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Tribute to the Honorable Richard S. Arnold

Morris S. Arnold

favored class. Achilles' pitiless enforcers, the myrmidons of the law, are not Richard's friends. He takes basic Christian ethics seriously, reflecting the ancient admonition found in Matthew 25:40: "Inasmuch as ye have done it unto the least of these my brethren, ye have done it unto me." Or as his charming and insightful wife, Kay, said to me once in more modern English: "I was lucky enough to marry the man who is always the last to judge and the first to forgive."

MORRIS S. ARNOLD*

My brother Arnold's distinguished career is too well known to most readers of this journal to make a rehearsal of it here worthwhile. Those who require or desire a primer on it, and a survey of some of my brother's more notable opinions, may consult the contributions noted in the margin.[1] What I want to write briefly about for present purposes has to do with some early influences on his life and thinking that have, I believe, left discernible traces in his jurisprudence, if only one looks at it with a trained and educated eye.

My brother, as everyone knows, possesses a legendary intelligence; indeed, his colleagues sometimes admiringly remark to me on how easy the analysis and solution of legal puzzles is for him. More importantly, my brother is an intellectual. There are lots of differences between being intelligent and being intellectual (there are many brilliant

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* Judge Morris Shepard Arnold has served with his brother, Richard S. Arnold, on the United States Court of Appeals for the Eighth Circuit since 1992. Prior to his appointment to the Eighth Circuit, Judge Arnold served on the U.S. District Court for the Western District of Arkansas for six years.

1. Especially useful for this enterprise are the following: William J. Brennan, Jr., *A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1 (1993); John P. Frank and A. Leon Higginbotham, Jr., *A Brief Biography of Judge Richard S. Arnold*, 78 MINN. L. REV. 5 (1993); Donald P. Lay, *My Colleague—Richard S. Arnold*, 78 MINN. L. REV. 25 (1993); and Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35 (1993).

people, for instance, who don't give a fig for ideas), but in this context I use the word "intellectual" to mean someone who believes in the practical consequence of political, philosophical, and legal principles, and in their capacity to produce morally reliable and systematic results. Such people, of course, are very interested in learning, and are consumed with a desire to acquire it. A relevant anecdote will serve to illustrate early signs of my brother's intellectualism rather nicely. When he was a first-year law student at Harvard, I remember telling him that the University of Arkansas had been ranked number 7 in the most recent polls. "Oh?" he replied, with considerable interest. "Which department? Latin? History?" I am not kidding—and neither was he.

The notion that legal problems can be puzzled out, that the mind can solve them by the application of principle, has a distinctly Whiggish cast to it, and it is here that early influences on my brother's modes of thinking may be showing themselves. Ideas and learning were extremely important around our house when we were growing up. One of my early memories is sitting around in our library listening to my sixteen-year-old brother teach our mother ancient Greek. (I wonder if there was anyone else in Miller County, Arkansas, doing that that day?) Our mother wanted to know just about all there was to know, and had an opinion on every subject, which she did not scruple to share with her sons. Her father had been a United States Senator, but despite (because of?) the fact that he had been a big New Dealer, Progressive, and Prohibitionist, she was highly skeptical of government (especially the federal government), and believed that it ought to be very jealously restrained.

Our father once told a newspaper that my mother was the most conservative person whom he had ever known (high praise, indeed, considering the source), but that is a highly partial appreciation of her. What our father was referring to was my mother's deep suspicion of government and her respect for a spontaneous order that gave wide range to individual effort. But Judge Henry Woods of Little Rock (not a political conservative) once described my mother to me as someone who was "involved in every righteous cause." I remember some of those causes: she supported the NAACP in the 'forties, wrote poems damning the KKK that were published in the local newspaper,

and threatened KKK members to their face that she would alert the FBI to any illegal activities that they might undertake. When she died, the *Texarkana Gazette*'s editor opined that she was the most democratic person whom he had ever met. In other words, she was a person of liberality and tolerance, and tried to teach her sons to be the same.

The characteristics of my mother that I have described are not disparate, antagonistic aspects of a single personality, as some would think, but rather manifestations of a single, simple principle which she tenaciously adhered to. That principle was freedom and responsibility for all, without respect to race, color, or creed. Such a political philosophy used to be called liberalism, but that word has a decidedly different odor about it today because it comes freighted with a large dose of statism. Nowadays, we call that philosophy libertarianism.

When one adds to all this the fact that our father was general counsel for a large public utility, and thus spent a great part of his life battling the rural electrical cooperatives in court, it is not hard to see that my brother grew up in a distinctly Whiggish environment. I want to suggest that this was one influence that produced the profound respect, even reverence, for the bill of rights that his opinions frequently exhibit.

Two quick examples from my brother's opinions will suffice to demonstrate what I am talking about. The twin ordering principles of libertarian philosophical thought are property and contract (indeed, if there were space enough, it would be easy to demonstrate that these principles are, at bottom, but one). In a case that affirmed the denial of a motion to suppress evidence,[2] my brother observed in dissent that the "liberty of the citizen [was] seriously threatened" by certain police practices, and that "[t]he sanctity of private property, a precious human right [was] endangered" by them.[3] (In one or two sentences, this opinion exposes to view the sophomoric character of jurisprudential attempts to differentiate privacy rights from property rights: The essence of both is the right to exclude.) Five years later, my brother, again in dissent, was moved to remark that the Contracts Clause of the constitution

2. United States v. Weaver, 966 F.2d 391 (8th Cir. 1992).

3. *Id.* at 397.

"is designed to safeguard a basic human right, the right to make private contracts."[4] If these two cases, which recognize property and contract as precious and basic human rights, do not expose to view a fundamental libertarianism at work, then I do not know how properly to characterize them.

Is not this high regard for individual rights and private ordering the best way to comprehend my brother's controversial ruling in *United States Jaycees v. McClure*?[5] In that case, he held that the Minnesota legislature's attempt to force the Jaycees to take women as members violated the Jaycees' rights to association and was thus unconstitutional. In the course of his opinion, my brother hinted, and hinted strongly, that he had no sympathy for the Jaycees' position, but concluded that the Minnesota statute violated the constitution because "the right to choose with whom one *will* be associated necessarily implies, within some limits, the right also to choose with whom one will *not* associate."[6]

Judge Patricia M. Wald of the District of Columbia Circuit has affected (as a rhetorical device, I suspect) to find this opinion "most enigmatic," especially in the context of my brother's intense insistence on protecting women's rights in other cases.[7] He had, for instance, as a district judge, in what Judge Wald quite correctly describes as "an exotic gender discrimination case about girls' basketball rules,"[8] struck down a state regulation that forced girls to play "half-court" basketball.[9] But if one sees both the Jaycees' case and the basketball case as manifestations of a healthy regard for individual liberty, their results are easily reconciled: They argue for constitutional protection of individual rights, whether the government is telling girls how to play basketball or telling men whom they must admit to their clubs. The Jaycees' case, in other words, is nothing more than a reprise on those cases in which

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4. Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n, 110 F.3d 547, 562 (8th Cir. 1997) (en banc), *cert. denied*, __ U.S. __, 118 S. Ct. 156 (1997).

5. United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom.* Roberts v. United States, 468 U.S. 609 (1984).

6. *Id.* at 1576 (emphasis in original).

7. *See* Wald, *supra* note 1, at 53.

8. *Id.* at 49.

9. *See* Dodson v. Arkansas Activities Assoc., 468 F. Supp. 394 (E.D. Ark. 1979).

my brother expressed his admiration for the principles of contract and property. What the Jaycees had agreed (contracted) to do was to exclude someone (the essence of property/privacy). Viewed in this light, there is nothing whatever "enigmatic" about the holding in this case.

No one, certainly no judge worth his or her salt, is so simple-minded that the essence of his or her jurisprudence can be captured by a single word. In addition to being deeply informed by classical liberal principles, my brother's opinions are shaped by, among other things, a highly practical sense of how the world works and the proper role of appellate judges. What I mean to suggest in this tentative look at a very select few of my brother's numerous, varied opinions, is simply that a way of understanding some of them is that he believes that the constitution, in its bill of rights and elsewhere, contains robust guarantees of individualism, not puny ones, and that this attitude may well have been forged rather early on in his life. Other examples of this mindset at work might no doubt be usefully multiplied and dissected, but I shall leave that to others and to another day.

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When Richard Arnold and I worked in the same office at the Harvard Law Review as the two "case editors" before we graduated in 1960, his character was already powerful and in many ways, unique.

Obviously, he came to the second year of law school with an imposing reputation, not only because he was first in our law school class, but also because he had enjoyed similar distinctions at Yale College and before. Still, he was younger than many of us, at a stage in life when that could be a

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