noted that Arkansas had criminalized prostitution, and that "[a] woman invited to trade herself for a job is in effect being asked to become a prostitute."22 Thus, he held that the complaint stated a common law claim for wrongful discharge,23 a position the Arkansas Supreme Court later adopted.24

14. Id. at 398.
15. 709 F.2d 1560 (8th Cir. 1983), rev'd sub nom. Roberts v. United States Jaycees, 468 U.S. 609 (1984). Judge Wald accounts for this decision by noting that "even at his peak, Jack Nicholas had an off-day."
16. 709 F.2d at 1570-73.
17. Id. at 1561.
18. Id. at 1571.
19. Id. at 1573.
22. Id. at 1205.
23. Id. at 1208.
In yet another case, Arnold held that the University of Minnesota had discriminated in determining whether a woman should become a department head.25 Arnold noted, "A selection process [for department chairs] that is subjective and dominated by men requires particularly close scrutiny."26

In the famous Webster case,27 Judge Arnold was again far ahead of the Supreme Court. He wrote specially to express his view that the provisions of the statute forbidding the use of public facilities, employees, or funds to encourage or counsel certain abortions was unconstitutional. This limitation on speech he found "flatly inconsistent with the First Amendment, as incorporated against the states by the Due Process Clause of the Fourteenth Amendment."28 The Supreme Court rejected this view in Rust v. Sullivan,29 although the restrictions Arnold complained of have since been removed by President Clinton.30

Arnold's dissent in Henne v. Wright,31 illustrates his strong support of family rights. In Henne, an Eighth Circuit majority upheld a Nebraska statute that required babies to be given names with which they had a legally established parental connection. Judge Arnold dissented, arguing that parents had a fundamental right to name their own children and that the state had no legitimate interest in the exercise of that right.32

The Eighth Circuit has a significant black population, and Arnold has coped with the resultant discrimination from every standpoint. Addressing racial discrimination in sentencing, Arnold was again ahead of the Supreme Court—which, indeed, has yet to catch up with him. In Rogers v. Britton,33 a young black man, who had been convicted of rape and received a heavy sentence, contended that a constitutional disparity existed between the sentencing of black and white rapists. Arnold accepted the hypothesis that if such a disparity existed, it would raise a constitutional question. He then conducted a careful case-by-case analysis of the recorded sentences and found that the asserted disparity simply did not exist.34

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26. Id. at 474.
27. Reproductive Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988).
28. Id. at 1085.
32. Id. at 1218-19.
33. 466 F. Supp. 397 (E.D. Ark. 1979), rev'd, 631 F.2d 572 (8th Cir. 1980).
34. Id. at 403.
Arnold, however, went one step further. The state court had sentenced the defendant, sixteen years old at the time of the offense, to life without possibility of parole.\textsuperscript{35} Arnold first gave the Arkansas Supreme Court an opportunity to review the matter and then adjusted the sentence.\textsuperscript{36} Recognizing that retribution is a legitimate factor in sentencing and that "rape is probably more revolting, more heinous, than any crime except murder," Arnold nonetheless concluded that "all rapes are not the same, and all victims of rape are not equally affected."\textsuperscript{37} The sentence was invalid, Arnold held, because the jury was given absolutely no guidance in fixing it.\textsuperscript{38} The trial court failed even to instruct the jury that it could not consider the race of the victim or the defendant in determining the appropriate sentence.

A common racial problem Arnold has frequently encountered is employment discrimination. In a discriminatory discharge case, Judge Arnold’s opinion reversed the trial court for excluding evidence that the employer had “excluded blacks from its workforce,” and “offered free rides to white customers while black customers were told to rent cars,” and that members of “management referred to blacks as ‘niggers.’”\textsuperscript{39} He found that discriminatory practices on the job, if proved, would have some legitimate bearing on whether the employer had a racially hostile motive for the discharge.\textsuperscript{40} Another Arnold opinion prefaced the now prevailing view that the government’s use of peremptory challenges to exclude black jurors based solely on their race

\textsuperscript{35} Id. at 401.  
\textsuperscript{36} Id. at 403.  
\textsuperscript{37} Id. at 402. The Eighth Circuit Court of Appeals reversed, holding that in noncapital cases due process does not require sentencing standards. Arnold has not done rapists any favors, however. In a federal habeas corpus action, reviewing an Iowa state conviction, the petitioner had forced his way into a woman's car, drove to a secluded space, and forced sexual relations, including sodomy, on her, before releasing the victim. Knutson v. Brewer, 619 F.2d 747 (8th Cir. 1980). The Iowa court held that this constituted "kidnapping for ransom;" Iowa defined ransom as exacting "money, property, or a thing of value." Id. at 751. The question before Arnold was whether the state court's holding this stretched this definition of "ransom" beyond all reason. Arnold's opinion upheld the conviction reasoning that if sodomy were not a "thing of value" to the rapist, he would not have demanded it. Id. at 752. In another case, the defendant raped and sodomized his mother for which the state court sentenced him to two consecutive life sentences; this case was also upheld. Pinson v. Morris, 830 F.2d 896 (8th Cir. 1987).

\textsuperscript{38} In the Arkansas state courts, if a defendant pleads not guilty and is convicted, the jury fixes the sentence.  
\textsuperscript{39} Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1102 (8th Cir. 1988).  
\textsuperscript{40} Id. at 1103.
violates the Equal Protection Clause.\textsuperscript{41}

One of the most racially charged issues Arnold ever faced was the desegregation of the Little Rock school system.\textsuperscript{42} The unusual opinion speaks through Judge Heaney, who begins the opinion by noting that Judge Arnold scripted certain portions of the opinion and collaborated in others. The Eighth Circuit, decisively requiring desegregation, found the school board in contempt for failing to comply with an earlier order relating to magnet schools.\textsuperscript{43} The portion written by Judge Arnold mandated a new system for choosing the school board in order to eliminate the potency for willful segregation.\textsuperscript{44}

As previously noted, Arnold was tutored on the First Amendment as a boy at home, and it remains the heart of the Constitution for him. Although Justice Brennan may have intensified this view, Arnold required no steering toward his fervent belief in the "Firstness" of the First Amendment. When the University of Arkansas Gay and Lesbian Students Association brought a civil rights suit against the student senate which had denied its request for funds normally available to student organizations because of the GLSA's message, Judge Arnold's opinion held that the denial violated the First Amendment:

In brief, we hold that a public body that chooses to fund speech or expression must do so even-handedly, without discrimination among recipients on the basis of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed. This will mean, to use Holmes's phrase, that the taxpayers will occasionally be obligated to support not only the thought of which they approve, but also the thought that they hate. That is one of the fundamental premises of American law.\textsuperscript{45}

\textit{National Vendors v. NLRB}\textsuperscript{46} also illustrates Arnold's sensitivity toward free speech. The case presented the question whether an employer could refuse its employees permission to conduct meetings in the employees' cafeteria during non-work

\begin{itemize}
\item \textsuperscript{41} Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990).
\item \textsuperscript{43} 839 F.2d at 1298.
\item \textsuperscript{44} \textit{Id.} at 1299-1301.
\item \textsuperscript{45} Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988).
\item \textsuperscript{46} 630 F.2d 1265 (8th Cir. 1980).
\end{itemize}
hours to discuss the progress of contract negotiations.47 In dis-
sent, Judge Arnold argued that, absent any evidence of potential
disturbances, the employees were within their rights to com-
municate with each other.48 Arnold has also recognized that public
employees, by virtue of their employment, do not surrender their
free speech rights.49

Arnold has also vigilantly protected freedom of the press,
even in the face of the media’s extreme criticism of public offi-
cials. Arnold subscribes to the Jeffersonian view that press att-
acks are “an evil for which there is no remedy. Our liberty
depends on the freedom of the press, and that cannot be limited
without being lost.”50

This brief outline of Arnold’s work in colorful contemporary
areas reflects only a fragment of Arnold’s jurisprudence. Arnold
has also carefully attended to the usual mass of other, more
mundane, matters. Some of these cases illustrate subtle atten-
tion to detail, particularly where they involve individual claims.
In one such case, an employer that had nine employees in one
division laid off the oldest two.51 The two claimed age discrimi-
nation, noting that all the remaining employees were at least
fifteen years younger.52 Arnold approached the problem by ob-
serving, “This fact is certainly not conclusive evidence of age dis-
crimination in itself, but it is surely the kind of fact which would
cause a reasonable trier of fact to raise an eyebrow, and proceed
to assess the employer’s explanation for this outcome.”53

In a disability case in which the plaintiff appeared pro se,
Arnold, noting the absence of counsel, effectively appointed him-
self counsel for the claimant.54 Reluctantly, Arnold decided the
case against himself for lack of a cognizable claim.55

Arnold never sweeps the claims of single individuals under
the rug. In warm praise of Justice Blackmun, Arnold has noted
that Blackmun “has not disdained to concern himself with the

47. Id.
48. Id. at 1269.
50. Janklow v. Newsweek, Inc., 759 F.2d 644, 657, aff’d, 788 F.2d 1300 (8th
51. MacDissi v. Valmont Indus., 856 F.2d 1054 (8th Cir. 1988).
52. Id. at 1058.
53. Id.
is not represented by counsel on this appeal, so the Court is without the benefit
of legal argument on her behalf. It might be argued, however, that . . .”).
55. Id. at 925-26.
least of his brothers and sisters."

In another Social Security disability case, Arnold closely scrutinized the facts and decided for the applicant, holding, "Neither the Administrative Law Judge nor this Court, however, is free to single out as the basis for the decision only the evidence favorable to the Secretary, and the Court is convinced that this is what the finder of fact did in this case." If Arnold has an overarching guideline, it is a spirit of fairness. For example, in a criminal case, the Government had permitted a key witness to testify falsely on a critical point. Arnold held that: "The duty to correct false testimony is on the prosecutor, and that duty arises when the false evidence appears."

Although Arnold repeatedly gives kind attention to cases involving individuals, he usually maintains a hard line when the appellant has not brought the claimed errors to the trial judge's attention. If counsel fails to object to an instruction at trial, he will receive a very chilly reception from Judge Arnold when he reaches the court of appeals. One reason for this strict rule is that district courts, as a matter of courtesy, should have the first opportunity to consider the case. Arnold is never heavy-handed with the lower courts, doubtless one reason for his popularity. In still another Social Security case, the district court set forth nine separate reasons for denying the claim. The court of appeals, Judge Arnold writing, reversed but, albeit briskly, addressed each of the nine grounds. The case illustrates that when Judge Arnold reverses a district court, he makes clear why.

The typical Arnold opinion is short and never windy, but complicated cases may require long opinions. A combination RICO and drug case once generated a twenty-five page opinion, one of Arnold's longest; thirty-seven headnotes indicate the matter's complexity. The case involved large-scale importation of drugs by air from Mexico, Canada, and Columbia; approximately one hundred overt acts were involved.

58. United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980).
59. Id. at 208.
62. Id. at 882-84.
64. Id. at 848.
breadth was clearly warranted. In another complex regulatory matter, the Federal Energy Regulatory Commission had imposed certain additional costs on a power company, which in turn petitioned the Missouri Public Service Commission to immediately increase its rates to offset the new costs. Recognizing that new federal costs will have to be passed on, Judge Arnold held that the states are nonetheless entitled to proceed in ratemaking "with as little intrusion" as possible and that such costs need not be "passed on intact." The state is entitled to decide whether savings in other areas might make a lesser adjustment suitable. A gem of an opinion, it resolves all the difficult jurisdictional problems inherent in the relationship between the federal courts and state utility commissions and rigorously addresses the merits as well.

In another very significant criminal case, Arnold's opinion deals with the use of hypnosis on witnesses who thereby make criminal identifications. In a well-organized opinion on a complex subject, the court, through Judge Arnold, reviews the ways in which hypnotism can potentially corrupt testimony, including: "confabulation, the process by which the subject fills in gaps in her memory to make her recall more coherent;" "suggestibility," which arises when the "subject wishes to please the hypnotist;" and "memory-hardening." These hazards did not lead Arnold to reject hypnotism outright as a useful device, but he did conclude that when the state introduces evidence procured through hypnosis, the resultant complexity requires that the defendant have its own expert to aid cross-examination.

Finally, in a Robinson-Patman action brought by an aircraft dealer against a manufacturer, Arnold found that Cessna maintained a discriminatory pricing system that unfairly differentiated between its various distributors. Arnold also found, however, that this discrimination worked no injury on the plaintiff who operated within a defined sales area that apparently lost no sales as a result thereof. The opinion displays a

66. *Id.* at 1451.
67. *Id.*
69. *Id.* at 1245.
71. *Id.* at 1501-02.
thoughtful rather than an automatic application of the antitrust laws: Mere sin is insufficient; there must be consequence from sin. The opinion demonstrates the cool quality of analysis that permeates Arnold's work.

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Let us retreat from this potpourri of opinions, more inevitable than enchanting in a piece of this kind, to look at our subject in its entirety. In Judge Arnold's opinions, we have witnessed uniformly good work, crafted at the highest professional level. Clearly, if there were a judicial Miss America contest, Judge Arnold would win the congeniality award. His office, with its parade of clerks and staff, is a genuinely happy family and Arnold enjoys both the respect and the affection of the lawyers who practice before him, as well as the judges with whom he sits and whom he leads. In this respect, he acknowledges Justice Brennan as a model. He counsels that judges will always have differences but they must never be spiteful: "Membership on a multi-judge court is something like a marriage. It is more than a contract, it is a status. As long as you are in it, you cannot have your own way all of the time." 72

A standard reference work for lawyers tells them what to expect from a particular judge. 73 The comments about Arnold reflect favorably on him: "probably the highest I.Q. on the court, and a very nice man," "an active questioner, so counsel had better be prepared," "brilliant," "smooth," "very knowledgeable, especially on economic regulation," "brightest judge on the bench," "super," "a polite gentleman, a fine scholar, a good judge." 74

Current styles seem to demand that federal judges be classified as "liberal" or "conservative," but Arnold, unresponsive to that demand, defies characterization. The Arkansas Democrat-Gazette threw in the towel, finally describing him as "the liberals' favorite conservative and the conservatives' favorite liberal." 75 We would go farther than this. On economic matters, Arnold does not take the bench to beat business over the head. On constitutional matters, he always aspires to rigorous enforcement of the Constitution, every last bit of it, and the Bill of Rights in particular. He has managed, even though a busy man

74. Id.
in a high place, to maintain a peculiar sensitivity to the needs of individuals, the people, so that individual claims of whatever sort receive an exquisite detail of attention. On the federal bench, with its complex records, multiplicity of facts to be considered, and stringent time constraints, it is easy to slip into formulay justice, to sweep the individual claim into the waste bin with some incantation about discretion or standard of review. Arnold operates within the classical rules, but nonetheless ensures that people get their day in his court. In this respect, in his devotion to the First Amendment, and in his brevity and directness, he is truly Justice Black revived, and it is singularly appropriate that both Black's and Brennan's portraits hang in his chambers.

The key to Arnold's jurisprudence is conscience. We mentioned at the outset the three gifts of the fairies, one of which was spirituality. Judge Arnold's conscience, informed by this deep and innate spirituality provides his guiding star: as he sees it, "If you have made a serious effort to focus your own conscience on any subject and have reflected on it carefully, and you are doing what your conscience tells you ought to be doing, then that is what God requires."  

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76. Interview with Richard S. Arnold, Chief Judge, Eighth Circuit Court of Appeals, in Little Rock, Ark. (Apr. 6, 1993).