Judge Arnold and Individual Rights

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Given limits on time and space, this is a kaleidoscopic piece, selective observations by a fellow judge on a dozen or so individual rights cases written by Richard Arnold over a fifteen-year period. Undoubtedly, I have missed some worthy ones, and make no pretense at comprehensiveness. I have known Dick Arnold for just about as long as he has served on the Eighth Circuit, and have had the good fortune to work with him on a number of judicial projects. Unfortunately, like so many of my colleagues on the bench, I only have time to fully read the opinions from my own circuit and the Supreme Court; other circuits' work product swims into view only occasionally while researching one's own cases, or brushes by with the wind of notoriety. Reading an Arnold's dozen in the assigned field of individual rights, however, has taught me much about the judge and the man that I did not know from our work together at the United States Judicial Conference, various circuit conferences, and the American Law Institute. Opinion-reading may be a lost art, which is too bad, because those in the press or academia who canonize or criticize judges based on events of their past lives or their present reputations would often be better informed—even surprised—to read those judges' opinions. A final caveat: even a more thorough reviewer than I proceeds cautiously in drawing conclusions about a judge's philosophy midstream in his career. Dick Arnold is an intellect on the move: his migration has carried him from the "Mansion" in Little Rock where he served as secretary to the Governor; to Washington, D.C. as chief legislative aide to Senator Dale Bumpers; back to Arkansas as a United States district judge; and finally, to the role of judge and chief judge of the Eighth Circuit Court of Appeals. Judge Arnold's progression has been stunning—he surely has many more miles to go.

Initially, let me say that I was impressed by the variety and immediacy of the individual rights opinions that Judge Arnold

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has authored. I should not have been. We in Washington are often seduced by the aura of power that hangs over this city into believing that our courts have a special lien on important issues affecting the vital center of our society. Not so. The issues that vex and contort our vast nation are just as likely to arise in the heartland—and the Eighth Circuit, spanning Arkansas, Minnesota, Nebraska, the Dakotas, Iowa, and Missouri, is certainly that—as on Constitution Avenue. The following sampling of Judge Arnold’s cases indeed represents a microcosm of the burning issues of civil liberties and rights in the 1980s, and illustrates the role of a federal appellate judge in striking the eternally delicate balance that the Constitution commands between the government and the individual.

I. SECTION 1983

A. Pro Se Petitions

Pro se petitions, particularly from prisoners, provide one of the staples of federal district court fare nationwide. Indeed, judges at both the district and appellate court levels often feel they are choking on them. Prisoners filed over 1,000 petitions in the Eighth Circuit in the twelve months ending on June 30, 1991.1 From experience in the D.C. Circuit, I know how real the incentive is for volume-besieged district judges to dismiss them summarily—especially the uncounseled ones—quickly, decisively, often without explanation. The chance that in that pile of stained, thumbprinted, outsized paper petitions lurks another Gideon v. Wainwright2 is admittedly infinitesimal. Fastidious appellate judges who insist that every pro se defendant be accorded all procedural rights in a meticulous fashion, as well as that pro se petitions be construed generously in deciding whether they state a cause of action,3 are often deemed obstructionists and spendthrifts in an overwhelmed system.4

Judge Arnold appears fearlessly to face the charge. I found several cases in which he overturned district court dismissals of prisoner and arrestee pro se petitions, sometimes over the dis-

2. 372 U.S. 335 (1963) (establishing that states must provide counsel for felony defendants).
4. See, e.g., Ketchum v. City of West Memphis, 974 F.2d 81, 84 (8th Cir. 1992) (Fagg, J., dissenting).
sent of a colleague. What is even more intriguing is that he never hesitated, even where the vehicle at hand was unprepossessing, to insist on honoring a constitutional right. In *Ketchum v. City of West Memphis*, a transient complained that the police had apprehended him for loitering in West Memphis, Arkansas, and told him to walk across the bridge to Memphis, Tennessee. When he refused (he had a broken toe, it turned out), the West Memphis police picked him up bodily, hauled him against his will into the neighboring state, and unceremoniously dumped him at a car wash in Memphis. Reading his cryptic complaint "with... indulgence," Judge Arnold found that it did indeed state a constitutional claim with sufficient particularity to withstand a motion to dismiss:

The nature of our federal system presupposes a right to travel from state to state, and states may not prohibit such travel. This federal right includes "the freedom to enter and abide in any State in the Union." If Ketchum, while in Arkansas, committed a crime, he was of course subject to arrest and prosecution. But neither the state nor its political subdivisions had a right to banish or exile him to Tennessee. Thus, it was error for the District Court to dismiss this complaint for failure to state a claim.

His dissenting colleague took a more hardened tack. Keeping the case on the federal court docket "merely encourages spite-based litigation and trivializes the Constitution," he said. The district court did well to dismiss this "tattered case." All federal judges recognize the dilemma. Similar ill-pleaded petitions—mostly from prisoners—flood our district courts. Only a handful may contain a kernel of constitutional wrong. Without astute counsel, plaintiffs cannot possibly know how to frame their claims or even how to tell if their cases present facts to support claims. The injury is often small—being

5. *See id.; Thompson v. Housewright, 741 F.2d 213 (8th Cir. 1984); Horsey v. Asher, 741 F.2d 209 (8th Cir. 1984).*
6. *974 F.2d 81 (8th Cir. 1992).*
7. *Id. at 82-83.*
8. *Id. at 83.*
9. *Id. at 82.*
10. *Id. at 83 (citation omitted) (quoting Dunn v. Blumstein, 405 U.S. 330, 338 (1972), quoting Oregon v. Mitchell, 400 U.S. 112, 285 (1970)). Recognizing the burden thrust on a pro se plaintiff mounting a constitutional case, Arnold added, "[o]n remand, Ketchum will be at liberty to move for appointment of counsel, and we ask the District Court to consider this motion carefully, if it is made." *Id.*
11. *Id. at 84 (Fagg, J., dissenting).*
12. *Id.*
dumped in a car wash is not life-threatening or even irreparable. A harried or weary appellate reviewer can readily conclude in almost any untutored petition that the plaintiff has not pleaded with sufficient particularity a constitutional claim. In *Ketchum*, the city based its defense on that assumption.\(^1\) Judge Arnold—and the dissenting judge too, for that matter—seemed to recognize in the petition the time-honored technique of rural (and apparently suburban) police of briskly escorting an undesirable out of town.\(^1\) Identifying that practice as a basic violation of the constitutional right to go and stay where one pleases as long as no crime is committed required a reviewing judge not only to shake loose the core of the petition, but to shake up a status quo in police practices. I am sure *Ketchum*’s case had a barely audible cheering section in the police precincts of Little Rock or elsewhere, but it said a good deal about Judge Arnold’s refusal to ignore constitutional violations committed on the most downtrodden segment of our population.\(^1\)

Compassion in Judge Arnold was noticeable early in his judicial career, along with a persistent, ornery refusal to rely on hyper-technicalities to dismiss individual rights claims with uncomfortable consequences. In 1984, he reversed a district court for not supplying a full state court trial transcript to a habeas corpus petitioner attempting to show that he had not been given effective assistance of counsel at trial.\(^1\) The district court had been willing to provide only the portion of the transcript that related to whether counsel had told the prisoner of his right to appeal,\(^1\) the failure of such notice being the petitioner’s main grievance. After reading the petition and surrounding documents, however, again “with indulgence,” Arnold concluded that the prisoner’s complaint presented other issues.\(^1\) The petitioner was in fact contesting all aspects of counsel’s performance, including her failure to cross-examine key prosecution

\(^{13}\) *See id.* at 82.
\(^{14}\) *Id.* at 84 & n.1 (Fagg, J., dissenting).
\(^{15}\) Of course, Judge Arnold also has dismissed his share of prisoner complaints that did not meet the constitutional threshold. *See*, e.g., McDowell v. Jones, 990 F.2d 433, 434 (8th Cir. 1993) (holding, inter alia, that verbal threats and name calling was not addressable under 42 U.S.C. § 1983 and that access to postdeprivation prison grievance remedy for alleged conversion of property barred due process claim).
\(^{16}\) Thompson v. Housewright, 741 F.2d 213, 216 (8th Cir. 1984).
\(^{17}\) *Id.* at 214.
\(^{18}\) *Ketchum* v. City of West Memphis, 974 F.2d 81, 82 (8th Cir. 1992).
\(^{19}\) 741 F.2d at 215.
witnesses.20 Arnold ordered that the prisoner be given the whole transcript at the United States's expense.21

In the same year, Arnold overturned a district court's dismissal of another pro se prisoner's claim that police officers had beaten him and seized his car without probable cause.22 This appeal involved an interesting question as to whether a claim that concededly could survive a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) might still be dismissed under the discretion granted by 28 U.S.C. § 1915(d) to refuse in forma pauperis status for any frivolous or malicious claims.23 The district court, after reading a state court file on a related case involving the plaintiff, concluded that the facts he alleged in his federal case were false, and proceeded to refuse in forma pauperis status to the prisoner.24 Reversing that decision, Judge Arnold held that no discretion existed under the in forma pauperis law to dismiss a nonfrivolous claim for a poor defendant that would have survived a § 12(b)(6) motion for a rich one:

There is no doubt that potential for abuse of the judicial system exists in the practice of allowing persons to pursue claims without having to pay related court costs. And it is true, as noted by the District Court, that pro se prisoner complaints filed in forma pauperis add to the work of the courts. Still, the potential for abuse and the administrative burden must be weighed against the right of every person to access to the courts, and complaints may not be more lightly considered simply because the petitioner is poor, imprisoned, or acting for himself without a lawyer.25

The preceding passage may sound like commonplace rhetoric for judicial opinions; the uplifting aspect in this instance is that Judge Arnold means it and practices it. Even when denying a prisoner relief on the merits, he has gone out of his way to commend the appointed counsel in the opinion, in my experience a practice far from common.26

From time to time we call on lawyers to serve indigent clients, often inmates of prisons, who have actions for damages or injunctive relief under 42 U.S.C. § 1983. A few lawyers complain about the imposition

20. Id.
21. Id. at 216.
23. Id. at 211.
24. Id.
25. Id. at 212. Judge Arnold also declined to infer the requisite malice to justify dismissal of the prisoner's case from the fact that the police officer defendant had testified against the prisoner in the earlier trial. Id. at 212-13.
26. This judge once had the unsettling experience of having to persuade a distinguished colleague not to sanction counsel, appointed in a criminal appeal, for raising arguments the court found not to have merit.
on their time. Most do not. In fact, the vast majority of lawyers called upon to render this kind of service do so competently and cheerfully, and thus conduct themselves in the highest traditions of a bar that is committed to public service. We try to reimburse appointed counsel for their out-of-pocket expenses, using a fund derived from admissions fees paid by members of our bar, but can of course pay no fees to lawyers in civil cases, and they receive none, except in those instances, rare as a practical matter, when their client prevails. We take this opportunity to thank the bar in general, as well as counsel for plaintiff in this particular case, for this exemplary service.\(^{27}\)

We hear much of the erosion of civility between bench and bar these days. In his circuit, to that band of lawyers who are the only, best hope of prisoners and other outcasts of society, Judge Arnold provides a morale-boosting antidote.

B. First Amendment Claims

Fascinating First Amendment cases have crossed Judge Arnold’s path. I will discuss two here. In the first, *McCurry v. Tesch*,\(^{28}\) evangelical church members sued the local sheriff, among others, for storming into their church during a Monday morning “prayer vigil,” forcibly ejecting them and padlocking the church.\(^{29}\) The deputies thought they were acting pursuant to a state court judge’s order, which they had interpreted as forbidding the use of the church except for scheduled religious services on Saturday, Sunday, and Wednesday evenings, because the church members had been operating an unauthorized school on church premises.\(^{30}\)

Recognizing that the deputies’ interpretation of the order would be unconstitutional,\(^{31}\) Judge Arnold found a constitutional interpretation in the preamble to the state judge’s order permitting in general terms the use of the church for religious purposes.\(^{32}\) He explicitly rejected any notion that the worshippers should have to specially apply to the state court judge for permission to hold services outside of scheduled times, or, if that proved impossible, hold them elsewhere:

> The right to worship free from governmental interference lies at the heart of the First Amendment. It embraces not only the right to free exercise of religion, but also the right to freedom of expression. The

\(^{27}\) Sims v. Wyrick, 743 F.2d 607, 611-12 (8th Cir. 1984). See also the public thanks to counsel in Thompson v. Housewright, 741 F.2d 211, 216 (8th Cir. 1984).

\(^{28}\) 738 F.2d 271 (8th Cir. 1984).

\(^{29}\) *Id.* at 273.

\(^{30}\) *Id.* at 274.

\(^{31}\) *Id.* at 275.

\(^{32}\) *Id.*
defendants' argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, because the plaintiffs would be free to congregate and worship elsewhere, misses the mark: "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77, 101 S. Ct. 2176, 2186-2187, 68 L.Ed.2d 671 (1981) (quoting Schneider v. State, 308 U.S. 147, 163, 60 S. Ct. 146, 151, 84 L.Ed. 155 (1939)). This principle applies with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship there. . . . It is no part of the business of government in this country to decide when people may go to church. The First Amendment protects prayer at six o'clock on Monday morning just as much as at eleven o'clock on Sunday morning.33 Arnold's narrower interpretation of the scope of the state court's order stripped the deputies of any absolute immunity attaching to execution of a court order and left them to the tender mercies of qualified immunity as a defense to the section 1983 action.34 In McCurry, Judge Arnold stood tall for freedom to pray when and where worshippers choose, but the reader may detect some deft footwork in the interpretation of the constitutionally suspect state court order itself. Dissenting, Judge Fagg honed in on this point. He found the terms of the state court order that the sheriff secure the building on days other than Saturday, Sunday and Wednesday evenings "explicit [and] clearly stated";35 he accused Arnold of over-relying upon a generalized, pre-order recital that suggested that the building would remain open at such times as church services occurred.36 "It would be anomalous for the court to punish obedient law enforcement officers by exposing them to civil damage liability based upon the shortcomings of orders drafted by absolutely immunized state judges,"37 he wrote.

Who had the right of it? Was it more accurate or even more fair to put the officers to the test of interpreting an ambiguous order (they might win on a qualified immunity defense, but there was no guarantee) in order to indulge the presumption that the state judge would not have issued an unconstitutional order? Maybe, but not surely so. What was important about the case—whether Judge Arnold or Judge Fagg was right on how the order read—was its reaffirmation of the worshippers' unre-

33. Id. at 275-76.
34. Id. at 276.
35. Id. at 277 (Fagg, J., dissenting).
36. Id.
37. Id. at 278.
served right of free exercise in their own church and on their own time. Arnold's interpretation cautioned law enforcement officials to act carefully, although armed with a state court order, when disrupting worship even by an unorthodox sect. That signal was an important one for civil liberties in the heartland.

The second case involving First Amendment rights featured an extremely provocative issue of the student newspaper of the University of Minnesota's Twin Cities campuses that satirized, inter alia, Jesus Christ, the Roman Catholic Church, a variety of ethnic groups, and public figures.38 In addressing these subjects, the newspaper used scatological (though not obscene) language and highlighted explicit and implicit references to sexual acts.39 “There was, for example, a blasphemous ‘interview’ with Jesus on the Cross that would offend anyone of good taste, whether with or without religion.”40 The newspaper was subsidized by compulsory student contributions.41 Predictably, the university’s regents heard from legislators and others suggesting that objecting students henceforth be allowed to withdraw their financial support of the newspaper if they did not like its content.42 Over internal university objections, the regents voted to refund such students' fees for a one year trial period, thus reducing the financial support for the newspaper.43 The district court judge thought that a rational, permissible reason for the policy change existed, namely to assuage the concerns of students who objected strongly to financing a paper they abhorred.44

On appeal, a unanimous panel, with Judge Arnold writing, assumed the presence and permissibility of such a motivation on the part of the regents, but found it indisputable that another, less permissible motivation—to suppress a recurrence of anything like the issue in question—was also present in their decisionmaking.45 In a “mixed motive” case, Judge Arnold said, the university had to demonstrate that it would have acted in the same way even if the impermissible motive were not present.46 But—and here lay the vigor and fearlessness of Judge Arnold's

38. Stanley v. Magrath, 719 F.2d 279, 280 (8th Cir. 1983).
39. Id.
40. Id.
41. Id.
42. Id. at 280-81.
43. Id. at 281-82 & n.4.
44. Id. at 281-82.
45. Id. at 283-84.
46. Id. at 283.
ruling—the court would not remand for an inquiry into how the regents would have acted, absent the impermissible motive, because the panel found it impossible on the record for any judge properly to find that the impermissible motive of silencing the students did not affect the decision.\(^{47}\) Regents' testimony and the fact that the new funding policy did not affect controversial papers on other university campuses would have rendered any such contrary conclusion unacceptable.\(^{48}\) The students won and the panel remanded the case only for issuance of an appropriate injunctive order to seal their victory.\(^{49}\) This result, too, one must imagine, did not play that well in the Twin Cities. Yet again Judge Arnold had displayed courage in a hostile setting. Where constitutional rights are at stake, he resolutely faces the hard questions.

II. RACE AND VOTING RIGHTS

In 1989, Judge Arnold authored a truly extraordinary voting rights opinion,\(^{50}\) calling into play virtually all the facets of his wide-ranging career. Writing for a three-judge district court with one member in partial dissent, he held that the 1981 apportionment plan for the Arkansas House and Senate violated section 2 of the Voting Rights Act.\(^{51}\) At the time of the challenge, the districting plan had been in place for almost a decade, and since only one more election in 1990 would take place before the regular decennial reapportionment, the disruptive effect of dealing with the current plan at all became a crucial issue in the case on which the panel split.\(^{52}\) Judge Arnold had no difficulty dispensing with that argument:

To the extent that electoral confusion and disruption exceed what they would have been if the case had been filed earlier, we think that fairness and equal opportunity in voting are worth it. We will not say to these plaintiffs, "Wait for another census. The time is not yet ripe." They have heard these words too many times in the past.\(^{53}\)

\(^{47}.\) Id. at 284.
\(^{48}.\) Id.
\(^{49}.\) Id. at 285. Judge Arnold also rejected the Regents' claim of absolute immunity because of their role as quasi-legislators: "The governing body of a state supported institution of higher learning, we think, cannot qualify for such protection. Such a rule would leave such bodies too free to violate the Constitution." Id.
\(^{51}.\) Id. at 198.
\(^{52}.\) Compare id. at 201-203 with id. at 219-26 (Eisele, C.J., dissenting).
\(^{53}.\) Id. at 203.
His panel took testimony for twelve days and "carefully considered the proof with due respect to the intensely practical nature of the political process." Its task was to decide if black citizens in the Delta and certain other districts of Arkansas, in the words of section 2, "have less opportunity than other members of the electorate to elect representatives of their choice." Arnold laid out the results of the 1981 redistricting plan plainly. First, there were only five districts in which a majority of the voting age population was black, even though sixteen relatively compact and contiguous black majority districts could have been fashioned. Second, realistically, under the current plan, there could be at most six black representatives in the 135-member legislature in a state where blacks made up 16% of the population. Moreover, race polarized voting in the areas in dispute such that blacks almost always voted for blacks and whites for whites. Before Judge Arnold could address whether these facts demonstrated that blacks had less opportunity to "elect representatives of their choice," he had to address the threshold question of whether that was enough under section 2. The dissenter thought that deprivation of the opportunity to participate, specifically to vote, must also be shown as a reason for distorted election results. Arnold thought not, and dressed his argument in golfers' garb:

"The argument fails purely as a logical and linguistic matter. Even if plaintiffs failed to show less opportunity to participate in the political process, a showing that they have less opportunity to elect candidates of their choice would suffice to establish their claim. The right protected is the aggregate of these opportunities—the right to effective participation in the political system: "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities..."

54. Id. at 198.
55. Id.
56. Judge Arnold did acknowledge that the alternative districting plan would create some districts that "look rather strange," id. at 207, and would contain "islands" that were completely surrounded by other districts. Id. The propriety of relying on the fact that strangely-shaped districts could be formed, as well as a good deal of the rest of voting rights jurisprudence, may be in question after the Supreme Court's recent pronouncements. See Shaw v. Reno, 113 S. Ct. 2816 (1993) (holding that appelleant stated a proper claim under the Equal Protection Clause by alleging that the North Carolina General Assembly's reapportionment plan was irrational on its face).
57. 730 F. Supp. at 198.
58. Id.
59. Id.
60. Id.
61. Id. at 230-31 (Eisele, C.J., concurring and dissenting).
enjoyed by the black and white voters to elect their preferred representatives." An example from a less exalted field of human endeavor will illustrate the point. Suppose you say that I have less ability to chip and putt than you do. If I am just as good a chipper as you are, but not so good at putting, this statement, as a matter of ordinary speech, is still a true one. It is a combination of qualities (play around the green) that we are discussing, and the comparison is between our respective totals or aggregates of these qualities. So in the context of Section 2: it is a combination of abilities (abilities to use the elective franchise) that we are comparing. If I can vote at will but never elect anyone, my political ability is less than yours. Elections, and winning them, are the whole point of voting. This is, at any rate, one reading of the statute that is grammatically available, and the statute should be construed liberally in favor of its object, which is to open up the electoral process to full participation.62

Returning to the record before him, Arnold the golfer then turned into Arnold the savvy politician and congressional aide. "[W]e rely primarily on actual events and practical politics," he said, to show that the "white voting majority is powerful enough, and consistent enough, to defeat black voters' preferences for black candidates almost without exception."63 Since 1978, black candidates had lost ten races to white candidates in white majority legislative districts and won none.64

White voters, in short, can elect white candidates against black opposition, but black voters cannot elect black candidates against white opposition, with insignificant exceptions. We hope the day will come when this is no longer true, when voters of both races will vote for the person and not for the color of his or her skin. Whatever distaste we may personally have for racial stereotypes in politics, the relevant question for present purposes is the preferences of voters in real life, and we believe they have been clearly established.65

Arnold followed up with a discussion of the relevant sociological and economic differences among blacks and whites living in the Arkansas Delta that reflected the effects of past discrimination and that "hinder[ed] their ability to participate effectively in the political process."66

If a person has no phone, cannot read, and does not own a car, the ability to do almost everything in the modern world, including vote, is severely curtailed. . . . [A]s long as blacks, as a group, remain in a depressed socio-economic status, their political power will necessarily

62. Id. at 204 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
63. Id. at 208.
64. Id.
65. Id. at 209.
66. Id. at 209 (quoting S. REP. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S.C.C.A.N. 177, 205.).
be less, and the impact on them of vote-diluting boundary lines will be greater.\textsuperscript{67}

He reviewed as well modern-day instances of official discrimination in abruptly moving polling places,\textsuperscript{68} appointing deputy voting registers only after litigation,\textsuperscript{69} intimidating black candidates,\textsuperscript{70} and a dearth of blacks elected to public offices generally in the state.\textsuperscript{71} No black person had ever won statewide office\textsuperscript{72} and black legislators had been elected exclusively from black majority districts.\textsuperscript{73}

On balance a clear answer emerges. In these areas, black political opportunity is significantly lessened by the 1981 apportionment plan, and the plan violates Section 2 of the Voting Rights Act.\textsuperscript{74}

Voting rights cases are difficult and messy. They have the potential not only of cutting deep into state political processes, but of exacerbating racial or ethnic tensions, simmering just below the surface. The results they ask judges to reach are often themselves quasi-political: whether past discrimination lingers in present state policies and whether elected officials have been responsive to the needs of minority groups. The remarkable combination of historical, statistical, anecdotal, analytical, and even experiential data Arnold used in this voting rights case pays a stunning tribute to the reality of his background as a practical politician. At one point, after discussing the method-

\textsuperscript{67} Id. at 211. The dissenting chief judge of the district court contested this nexus. In his view, the residual efforts of past discrimination in employment, health care, and education could not qualify as lack of “opportunity” to participate in the electoral process under section 2(b). Id. at 238 (Eisele, C.J., concurring and dissenting). Furthermore:

the assumed relevance of [the Senate Report] factors provides an escape from the discipline imposed by the specific statutory language [of section 2]. Once so liberated, the judges must rely on their own personal or even political philosophies. This can be dangerous business. The temptation of judges to overly rely on their own “life experiences” as personal values becomes difficult to resist. . . . Of course, each of the three judges on this Court brings a lifetime of personal exposure to, and involvement in, the political affairs of our state, but, as this case demonstrates, we do not always come away from that exposure and involvement with the same conclusions, views, ideas, and opinions.

Id. at 254.

\textsuperscript{68} Id. at 210.

\textsuperscript{69} Id.

\textsuperscript{70} Id.

\textsuperscript{71} Id. at 213.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 215. Judge Arnold found, however, that as to one of the areas in dispute, Pulaski County, there was no section 2 violation, largely because representatives of the local black community had endorsed the status quo. Id. at 216-17.
ological debates between experts on both sides as to single regression, double regression, and homogenous-precinct analysis, as well as "scattergrams" plotting black/white votes in precincts, Arnold concluded, not unreasonably, "To our untrained eye, the cumulative effect of these exhibits is overwhelming, whatever the technical merits or demerits of the various statistical theories. And our own experience as citizens of this State, which we are not required to lay aside, strongly confirms this conclusion."75

Richard Arnold, the home state boy, could sniff out and smoke out unjust discrimination in the most abstract record. Even for one election, he believed that it was worth all the trouble to make it right.76 As a result of the redistricting ordered by the court, for the first time in history, voters in Arkansas elected a black state senator from the Delta region, and ten new black senators and representatives to the state legislature in the 1990 election.77

75. Id. at 208.

76. The Arkansas redistricting case is legendary. See Elaine R. Jones, Broder v. Guinier, WASH. POST, June 20, 1993, at C7. The Arnold opinion discussed in text was summarily affirmed by the Supreme Court. See 498 U.S. 1019 (1991). It was followed by a second opinion adjudging that violations of the Fourteenth and Fifteenth Amendments had been committed. See Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990), appeal dismissed, 498 U.S. 1129 (1991). Again, Judge Arnold wrote. He first held that before a court could order a preclearance remedy (preclearance means that there must be advance federal approval of future changes in state election laws and practices) under 42 U.S.C. § 1973a(c) it had to find an intentional constitutional violation. Id. at 589. Arnold found no such violation in the adoption of the 1981 apportionment scheme itself but, rather, in other electoral practices that had been shown in the voting rights case, principally the adoption of majority voting rules for general electoral offices that had formerly required only a plurality vote. Id. at 599-95. Devotion to majority rule for local offices lay dormant as long as the plurality system produced white office-holders. But whenever black candidates used this system successfully . . . the response was swift and certain. Laws were passed in an attempt to close off this avenue of black political victory. This series of laws represents a systematic and deliberate attempt to reduce black political opportunity. Such an attempt is plainly unconstitutional. It replaces a system in which blacks could and did succeed, with one in which they almost certainly cannot. The inference of racial motivation is inescapable. Id. at 594-95 (footnote omitted). Although he concluded that even when constitutional violations were proven, a court retains equitable discretion not to order preclearance, Arnold nevertheless ordered preclearance here for any majority vote laws involving general elections. Id. at 599-602. A new redistricting plan was approved with modifications in early 1990. See Jeffers v. Clinton, 756 F. Supp. 1195 (E.D. Ark. 1990).

77. See Jones, supra note 76.
The decisions of Judge Arnold I have read—and I have tried to review a faithful cross-section—have on the whole been distinctly sympathetic to women's claims of discrimination in the workplace and in school. Thus, he ruled that a pro se woman could state causes of action under Title VII, 79 42 U.S.C. § 1981, and 29 U.S.C. § 185 sufficient to withstand dismissal when she claimed that because of her race and sex her union did not adequately represent her in her grievance against her federal employer. 80 More specifically, he overturned a finding of untimeliness under Title VII and remanded for further factfinding to see if the plaintiff had in fact been turned away by the Equal Employment Opportunity Commission as she represented; 81 said that Brown v. General Services Administration, 82 which barred any action against a federal employer that could have been brought under Title VII, 83 did not preempt the plaintiff's section 1981 cause of action against her union; 84 and sustained the viability of her claim based on the union's failure to represent her fairly. 85

In an early sexual harassment case, he upheld a woman's state law claims of wrongful discharge and intentional infliction of emotional distress grounded in her foreman's requests that she sleep with him. 86 In assessing the wrongful discharge claim, Judge Arnold found that Arkansas law recognized a public policy exception to its employment at will doctrine, so that an employee could base a contract claim on a dismissal caused by her declination to break the law. 87 He then went on to infer that

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78. I could find only one age discrimination case authored by Judge Arnold. In Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983), he faced the routine issue of whether the district judge should have rendered a directed verdict before allowing the plaintiff to submit rebuttal evidence. Id. at 375. After a characteristically careful review of the evidence, Arnold concluded that it was not clear enough to support a directed verdict, so the case was remanded to permit it to go to the jury. Id. at 379.


80. Jennings v. American Postal Workers Union, 672 F.2d 712, 714-15 (8th Cir. 1982).

81. Id. at 715.


83. Id. at 835.

84. 672 F.2d at 716.

85. Id.

86. Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984). Her Title VII claim was held to be untimely. Id. at 1203.

87. Id. at 1204-05.
because Arkansas had a statute against prostitution, and a “woman invited to trade herself for a job is in effect being asked to become a prostitute,” an employer could not lawfully dismiss her for refusing to do what the law forbids. Judge Arnold presented an ingenious rationale, for sure, but a self-limited one that might not be extendible to cover harassments short of sleep-over invitations, such as just plain hostile environment claims. Still, this was 1984 and it was a start. In going even that far in that remote pre-Thomas/Hill era, Judge Arnold again showed his irrepressible streak of judicial realism and an admirable willingness to state outright what we all know—that judges do, and indeed must, make law:

Public policy is usually defined by the political branches of government. Something “against public policy” is something that the Legislature has forbidden. But the Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field. It is the courts, to give one example, that originated the whole doctrine that certain kinds of businesses—common carriers and innkeepers—must serve the public without discrimination or preference. In this sense, then, courts make law, and they have done so for centuries.

In his very early years on the district court bench, Judge Arnold decided an exotic gender discrimination case about girls’ basketball rules. Arkansas was one of only a few states that still imposed special “half-court” playing rules on girls’ junior and senior high school teams. A fourteen year-old ninth-grader brought suit on equal protection grounds. Despite the state’s argument that tradition and custom justified the difference, Arnold grasped immediately the importance of rule-equality to the young players. The playing rules placed the plaintiff and other female junior athletes at a severe disadvantage, Arnold noted, if they wanted to play college basketball (perhaps on scholarship), which used “full-court” rules. Moreover,

Arkansas girls simply do not get the full benefit and experience of the

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88. Id. at 1205.
89. Id.
90. Id.
91. Id.
93. Id. at 397.
94. Id. at 395-96.
95. Id. at 398.
96. Id. at 396-97.
game of basketball available to Arkansas boys.... A five-person, full-court game requires a more comprehensive and more complex strategy. It also provides more intensive physical training and conditioning, because, if for no other reason, players on a five-person team have to run up and down the full length of the court, not just half of it.... Girls are "learning half of the game."97

As the state argued, "[h]alf-court may in fact be a better game. But if it's better for the girls, it's better for the boys as well."98

In addition, "[s]imply doing things 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."99

In holding for the plaintiff, Arnold refused to follow a prior case from an Oklahoma district court that had held against protesting girls on the ground that their injury, in the great scheme of things, was de minimis.100

Jones [the contrary case] suggests ... that the injury to Oklahoma girls is de minimis. It certainly is not de minimis to people who play basketball, and a lot of people do.... This is not to say that basketball is of equal dignity in the constitutional hierarchy with freedom of speech and academic inquiry, or that athletics is as important to an educational program as academics. This Court holds only that school authorities, once having adopted the maxim mens sana in corpore sano, must extend the benefits of physical training with a reasonably even hand.101

Some women's groups have skeptically viewed Arnold's position in abortion cases. Except for perhaps one case, I think his record stands up well as a defender of a woman's right to control her body under the strictures of Roe v. Wade.102 He sat as a member of the en banc court in Reproductive Health Service v. Webster,103 in which Chief Judge Lay wrote for the court. The majority decision, ultimately reversed by the Supreme Court,104 held unconstitutional under Roe an array of Missouri restrictions on the availability of abortion. The restrictions included requirements that abortions beyond the fifteenth week of preg-

97. Id. at 396 (citation omitted).
98. Id. at 397.
99. Id. at 398.
100. Id. at 398-99 (citing Jones v. Oklahoma Secondary Sch. Activities Assr., 453 F. Supp. 150 (W.D. Okla. 1977)).
101. Id. at 399.
nancy be performed in a hospital, that certain tests be used to determine the viability of a fetus, and the use of public facilities or public employees to perform or assist abortions be prohibited, even if no public funding was involved. Judge Arnold concurred fully in all of these judgments.

There was, however, one section of the Missouri law that proclaimed that life begins at conception, that unborn children have predictable interests in life, well-being and health, and that

the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court.

The law defined "unborn children" to include all "offspring of human beings from the moment of conception until birth." The majority held the section unconstitutional under the Supreme Court's decision in City of Akron v. Akron Center for Reproductive Health, Inc., which said that the "State may not adopt one theory of when life begins to justify its regulation of abortions." The defendants argued that this law was abortion-neutral because it exempted any contrary declarations by the Supreme Court. Chief Judge Lay pointed out that just saying it did not make it so, since the declaration of personhood as beginning at conception appeared in an abortion bill, and the "only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life."

Judge Arnold's difference with the majority was confined to the single point that the entire section on unborn children need not be invalidated, although it could not constitutionally be

105. 851 F.2d at 1073-74.
106. Id. at 1074-75.
107. Id. at 1081-84.
108. Id. at 1084-85 (Arnold, J., concurring in part and dissenting in part).
110. Id. at § 1.205.3.
112. Id. at 444.
114. Id.
115. His entire dissent is only two columns long. Id. at 1084-85 (Arnold, J., concurring in part and dissenting in part).
applied to abortion. 116 "Of course a governmental declaration about when human life begins, insofar as it is used to justify regulation of abortion, is unconstitutional. But I do not see why [the Missouri law] should not be upheld insofar as it relates to subjects other than abortions." 117 Arnold used as examples of permissible applications actions based on wrongful death or injury to a fetus (other than from the mother's neglect) or property rights. 118 In sum, his singular point was that the section was not facially invalid, but only as applied to abortion. 119

His, I think, was a narrow difference from the majority and, in what has become its most notorious aspect, in fact suggests not the slightest ambivalence as to the fundamental validity of Roe v. Wade. 120 Chief Judge Lay may well have been right in surmising that the motivation and even intent of the unborn children section was that it would be applied to abortions, even though, in terms, it specifically made constitutional law, as declared by the Supreme Court, dispositive. Legislators, doctors,

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116. Id. at 1085 (Arnold, J., concurring in part and dissenting in part). For the rest, he even concurred in the majority's conclusion that the counselling portions, ultimately upheld by the Supreme Court in Rust v. Sullivan, 111 S. Ct. 1759 (1991), were unconstitutional:

As to Part D(1), invalidating those portions of §§ 188.205, 188.210, and 188.215 forbidding the use of public facilities, employees, or funds to encourage or counsel certain abortions, I concur in the result. These statutes sharply discriminate between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment, as incorporated against the states by the Due Process Clause of the Fourteenth Amendment.

851 F.2d at 1085 (Arnold, J., concurring in part and dissenting in part).

117. Id. (emphasis added) (citation omitted).

118. Id.

119. The Supreme Court held that it need not pass on the constitutionality of the "unborn children" preamble to the statute because the circuit court majority had misconceived the effect of the dictum in Akron. Webster v. Reproductive Health Serv., 492 U.S. 490, 506 (1989). According to the Court, the preamble could be interpreted to do no more than offer protection to the unborn in tort and probate law, as Arnold suggested. See id. It might also be seen as simply expressing a "value judgment." Id. The Court also found that the restrictions on use of public facilities and employees to perform abortions did not contravene the Constitution, id. at 507-11; that the dispute over use of public funds to encourage or counsel abortion had been intentionally mooted by the plaintiffs, id. at 512-13; and that the tests for viability mentioned in the law were optional at the doctor's choice, id. at 514 (plurality opinion); id. at 525 (O'Connor, J., concurring in part and concurring in the judgment); and, so interpreted, were constitutional. Id. at 519-20 (plurality opinion); id. at 530 (O'Connor, J., concurring in part and concurring in the judgment).

120. 410 U.S. 113 (1973).
unsophisticated judges, and, certainly, laypersons might not pick up so subtle a reservation. But Arnold's countervailing concern that state laws not be held facially unconstitutional if they encompassed legitimate as well as illegitimate applications also has strong roots in our law.121 Even in dissent, orthodox feminists must recognize that his position is in most respects far more expansive than the present Supreme Court's.122 Judge Arnold's critics must play fair among all suspects in assessing alleged heresies.

Perhaps the most enigmatic of Judge Arnold's formidable array of civil rights decisions is his opinion for the Eighth Circuit in *United States Jaycees v. McClure*,123 later reversed unanimously by the Supreme Court.124 Perhaps the best explanation lies in Judge Arnold's own golfing motion—even at his peak, Jack Nicholas had an off-day. *Jaycees* considered whether a Minnesota law forbidding gender discrimination in a "place of public accommodation"125 could be enforced against the National Jaycees, which had sanctioned their Twin Cities's chapters for admitting women to full membership in defiance of the Jaycees's national rules.126 Judge Arnold, for a split panel with Chief Judge Lay dissenting, found first that because the organization devoted a substantial part of its activities to the expression of social and political ideas, including controversial notions such as voluntary prayer in the schools, it qualified for First Amendment protection of the right of association.127 He then reasoned that regulating the grounds for membership would

121. See, e.g., United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

122. This may not be true in one respect, however. Judge Arnold joined an en banc majority in holding constitutional a Minnesota statute requiring that minors notify both parents at least forty-eight hours before receiving an abortion or, alternatively, obtain court approval. Hodgson v. Minnesota, 853 F.2d 1452, 1453 (8th Cir. 1988). The majority felt that the Supreme Court's "approval [of] similar statutory plans mandates approval in this case," *id.* at 1459, despite its "considerable questions about the practical wisdom of this statute." *Id.* The dissenters thought that the Supreme Court precedent was distinguishable. *Id.* at 1467 (Lay, C.J., dissenting). The majority's decision was affirmed in full by the Supreme Court. Hodgson v. Minnesota, 497 U.S. 417, 423 (1990).


125. MN. STAT. § 363.03 subd. 3 (1983).

126. 709 F.2d at 1561-63. See also 468 U.S. at 614 (describing sanctions).

127. 709 F.2d at 1569-70.
deeply invade the organization's right to associate freely for the purpose of expressing such views. Finally, he thought that the state's interest in eradicating gender discrimination was not compelling enough to justify so deep a cut into the internal affairs of a First Amendment organization, in part because alternative ways to accomplish the state interest existed, like forbidding state employees to take part in the Jaycees or cutting off any indirect state subsidies of Jaycee activities, such as a deduction for charitable contributions. He also thought that the Supreme Court of Minnesota's ruling that the Jaycees were a "public" organization was not well-reasoned enough to pass muster against a vagueness challenge: it failed to delineate clearly the difference between public and private organizations, leading to the puzzling result that the Kiwanis Club was "private" while the Jaycees was "public." In sum, Judge Arnold reasoned that "if, in the phrase of Justice Holmes, the First Amendment protects 'the thought that we hate,' it must also, on occasion, protect the association of which we disapprove."

Arnold's conclusion seems driven by his view that although this was not a "private" club in the classic sense, neither was it a classic "public" club because it engaged in First Amendment expressions that went far beyond commercial speech. He did not fail to recognize the right to associate freely, but in the view of dissenting Chief Judge Lay, and ultimately the Supreme Court, he underestimated the force of the state's interest in regulating that right to limit gender discrimination. He appeared to assume that the core freedom of expression would somehow be impinged by a requirement of gender neutrality in membership. That might be arguable if a select group of men banded together to fight the Equal Rights Amendment, but a national organization that unselectively solicited dues-paying male members between eighteen and thirty-five and opened its programs and benefits to associate women members would be
hard-pressed to make out the case.

Chief Judge Lay thought that at the heart of his colleague's opinion was a fundamental disagreement with the Minnesota Supreme Court's inclusion of the Jaycees as a "place of public accommodation." He objected as well to Arnold's notion that inclusion of women in membership might affect the ideological positions of the organization: "The activities the Jaycees engage in have no relationship to its internal membership practices; an association of men with privileges superior to women does not enhance the effectiveness of the type of advocacy the group has undertaken."

The Supreme Court, in an opinion written by Justice Brennan (for whom Judge Arnold had clerked many years before), found that the Jaycees did not warrant the kind of protection reserved for intimate associations like the family:

In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection (under an "intimate association" theory) to the decision of its members to exclude women.

Justice Brennan then turned to the line of cases protecting "expressive associations," and declared that, although the Minnesota statute did impinge on the Jaycees's ability to express its

137. 709 F.2d at 1579 (Lay, C.J., dissenting).
138. Id. at 1580. Judge Heaney, dissenting from denial of rehearing en banc, presaged the Justice O'Connor concurrence in the Supreme Court. See Roberts, 468 U.S. at 639-40 (O'Connor, J., concurring in part and concurring in the judgment). He saw the Jaycees as primarily a business-gathering, networking organization from which young women were being unfairly excluded:

Young women are entitled to share in the good jobs in our society according to their abilities. They will not share fully in these jobs, however, as long as young men are exclusively eligible for membership in the "right business organization," which gives them an edge in hiring for and promotion to leadership positions. To be sure, the Jaycees sponsor many social activities and events. They also take positions on some of the great issues of our time. But these activities are not central to their purpose. The central purpose is rather to learn the techniques and skills and to form the acquaintances that will serve as a basis for leadership positions today and tomorrow.

Young men have the right to associate with whomever they please, but under Minnesota law they should not be able to form an organization that is primarily business oriented and exclude young women from that organization when the effect of that exclusion is to deprive the latter of an equal opportunity for leadership positions.

Jaycees, 709 F.2d at 1583 (Heaney, J., dissenting from denial of rehearing en banc).
139. Roberts, 468 U.S. at 621.
views by interfering with its internal organization, infringements of the right of expressive association can be countenanced for compelling reasons; wiping out gender discrimination was more compelling than Judge Arnold had recognized. Judge Arnold, in defense of one freedom, had, at least in the Supreme Court's view, underestimated the importance to society of another freedom—freedom from discrimination on the basis of gender in public groups, even those that engage in advocacy.

Why did a judge so quick to see the diminished future of a young athlete forced to play by "girls' rules" find it acceptable to bar young professional women from such an important business and social networking group as the Jaycees? The best answer I can surmise (beyond the golfing analogy I have suggested) is that in the one case he was dealing with a game, in the other, with a constitutional right. For recognition of the rights at stake, he gets an A; for balancing, he gets a B-.

The final stop on our excursion is a recent and, I believe, quite revealing dissent by Judge Arnold in what might at first seem to be a minor case but which turns out to illustrate Arnold's continuing strengths in the civil rights area: his ability to identify and stand up for constitutional rights in situations others would dismiss as unworthy of constitutional explication. We saw it before in the case of the transient forced to cross the bridge, and again, as we shall see, in the desire of a new mother to pick out her baby's surname. We also see his lack of timidity in probing for constitutional ground in the much-maligned right to privacy. It is my gut feeling and prediction that these characteristics will mature and flourish as his stint on the bench lengthens. In the final opinion I discuss, Arnold again displays to advantage his trenchant writing style and his lack of reticence in drawing on his own experiences and reac-

140. Id. at 623.
142. See supra notes 6-15 and accompanying text.
143. Henne, 904 F.2d at 1216-17.
144. The following passage is typical:
A few salient facts are worth repeating. Debra Henne wants to give her daughter the surname of the little girl's father. The father is willing. He has acknowledged his fatherhood. The man to whom Ms. Henne was married when the baby was born has no objection. Linda Spidell wants to name her daughter "McKenzie," which is neither her name nor the name of the child's father. The choice is not so eccentric as it seems, however: Ms. Spidell's two other children are named "McKenzie," and it is quite natural to desire that all of one's three children have the same surname. Again, no one with a personal interest ob-
tions, not to justify results but to reaffirm (or even contradict) the references and arguments of those who appear before him.

In *Henne v. Wright*, the Eighth Circuit considered whether a Nebraska law infringed a new mother's constitutional right to privacy because it would not allow her to pick a surname for her baby which had no legally established connection with the child. One of the plaintiff mothers, although married to another man at the time of the child's birth, wished to give her child the surname of its real father, who had acknowledged, but not obtained, a judicial declaration of paternity. None of the parties objected to giving the child the real father's surname. The district court had held that a woman's right to privacy includes naming her child, but the circuit court reversed, finding that a right to give a child a name with which the child has no legally established connection was not deeply rooted in American history and tradition:

The custom in this country has always been that a child born in lawful wedlock receives the surname of the father at birth, and that a child born out of wedlock receives the surname of the mother at birth.

While some married parents now may wish to give their children the surname of the mother or a hyphenated surname consisting of both parents' surname, and some unmarried mothers may wish to give their children the surname of the father, we can find no American tradition to support the extension of the right of privacy to cover the right of a parent to give a child a surname with which that child has no legally recognized parental connection. Plaintiffs therefore have not asserted a right that is fundamental under the fourteenth amendment right of privacy. ... Judge Arnold in dissent took quite a different view of the case: "The fundamental right of privacy, in my view, includes the right of parents to name their own children, and the State has shown no interest on the facts of these cases sufficiently compelling to override that right." Acknowledging that the case might have been, but was not,
pleaded on First Amendment grounds, and that finding such a right as an aspect of the right of privacy was “trickier ground,” he went on:

The right of privacy is not the beneficiary of explicit textual protection in the federal Constitution. It is an unenumerated right. There are such things in constitutional law, however. People existed, and had rights, before there was such a thing as government. Government might protect or recognize rights, but rights, some of them anyway, existed before government and independently of it, and would continue to exist after government had been destroyed. The source of rights was not the State, but, as the Declaration of Independence put it, the “Creator”.

The real question is not whether there is a right to privacy but how do you tell what it includes? The right to name one’s child seems to me, if anything, more personal and intimate, less likely to affect people outside the family, than the right to send the child to a private school or have the child learn German. We know, moreover, from Roe v. Wade that these women had a fundamental right to prevent their children from being born in the first place. It is a bizarre rule of law indeed that says they cannot name the children once they are born. If there was ever a case of the greater including the less, this ought to be it.

A person’s name is, in a sense, her identity, her personality, her being. There is something sacred about a name. It is our own business, not the government’s. Arnold then conducted a foray into the history of surnames to discern what the custom and tradition really was, and concluded that names were not always inherited and early tradition did not restrict the choice of a surname. Unlike the majority which focussed on whether there is any tradition supporting the specific right claimed here, Arnold asked whether there is any solid tradition of legislation denying such a right. In the absence of tradition either way on that more narrow question, he suggested we look to the tradition we do have. “People may choose or change their own names without leave of government. It is only a small step to extend the same right to their children’s names. Children are, during infancy anyway, simply legal ex-

152. Id. (“What I call myself or my child is an aspect of speech.”).
153. Id.
154. Id. at 1216-17 (citations omitted).
155. Id. at 1218. Pointing out that older authorities on names refer only to fathers and sons, Judge Arnold said: “I take it everyone would concede today that mothers, daughters, and women in general are legally entitled to the benefit of whatever tradition was formerly expressed in male terms.” Id. at 1218 n.2.
156. Id. at 1218-19.
tensions of their parents for many purposes.”\textsuperscript{157}

The \textit{Henne} dissent suggests the present stance of Judge Arnold: a judge growing steadily in stature, a strong and plain-spoken judge sensitive to the needs of ordinary people and not afraid to recognize and declare basic rights to protect their most basic needs, even if those rights are not specifically enumerated in the Constitution. Most of us, at this stage of our careers, could not ask for a nobler interim epitaph.

\footnotesize
\textsuperscript{157} \textit{Id.} at 1219.