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## Richard Sheppard Arnold: A Distinguished Jurist, a Loyal Colleague and a Good Friend

### Cover Page Footnote

The UALR School of Law and the UALR Law Review honor the life and accomplishments of Judge Richard Sheppard Arnold by including this and four other essays paying special tribute to a remarkable man. The essays present a small sample of the impact Judge Arnold had on those who knew him while he served more than a quarter century on the federal bench. Although he will be missed by family, friends, and the legal community, Judge Arnold's legacy will undoubtedly endure.

## RICHARD SHEPPARD ARNOLD: A DISTINGUISHED JURIST, A LOYAL COLLEAGUE AND A GOOD FRIEND

*Gerald W. Heaney\**

The United States Court of Appeals for the Eighth Circuit and the people who reside in the circuit were greatly enriched by the twenty-four years that Richard Sheppard Arnold served as a member of the court and as its Chief Judge. His opinions and dissents have served as a benchmark for those who seek to preserve the liberties guaranteed by the Constitution and the Bill of Rights. Richard's dedicated service with the Judicial Conference of the United States Courts and then as chairman of its Budget Committee made it possible for the federal judiciary to thrive as an independent branch of our national government and protect the basic rights of our citizens. He succeeded in securing financial resources from Congress in the face of congressional and executive opposition to the role of the federal judiciary.

If given the opportunity, Judge Arnold would have contributed even more to the nation he loved as a justice of the United States Supreme Court. We all know that if Judge Arnold had been nominated to the Supreme Court, he would have been easily confirmed. It appears now that a Justice Arnold might well have served only a decade on that Court before he was taken from us, but what a momentous ten years that would have been. Even in that short period he would have taken his place alongside John Marshall, Oliver Wendell Holmes, William Brennan, and Hugo Black as one of the great Justices of all time. But we cannot mourn what might have been; we must rather rejoice in his life of service and in his accomplishments.<sup>1</sup>

Judge Arnold was named as a district court judge by President Jimmy Carter in 1978. In 1980 he was elevated to the circuit court by the same President. He became Chief Judge of the circuit in 1992 and served in that capacity for six years. He could have continued in that position, but he stepped aside in 1998 to give others an opportunity to serve in that position. He took senior status in April of 2001 and continued to serve the court and

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\* Judge Gerald W. Heaney serves as a Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

1. This short essay can hardly do justice to so rich a life. Fortunately, I am one of many who have written about the tremendous accomplishments of Judge Richard Arnold. *See, e.g.,* Memorial Resolution: Celebrating the Life and Contributions, and Mourning the Passing of the Honorable Richard Sheppard Arnold, H.M.R. 1001, 85th Gen. Assem., Reg. Sess. (Ark. 2005); *Tribute to the Honorable Richard Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit*, 1 J. APP. PRAC. & PROCESS 188 (1999); William J. Brennan, Jr., *A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1 (1993); John P. Frank & 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); Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35 (1993).

the people of the circuit and the nation until his death on September 23, 2004.

As my investiture preceded Richard's, I had the great privilege and pleasure of sitting on a number of panels with him. I witnessed first-hand his kind and deferential questioning of the lawyers appearing before us. With his colleagues, Judge Richard Arnold would state his views and the reasons therefore, and would consider our comments or criticism fully before producing an opinion or dissent. His thoughtfulness is reflected in his opinions, which could serve as a touchstone for a young lawyer or judge seeking to hone his or her writing style.

Why was Judge Arnold so special? Why was he so admired by his colleagues in the Eighth Circuit and by judges and lawyers throughout the nation? Perhaps each of us who served with him would have a different reason for admiring him, both as a person and as a colleague. Put simply, he was a good man. Judge Arnold had an abiding sense of justice and fairness. He was a compassionate and caring human being, who believed sincerely in the rule of law and following precedent. He listened to everyone—those who agreed with him and those who disagreed. And he wrote beautifully. We all knew it and did our best to emulate him—not always successfully. An accomplished legal scholar, he wrote simply but eloquently, and his intelligence and persuasiveness showed in his opinions. As a result, lawyers, litigants, and the general public understood his decisions.

Judge Richard Arnold richly deserved the many honors that were bestowed on him. From time to time he had a difference of opinion with others on the court, but he always kept an open mind and never let differences in opinion interfere with friendship. His gentlemanly nature was reflected in his opinions, but more often in his dissents, lessons to all of us on disagreeing gracefully.

During his years on the court, Richard Arnold wrote more than 1,000 opinions and dissents. We all looked to Richard to write the majority opinion in en banc cases. When he was with the minority, we looked to him to write the dissent. It would be impossible to recount all of the en banc opinions and dissents that Judge Arnold wrote, but I would like to highlight a few of the more important ones.

In 2000 Judge Richard Arnold and I sat together on the case of *Anastasoff v. United States*.<sup>2</sup> The appellant, Anastasoff, had filed for a tax refund due to overpayment, which the Internal Revenue Service denied because it received her claim one day late. Anastasoff argued that since she mailed the claim in a timely manner, we should employ the so-called "Mailbox Rule" to deem her claim to be timely filed. An unpublished decision from our cir-

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2. F.3d 898 (8th Cir. 2000).

cuit held that the mailbox rule did not apply to this type of claim. At the time, our circuit gave no precedential effect to unpublished opinions.

Writing for our unanimous panel, Judge Richard Arnold held that our local rule on unpublished opinions was an unconstitutional extension of Article III. His opinion provided a marvelous and thorough explanation of our view, that the Framers of the Constitution relied on the concept of precedent as part of our judicial scheme:

[I]n the late eighteenth century, the doctrine of precedent was well-established in the legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.<sup>3</sup>

Although his opinion's historical review served as a convincing argument for our position, Judge Richard Arnold responded to the complaints of a modern-day judiciary, which was saddled with many more cases now than the Framers had certainly envisioned:

It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case.<sup>4</sup>

The panel decision in *Anastasoff* was subsequently vacated by our court en banc, presumably to reconsider the harsh result on the taxpayer. While the case was pending, however, the Internal Revenue Service paid Anastasoff the entirety of her claimed refund, rendering a decision moot.<sup>5</sup> Nonetheless, Judge Arnold's opinion stands out as a seminal work on the precedential effect of unpublished opinions and has been cited extensively in many cases, law reviews, and journals.

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3. *Id.* at 903.

4. *Id.* at 904.

5. See *Anastasoff v. United States*, 235 F.3d 1054, 1055–56 (8th Cir. 2000) (en banc).

I also had the opportunity to sit with Judge Arnold in the en banc court considering *McCoy v. Schweiker*,<sup>6</sup> a social security disability case. One of the fighting issues in that case was how a secretary of Health and Human Services was to determine whether a person was able to perform sedentary, light, or medium work as defined in the social security regulations. Judge Arnold approached this arcane subject in a very humane way. He rejected the Secretary's highly technical reading of that section, and in a phrase that has been cited again and again, not only by our court, but by other courts of appeal, he noted:

The RFC [residual functional capacity] that must be found if the grid is to be used, in the case of sedentary and medium work, as well as light work, is not the ability merely to lift weights occasionally in a doctor's office; it is the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world.<sup>7</sup>

No one in the federal judiciary has been more protective of First Amendment rights than Judge Arnold. He has written several opinions in this area, none more eloquent than his en banc opinion in *Janklow v. Newsweek*.<sup>8</sup> William Janklow, then governor of South Dakota, filed a defamation action against *Newsweek*. One paragraph of an article on Dennis Banks, a Native American activist, referred to "Banks's 1974 initiation of tribal charges of assault against Janklow, in connection with an allegation (now acknowledged to be false) that [Janklow] had raped a teenaged Indian girl five years before."<sup>9</sup> The district court granted summary judgment against *Newsweek*. A panel of this court, with Judge Arnold dissenting, affirmed the district court.

The matter then came before the court en banc. Judge Arnold initially characterized the question as whether the *Newsweek* article should be read as fact or opinion. Judge Arnold held that the article was opinion, and thus absolutely protected under the First Amendment. His concluding remarks are a model for all who desire to protect First Amendment rights.

Every news story (like every judicial opinion) reflects choices of what to leave out, as well as what to include. We can agree that this story would have been fairer to Janklow and more informative to the reader if the chronology of the rape charge against Janklow and the riot prosecution

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6. F.2d 1138 (8th Cir. 1982).

7. *Id.* at 1147.

8. F.2d 1300 (8th Cir. 1986) (en banc). Judge Arnold wrote the dissenting opinion (as well as concurring in part of the opinion) in the panel decision of *Janklow v. Newsweek*, 759 F.2d 644 (8th Cir. 1985). That opinion was subsequently vacated when the court took the case en banc.

9. F.2d at 1301.

against Banks had been more fully explained. Certainly there can be omissions serious enough to take what is ostensibly an opinion and convert it into a fact for legal purposes. We have attempted to explain why this particular omission does not rise to that level. Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government.

We return in conclusion to our initial point: that both in establishing the standards by which opinion is distinguished from fact, and in measuring a particular statement against those standards, we are dealing with First Amendment rights, among the most precious enjoyed by Americans.<sup>10</sup>

In *Richenberg v. Perry*,<sup>11</sup> Judge Richard Arnold considered what was at the time a politically charged topic: the treatment of homosexual servicemembers in the armed forces and the “Don’t Ask, Don’t Tell” policy.<sup>12</sup> Captain Richard F. Richenberg, Jr. challenged this policy following his honorable discharge from the Air Force. In a characteristically careful and precise dissent, Judge Richard Arnold reasoned that the military must permit servicemembers who admit that they are homosexual to rebut the presumption that they will engage in prohibited conduct or the policy will run afoul of the First Amendment.

Explaining the policy, Judge Arnold wrote: “The military may no longer discharge homosexual servicemembers simply because they are homosexual. Instead, federal law authorizes the dismissal of homosexual servicemembers only if they engage or intend to engage in prohibited homosexual conduct, or if they demonstrate a propensity to do so.”<sup>13</sup> Judge Arnold proceeded to consider the impact of the presumption that any servicemember who states that he or she is homosexual is likely to or intends to engage in prohibited conduct. He noted that the policy “would raise serious First Amendment problems” if this presumption were irrebuttable. “The First Amendment prohibits the government from penalizing people because of their thoughts and feelings. Indeed, [o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>14</sup>

After reviewing Captain Richenberg’s exemplary service record and the testimony of his fellow officers and friends, Judge Richard Arnold concluded that Captain Richenberg had shown “that he is the kind of man who

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10. *Id.* at 1306.

11. 97 F.3 256 (8th Cir. 1996).

12. *Id.* at 264–66 (Richard Arnold, J., dissenting).

13. *Id.* at 264.

does what he promises to do, could be expected to abstain from any homosexual conduct, and should not have been discharged simply for saying that he was homosexual."<sup>15</sup>

The due process clause of the Fourteenth Amendment of the United States Constitution has been the focus of litigation over the years. In the en banc case of *Singleton v. Cecil*,<sup>16</sup> Judge Arnold, in a compelling dissent, provided guidance for all who are faced with this issue. In that case, a police officer brought an action against the city and other public officials, claiming due process violations resulting from his termination. Judge Arnold eloquently explained what he saw as the flaw in the majority's opinion, which equated substantive and procedural violations of the clause:

The Due Process Clause declares that no state shall deprive any person of life, liberty, or property without due process of law. The words sound entirely procedural and could well have been interpreted that way, but that has not been the course of the law. The Supreme Court has traditionally recognized two kinds of due-process claims, substantive and procedural. Procedural-due-process claims are what they sound like—claims that a plaintiff has been deprived of something without the proper procedure. The claim is not that the plaintiff has a right to keep the thing in question at all events, but rather that the state cannot deprive him of it without some sort of hearing, either before or after the deprivation. The "property interest" and "liberty interest" concepts were developed in this context, and they make sense. In the case of the employment relationship, a "property interest" arises out of a contract that provides that I have a right to keep my job for a certain period of time, at least in the absence of misconduct or other specified circumstances. The "liberty interest" concept refers to the interest in my own reputation, and embodies the right not to be stigmatized at the time of discharge, unless some sort of fair procedure establishes that the stigma is appropriate.

Substantive due process, on the other hand, has nothing to do with procedures, hearings, contracts of employment for fixed periods, stigmatizing reasons for dismissal, or any other particularized kind of governmental conduct. The concept is much more general. As the Supreme Court has recently explained, a substantive-due-process violation takes place when governmental power is exercised arbitrarily and oppressively. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 1716, 140 L. Ed.2d 1043 (1998) . . . . The concept is a general one. It is not susceptible of detailed formulation. It cuts across all limiting categories. The core of the idea is not that government can deprive me of the thing in question only if it follows certain procedures, but rather that government cannot, for the reasons given, deprive me of the thing in question at all. "Substantive due process" is certainly controversial, historically and academically, but the idea is firmly fixed in our jurisprudence.<sup>17</sup>



Richard Arnold was our colleague, our leader, and our friend. He served as a model for all of us, and for those who will succeed us. In the words of his dear friend, the Right Reverend Thomas Frerking of the St. Louis Abbey:

We give You thanks for his great gift of judicial wisdom. We give You thanks for his acute intellect, for his learning and scholarship, for his beautiful and eloquent, profound and simple English prose. We give You thanks for his tireless work for the administration of justice, for his reception of all who appeared before him, with recognition of their dignity and with fairness, for his judgment of rich and poor alike according to the rule of law without respect of persons.

We give You thanks for his great integrity, for his humility, for his kindness, for his righteousness which informed his whole life. We give You thanks for his wit and humor, for his amiability, for his excellence as a teacher, for his capacity for deep and loyal friendships. We give You thanks for the great religious faith which was Your gift to him which was, indeed, the well spring of all his life and work.<sup>18</sup>

