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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.

LESSONS FROM "SMALL CASES": REFLECTIONS ON *DODSON V. ARKANSAS ACTIVITIES ASSOCIATION*

Polly J. Price[*]

Prior to a brilliant twenty-four year career on the Eighth Circuit Court of Appeals, Richard Arnold served as a federal district judge for about eighteen months. One of my favorite Arnold opinions dates from this time. *Dodson v. Arkansas Activities Association*,[1] a dispute about the rules for girls' basketball in Arkansas, is not the best known among Arnold's hundreds of judicial opinions. It is perhaps not an obvious choice for this collection of essays, given that assessments of Arnold's immense contributions will no doubt center upon his work as a circuit judge. The ruling applied only within the State of Arkansas and received little notice even there. The defendant in the case did not appeal the decision. It seems to qualify as a "little case"—no doubt to some, a relatively insignificant or even trivial issue.

Yet I have two reasons for reviewing *Dodson v. Arkansas Activities Association* in this tribute. First, *Dodson* is an early indication of Arnold's judicial method and temperament, and in this opinion one can find harbingers of the next twenty-five years of his judicial career. Judge Arnold himself was quick to say that there was "no such thing as a little case."[2] By this he reminded us that every case brought into a federal court is important to the litigants. Large sums of money are not always at stake. Not all cases involve sweeping institutional reforms or even important constitutional questions. Nonetheless, such cases are part of the "highest calling" of the judge:

> There really isn't such a thing as a little case. A case is always a controversy between two or more citizens, or non-citizens maybe, who have a claim for justice based on the facts. The important job of the court is to listen to the parties and decide where justice lies. It isn't the primary job

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1. Dodson v. Ark. Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979).

2. Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 669 (1999).

> of courts to seek out cosmic legal issues or to try to state new principles. It's not the job of the lower courts at any rate. It's our job to do the ordinary work of the grist of the mill day in and day out and make sure that the individual citizen . . . gets his or her due . . . .[3]

Litigants deserve to be heard and to feel assured that they have been heard, however trivial the issue may appear or however routine or repetitious the case may seem. As Arnold noted, "An individual's lawsuit . . . may be the most important thing in that person's life."[4] He treated *Dodson v. Arkansas Activities Association* with this sort of respect, and in a manner that revealed much about his judicial approach.

Second, although any number of Judge Arnold's opinions could be chosen to demonstrate consistent aspects of his judicial philosophy, *Dodson* is one of my favorites because of its subject. The case required Arnold to explicate the meaning of gender equity under the United States Constitution in the unlikely context of a dispute about the rules of high school basketball. At the time of his decision, two other federal courts—including the Sixth Circuit Court of Appeals—had already ruled the other way. Arnold's opinion became the leading cited authority for the particular issue it addressed, by those who agreed with it and those who did not. Importantly for me, the ruling directly affected my life as a public school student in Arkansas, although, as I explain below, I was not aware of Judge Arnold's role until I came across the opinion many years later while serving as his law clerk. The editors have encouraged personal remembrances, so along with my discussion of Judge Arnold's role in this case, I have included some accounts of conversations I later had with him about *Dodson*.

I. BACKGROUND OF THE CASE

The litigation began well before Richard Arnold assumed his duties as a United States District Judge in October 1978. Diana Lee Dodson,[5] then a fourteen-year-old student in the Arkadelphia public school system, filed a lawsuit in January 1977 against the Arkansas Activities Association (AAA), the governing body of public and private school athletic programs, asking that girls in Arkansas be permitted to play under the same full-court basketball rules as Arkansas boys played.[6] Arkansas schools at that time required that basketball for girls be played under "half-court" rules.[7] The AAA,

3. *Id.* at 668–69.

4. *Id.* at 669.

5. Diana Lee Dodson was represented in the complaint by her mother, Diana R. Dodson, then a professor at Henderson State University.

6. *Dodson*, 468 F. Supp. at 396.

7. *Id.*

which set the rules for all member schools in the state, required that girls compete under an archaic form of the girls' game that was not played in college-level competition in the United States and survived in only four states at that time.[8] In this game, which had been played in Arkansas and other states since at least the World War II era, girls' teams had six players.[9] Three players were forwards, the scorers for the team who stayed on one end, and three others were guards, defenders who stayed at the other end.[10] No player could cross the center line of the court. Arkansas boys played the "full-court," or "five-on-five" game, which is consistent with today's standard game of basketball.[11]

Prior to the litigation, the member schools of the AAA were almost evenly split on the desirability of changing the rules for the girls' game to match those of women's college teams in the United States and other states (except for Iowa, Oklahoma, and Tennessee). In response to requests from some of the larger schools, the AAA had twice polled its members about whether to change to full-court basketball for junior and senior-high girls.[12] The first poll, in August 1976, favored the change by a vote of 117 to 114.[13] A second poll, held in January 1977, reversed the rule change by a vote of 147 to 116.[14] Thus, by a margin of thirty-one votes the member schools voted to retain half-court basketball for Arkansas girls.

The federal court lawsuit was filed soon thereafter. Diana Lee Dodson, who was then a junior high school student and a good basketball player, claimed through her lawyer that differences in girls' and boys' junior and senior high basketball rules mandated by the AAA deprived girls of equal protection of laws[15] and violated Title IX of the Education Amendments of 1972.[16]

The plaintiff's motion for a preliminary injunction was tried in October 1977 in Little Rock before Judge Terry L. Shell. For many months no decision was forthcoming. The motion was still under advisement when Judge Shell died on June 25, 1978. Judge Shell's replacement on the district court was Richard Arnold, and *Dodson* was among the pending cases that Arnold inherited when he entered duty on October 16, 1978. Judge Arnold sought the agreement of the parties to submit the case for his decision based upon the trial transcript and briefs. Accordingly, in November, Judge Arnold en-

8. *Id.* at 397.
9. *Id.* at 396.
10. *Id.*
11. *Id.*
12. *Dodson*, 468 F.Supp. at 397.
13. *Id.*
14. *Id.*
15. UNITED STATES CONST. amend XIV.
16. 20 U.S.C. §§ 1681–1688 (2000).

tered an order directing preparation of the hearing transcript. The transcript was completed in February 1979. Judge Arnold issued his opinion in the case on April 4, 1979. After the hearing transcript was prepared, a motion for a preliminary injunction that had lingered for nearly two years came to conclusion in a matter of weeks.

II. JUDGE ARNOLD'S DECISION

In what has been called "probably the most significant step for female athletes in the State of Arkansas,"[17] Judge Arnold ruled in favor of Diana Lee Dodson and declared that Arkansas's half-court rules for girls violated the Equal Protection Clause of the Fourteenth Amendment.[18] Judge Arnold determined that tradition alone, without supporting gender-related substantive reasons, was not a sufficient reason to justify the fact that such rules placed girl athletes in Arkansas at a substantial disadvantage as compared to boy athletes.[19] Arnold cited testimony in the record that all college women's basketball teams played the full-court game, and recruiting for those teams centered upon athletes who had played full-court basketball and thus were prepared to play that game.[20] Even the University of Arkansas—today the state's premier women's basketball program—focused its primary recruitment efforts out of state.[21] Diana Lee Dodson wanted the opportunity to compete for a basketball scholarship at the collegiate level. Arnold cited testimony from the hearing that the disadvantage to Arkansas girls schooled in the half-court game was "tremendous" for college scholarship competition.[22]

The decision was somewhat surprising because the only other courts to address this specific claim had ruled that half-court basketball for girls did not violate any constitutional right. The Sixth Circuit Court of Appeals, reversing a Tennessee district court, had stated in a per curiam opinion that distinct differences in physical characteristics and capabilities justified not only separation of girls' and boys' sports teams by gender, but the rules for those games as well.[23] In addition, a federal district court in Oklahoma had dismissed a similar claim under the theory that no fundamental constitu-

17. The quotation is attributed to Alvy Early, Athletic Director, University of Arkansas–Monticello, *in* Todd Traub, *The Century in Arkansas Sports: 6 Girls Switch to 5-on-5*, ARK. DEMOCRAT–GAZETTE, July 25, 1999, at C11.

18. *Dodson*, 468 F. Supp. at 396.

19. *Id.*

20. *Id.*

21. *Id.* at 397.

22. *Id.*

23. Cape v. Tenn. Secondary Sch. Athletic Ass'n, 563 F.2d 793, 795 (1977).

tional rights were implicated, and even if an equal protection claim could be stated for the case, any injury to girls was de minimis.[24]

Arnold distinguished these cases politely but without apology:

> This Court is aware that the two precedents most closely in point are to the contrary. To some degree the record here appears different, because here tradition alone is offered to support the sex-based distinction. To the extent that the reasoning of those cases is contrary to this opinion, this Court respectfully disagrees. They are not binding authority here, and their reasoning seems, with deference, unpersuasive.[25]

Simply because the game had always been played that way in Arkansas was not a sufficiently compelling interest to overcome the economic inequity. As Arnold noted, girls historically had been prohibited from playing the more rigorous full-court game of basketball because with their "bustles, long trains, and high starched collars," they could not "get up and down the court fast enough."[26]

Perhaps to allay the concerns of those who might view his decision to require that girls be allowed to play on boys' teams, Arnold also wrote:

> It is proper to add a word about what this case is not about. It is not about whether girls could or should play against boys. The question is whether girls are entitled to play full-court against each other. Nor is the case concerned with discrimination between Arkansas girls and, say, Mississippi girls. (Mississippi plays full-court.) That kind of discrimination is not cognizable under the Equal Protection Clause, because it results from the action of two separate sovereigns. The point here is that Arkansas boys are in a position to compete on an equal footing with boys elsewhere, while Arkansas girls, merely because they are girls, are not.[27]

Judge Arnold's decision in the case was fully consistent with the policy animating Title IX of the Education Amendments of 1972,[28] but it was not, then, a Title IX case. Although the complaint also alleged a violation of Title IX, Arnold dismissed that claim in a footnote, stating, "There is no evidence in this record that any 'educational program or activity' involved here received '[f]ederal financial assistance . . . .'"[29] Instead, Arnold's decision turned on his analysis of the plaintiff's equal protection claim. As an

24. Jones v. Okla. Secondary Sch. Activities Ass'n, 453 F. Supp. 150, 155–56 (W.D. Okla. 1977).

25. *Dodson*, 468 F. Supp. at 398–99 (citations omitted).

26. *Id.*

27. *Id.* at 398.

28. 20 U.S.C. §§ 1681–88 (2000).

29. *Dodson*, 468 F. Supp. at 396 n.1 (citing 20 U.S.C. § 1681(a) (2000)).

initial matter, Arnold had no difficulty determining that the AAA's mandate of rules for its voluntary members constituted state action: "The Association, although not itself a governmental body, is supported in large part by dues paid by public school districts . . . . The Association in effect exercises a delegated governmental power. It is, at least for present purposes, subject to the Equal Protection Clause of the Fourteenth Amendment."[30]

Further, *Dodson* was among the earliest cases to apply the intermediate standard of constitutional scrutiny suggested by the United States Supreme Court in *Craig v. Boren*:[31] "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[32] Because tradition alone supported Arkansas's continued requirement of half-court basketball for girls, Arnold held that this justification—because it was an outdated and over-broad generalization about the differences between males and females—did not constitute an important governmental objective. Arnold wrote,

> Simply doing things the way they've always been done is not an "important government objective," if indeed it is a legitimate objective at all. Change for its own sake is no doubt to be avoided, and tradition is a healthy thing. But tradition alone, without supporting gender-related substantive reasons, cannot justify placing girls at a disadvantage for no reason other than their being girls.[33]

The same rationale would later be invoked by the Supreme Court in *Mississippi University for Women v. Hogan*.[34] "Rational basis" review, on the other hand, would likely sustain the challenged rules.[35] Under this standard of review, Dodson would have had to prove the complete absence of a legitimate objective of the state.[36]

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30. *Id.* at 396.

31. 429 U.S. 190 (1976).

32. *Id.* at 197.

33. *Dodson*, 468 F. Supp. at 398.

34. 458 U.S. 718, 723–25 (1982) (stating that gender-based classification was insufficient if supported only by tradition).

35. This proposition is in some doubt because the district court in *Cape v. Tennessee Secondary School Athletic Association*, 424 F. Supp. 732, 742 (E.D. Tenn. 1976), *rev'd* 563 F.2d 793 (6th Cir. 1979), held that there was no rational relationship for the requirement of girls' half-court basketball in Tennessee. This decision was reversed, however, by the Sixth Circuit Court of Appeals, although it applied the heightened scrutiny, "substantial relationship" test. *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977).

36. The uncertainty of the standard of review for allegations of gender discrimination during this period is exemplified, for example, in Note, *The Search for a Standard of Review in Sex Discrimination Questions*, 14 HOUS. L. REV. 721 (1977).

The AAA's decision not to appeal Arnold's ruling came after polling all of its member schools. The AAA sent letters to each of its 500 schools, and of the 419 that responded, the great majority (303) did not want the ruling appealed.[37] One hundred and sixteen school districts thought that the decision should be appealed.

The following season, all Arkansas schools complied with the ruling.[38] Full-court basketball competition for junior and senior high school girls in Arkansas was played for the first time in the fall of 1979, leaving only two states—Iowa and Oklahoma—still playing the half-court girls' game. Although the Sixth Circuit had ruled in its favor on the issue of half-court rules for girls, Tennessee's school activities association voted to switch to five-on-five basketball anyway.[39]

Diana Lee Dodson's lawsuit was filed when she was in the ninth grade. Judge Arnold's decision came at the conclusion of her junior year in high school, meaning that Dodson's senior year basketball team would play under full-court rules. Unfortunately, Dodson seriously injured her knee before that year and never had the opportunity to compete for a scholarship or to play college basketball. She attended college, but later, a tragic event claimed her life. Diana Lee Dodson was shot and killed.[40] A roommate at the time was later convicted of manslaughter. Some years later Judge Arnold mentioned hearing about both her career-ending injury and her later death with sadness, even though he had never met Diana Lee Dodson. His phenomenal memory of persons was matched only by his empathy.

III. AN EARLY INDICATION OF RICHARD ARNOLD'S JUDICIAL PHILOSOPHY

The opinion in *Dodson*, among the first cases Arnold encountered, reveals several features of his approach to judicial work that would stand out over his career. What does it tell us? Others have amply attested to his clear and incisive writing style, and this opinion is a prime example of that. Arnold also treated individuals' claims of constitutional violations with great sensitivity. But in addition, this opinion provides an example of at least three other characteristics that Arnold himself would later suggest to be essential for continued public acceptance of the justice system. In the day-to-day business of judging, Arnold said that it was important to (1) avoid delays in resolving cases, (2) decide cases boldly, and (3) show respect for litigants and their lawyers. Judge Arnold was a frequent speaker and author,

37. *AAA Plans No Appeal of Basketball Ruling*, ARK. GAZETTE, Apr. 24, 1979 at 1C.

38. Traub, *supra* note 17, at C11.

39. *See AAA Plans No Appeal of Basketball Ruling, supra* note 37.

40. *LR Woman Who Won Girls Basketball Suit Killed; Roommate Held*, ARK. DEMOCRAT-GAZETTE, Nov. 11, 1991, at 8B.

and each of the points above is best illustrated in Judge Arnold's own words.

A. "The first duty of a court is to decide a case."[41]

Judge Arnold was concerned about delays in the judicial system. In a tribute to Judge Henry Woods, Arnold wrote, "He was decisive, which, after all, is an indispensable quality for a judge. The job of a judge is to decide cases, not to dither over them. Cases do not normally improve with age."[42] In *Dodson*, after the two-day hearing on the plaintiff's motion for a preliminary injunction, the parties had waited nearly eighteen months for a ruling. The delay was occasioned in part by Judge Shell's death, but the case had lingered in his court almost ten months after the hearing.

Once on the bench in Judge Shell's place, Arnold wasted no time resolving the matter. Judge Arnold issued his opinion in the case in less than three weeks after receiving the prepared trial transcript. The litigants deserved an answer, and deserved no further delays or the additional expense of a rehearing before a new judge. Yet Judge Arnold decided the case and wrote his opinion with great care. He made the effort to understand and articulate the differences between the two games. Because Arnold took time to understand the rules of half-court basketball, he could make critical distinctions that the other courts had missed. His notes from the hearing transcript and briefs of the case are meticulous.

Arnold's speeches and writings often emphasized speedy, yet careful, resolution of cases as necessary to the continued acceptability of the judicial branch by the public:

> You have to get the case out the door, because there are other cases waiting on it. Then you have to try to get it right, [and] write an opinion which is intelligible, which explains the result, and which we hope, is acceptable to the losing side. . . . And so it's important how opinions are written. . . . And that takes time. I worry that sometimes our opinions are not living up to that standard.[43]

Over the course of his career, Arnold was increasingly concerned about the volume facing the federal courts and whether, without additional judgeships, the federal courts could continue to produce quality work at an

41. Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 536 (1995).

42. Richard S. Arnold, *Judge Henry Woods: A Reminiscence*, 25 U. ARK. LITTLE ROCK L. REV. 229, 230 (2003).

43. Arnold, *supra* note 41, at 536.

acceptable pace.[44] A conscientious judge should keep the wheels of justice moving:

> People want to know the answer. They want a result. It's important to them of course that the result be in their favor, but if they're going to lose anyway, it's important for them to know quickly. The virtue highlighted here is quickness, promptness, no agonizing over these matters, but just deciding them. That is a virtue that judges should have in mind.[45]

In *Dodson*, in fact, it appears that the AAA preferred the decision to be in the hands of the federal courts because its members were relatively evenly divided, and two different votes on the subject produced two different results in a six-month period. The AAA needed to take no further action once the *Dodson* case was decided. The AAA's decision not to appeal was ratified by a vote of nearly two to one among all member schools, not just those with girls' basketball programs.[46] The issue was resolved, and all Arkansas schools made the transition to full-court basketball in the following season.

Delay in the course of justice was a topic of concern to Judge Arnold because of his larger belief in the courts as an essential function of good government and at bottom engaged in public service:

> [J]udges, in common with members of the Executive Branch and members of the Legislative Branch, are public servants. We work for the people. We derive whatever power we have from their consent, and if the day comes in this country when the people cease to give general consent to the exercise of judicial power, that's the day we will have no more courts, and that's the day we shouldn't have any more courts.[47]

Arnold fulfilled this obligation in *Dodson*, with his quick resolution of a case that had languished in the system.

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44. *See, e.g.*, Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 S.M.U. L. REV. 767 (2003).

45. Arnold, *supra* note 2, at 667.

46. *AAA Plans No Appeal of Basketball Ruling*, *supra* note 37.

47. Richard S. Arnold, United States Circuit Judge for the Eighth Circuit, Remarks at a Symposium on the Judiciary Sponsored by the Arkansas Bar Association Committee for the Bicentennial of the Constitution 2 (July 2, 1987) (copy of manuscript on file with the author).

B. "[I]f we become timid when the moment comes for the exercise of power, if we pull our punches in that sort of situation, then we are false to the very function that called us into being, and we have forgotten what the framers wanted when they created an independent judiciary."[48]

Judge Arnold also believed it was important for judges to be bold—to have courage in the exercise of power. He once said,

> After you are convinced that you have jurisdiction, after you have given to the state courts and to the other branches of government the deference and respect that is their due, after you have satisfied yourself that you really are, if there is a statute involved, enforcing the will of the legislature, after all of those hurdles have been gotten over, then the greatest error that a judge can make is to pull your punches because you're afraid that the majority of your neighbors are not going to like what you decide.[49]

Dodson is a good example. No doubt Judge Arnold was sensitive to the likely response of critics that the rules of a game of basketball could not possibly implicate the federal Constitution. Just after Arnold was sworn-in as a new federal judge, George Will published an editorial in the *Washington Post* and other syndicated newspapers excoriating the Tennessee district court for its ruling in favor of full-court basketball for women, maintaining that "[a] federal judge can be found to do anything."[50] After Arnold's decision, in fact, an Arkansas basketball coach wrote to the *Arkansas Gazette* that it was "beyond my comprehension how courts have jurisdiction over the rules of a game."[51] Judge Arnold said later that he expected the decision would be reversed by the Eighth Circuit Court of Appeals, given the prior decision by the Sixth Circuit. Nonetheless, he believed it was the right decision, whether or not he was to be reversed.

Henry Morgan, the attorney for Diana Lee Dodson, believed that the executives of the AAA were happy with Judge Arnold's decision. He said,

> What I wanted to do was help Arkansas compete with other states. And although they never said so, I think the AAA leadership was for the same. They thought it would be good. The coaches had voted one way and they wouldn't roll over, but now they could tell the coaches they

48. Richard S. Arnold, *Improving the Public's Perceptions of Federal Judges*, 17 SOC'Y OF BARRISTERS Q. 314, 325 (1982).

49. *Id.* at 324.

50. George F. Will, *Six Players in Search of Sense at HEW*, WASH. POST, Oct. 26, 1978, at A19.

51. Jim Yeager, *Letter to the Editor*, ARK. GAZETTE, April 10, 1979, at 8A.

> didn't want the expense of appeal. And so that one judge changed Arkansas.[52]

Ed McCorkle, the attorney for the AAA, recalled surprise with the ruling, but nonetheless was happy with the resolution:

> We tried the case. And we had witnesses who talked about the merits of the case, and why this was better or that was better. But in the middle of the case a decision was handed down by the Sixth Circuit Court of Appeals that three-on-three was OK from a federal constitutional standpoint. And I said, "Aha! This case is over. I have won."
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> Well, Judge Shell couldn't decide the case. He took it under advisement. But I never had that happen before or since that you get a favorable decision, although from a different circuit, and you think you are going to win. And Judge Shell never ruled on the case. Now Judge Arnold, it didn't take him any time. He ruled, and I was of course flabbergasted about all of it. I thought, "How could you do this to me, Judge Arnold?" Both of them [Richard and Morris Arnold] are pretty quick learners, and when they make a decision, they make a decision, and they move on. And that's what Richard did.
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> After I got the decision, I sent it to my people and we all talked about it, and said how in the world could he do this to us in the face of the Sixth Circuit decision? And finally we came to the conclusion, "Who cares? This is wonderful, the issue is solved."[53]

In an address in 2002 before the Eighth Circuit Judicial Conference at Duluth, Minnesota, Judge Arnold said, "[T]here is probably more danger in the courts from an excess of timidity than from an excess of boldness in decision, and yet the timid among us may get reversed less."[54] Whether a judge is affirmed or not "is not really a true measure of judicial prowess. The decision that is reversed today may be the law of tomorrow."[55] By "boldness of decision," Judge Arnold meant that momentary popularity or public acceptance is not the guide:

> But if by public opinion we mean the shifts of popular emotion that occur from day to day, if that is the beat to which the courts should march, then we will not long have courts worthy of the name. Our courts will be blown about by every wind of doctrine, and the security we have found

52. Telephone interview with Henry Morgan, attorney for Diana Dodson, Arkadelphia, Ark. (Dec. 7, 2004) (transcript on file with the author).

53. Telephone interview with Ed McCorkle, attorney for the Arkansas Activities Association, Arkadelphia, Ark. (Dec. 7, 2004) (transcript on file with the author).

54. Richard S. Arnold, The Art of Judging, Address before the Eighth Circuit Judicial Conference, Duluth, Minn. 21 (Aug. 8, 2002) (manuscript copy on file with the author).

55. *Id.* at 21–22.

> in a Constitution that restrains government even, or especially, when it acts to carry out the majority will, will soon be gone.[56]

Dodson seems to epitomize Judge Arnold's meaning. And yet, however one views his ruling on the constitutional issue, Arnold was clearly conservative with respect to the plaintiff's statutory claim under Title IX. Judge Arnold dismissed the Title IX claim on the ground that there was "no evidence in this record that any 'educational program or activity' involved here received 'federal financial assistance.'"[57] In other words, Judge Arnold did not recognize a private right of action under Title IX, and believed that Title IX did not apply to athletic programs of schools receiving any type of federal assistance unless federal money went directly to the athletic program.

Both of those propositions are no longer the law today.[58] Nonetheless, Judge Arnold's views of Title IX probably comported with those of most other federal judges at the time. Just over one month after the *Dodson* opinion was filed, the United States Supreme Court in *Cannon v. University of Chicago* decided that Title IX did imply a private right of action.[59] As to the question of what constituted "receipt" of federal funds under the statute, that issue would not finally be resolved by the United States Supreme Court until 1984. In *Grove City College v. Bell*,[60] the Court adopted a "program-specific" approach consistent with Judge Arnold's ruling in *Dodson*. Congress responded with the Civil Rights Restoration Act of 1987,[61] legislatively overturning *Grove City College*. The Act expressly adopted an "institution-wide" approach so that if any part of a school or institution receives federal financial assistance, all of the school's programs are subject to Title IX.[62]

To the extent the United States Supreme Court was later judged to be "wrong" in its interpretation of Title IX, then so was Judge Arnold. Because of his resolution of the constitutional issue in favor of the plaintiff, however, not much turned on the additional Title IX claim. Arnold's restraint on the statutory issue was not inconsistent with "boldness" in decision-making. As Arnold himself said, a judge should not be bold in the sense of making law or imposing preferences but should decide a case in a way the law permits or requires, regardless of public opinion. He interpreted the statute in a way

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56. *Id.* at 22.

57. Dodson v. Ark. Activities Ass'n, 468 F. Supp. 394, 396 n.1 (E.D. Ark. 1979).

58. *See generally* Diane Heckman, *Women and Athletics: A Twenty-Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992) (recounting history of judicial interpretation of Title IX).

59. 441 U.S. 677, 717 (1979).

60. 465 U.S. 555 (1984).

61. Pub. L. 100-259 (codified at 20 U.S.C. § 1687 (2000)).

62. *See* Heckman, *supra* note 58, at 32–33.

he intended to be respectful of Congress, and in *Grove City College* six Justices of the Supreme Court agreed with him. In any event, since the *Grove City College* decision, the "greatest progress in achieving female representation in athletics" has been under Title IX,[63] not the Equal Protection Clause.

Judge Arnold's "boldness" of decision was not the statutory interpretation issue but the constitutional right. As a circuit judge, Arnold reflected upon the constitutional decision-making process.[64] That process, he said, involves several steps. First, and most importantly, a judge looks to the words of the Constitution.[65] Second, to the extent those words are not clear, a judge should try to ascertain the intent behind the document, either from historical research or reasonable inferences from the structure.[66] Third, judges look to precedent, and for lower-court judges the United States Supreme Court's precedent is decisive.[67] But the really difficult cases, he said, are those that are not answered by any of the above, and in those cases, the greatest danger lies in the influence of a judge's own personal preferences.[68]

Solving these kinds of constitutional law questions, as Arnold seems to have done in *Dodson*, requires a judge to avoid putting personal preferences into law. For Arnold, he would of necessity:

> [C]ome to it with, I guess, some feeling about American history, [and] some presumption about personal liberty. . . . Now that doesn't mean that other people can't come to it with different but equally legitimate presumptions, but it does mean that in a case like this personal philosophy, which I hope is a little bit different from mere personal preference, comes into play.[69]

A judge should bring to constitutional decisions "the best knowledge you can get of American history and tradition, your sense of our system, your sense of the American ideal of worth of the individual."[70]

Judge Arnold believed that "boldness," consistent with conservative judicial behavior of which Judge Arnold approved, consisted of five points:

1. Be confined by precedent;
2. Insist that jurisdiction not be exercised unless you are sure that you have it. This is especially true of the federal courts, which are courts of limited jurisdiction;

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63. Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1111 (1998).

64. *See, e.g.*, Arnold, *supra* note 47, at 2.

65. *Id.* at 3.

66. *Id.* at 4–5.

67. *Id.* at 5.

68. *Id.* at 5–6.

69. *Id.* at 7.

70. Arnold, *supra* note 47, at 8.

3. Decide points only when properly preserved in the record and properly argued by the lawyers;
4. Decide only what is necessary to the case; and
5. Avoid constitutional questions whenever you can.[71]

Judge Arnold's notes of the *Dodson* case reveal that he carefully considered the determinations in other jurisdictions that the equal protection claim in the rules of girls basketball presented, at best, a de minimis injury. He also considered, but rejected, the Oklahoma district court's argument that the equal protection claim in this context was not worthy of recognition because it did not implicate a fundamental right such as free speech or the right to vote. Arnold's opinion in *Dodson* dealt with constitutional uncertainty in a decisive way.

C. "We ought to be mindful that every time somebody appears in court, that person is part of that body of 'the governed' on whose continued consent our power depends. . . . I'm suggesting that it's also desirable that we be deferential and respectful towards other people even when we are rejecting or disagreeing with what they have done or said."[72]

Richard Arnold was widely known and lauded for his politeness and his enduring respect of persons. He showed the utmost respect for litigants and the lawyers who appeared before him. This was true in oral argument, in dealings with staff and law clerks, and even (or especially) in chance meetings with strangers in public. It was also true of his approach to writing judicial opinions. Arnold knew that the losing side would not like the result. His opinions would be written clearly and simply, so that the losing litigant might at least understand the reason for losing. Arnold did not avoid painful truths, but he never demeaned any person in a judicial opinion. We have all seen examples of judicial opinions that ridicule or rail against lawyers or litigants, or try to show cleverness at someone's expense, but Judge Arnold would never approve.

This sentiment is related to Judge Arnold's admonition that there was "no such thing as a small case." In *Dodson*, Arnold never trivialized the claim of a fourteen-year-old girl. Henry Morgan recalled a conversation with Arnold some years after the case: "He remembered who I was. I talked to him about that 'silly' basketball case, thinking he might not remember. He said, 'Oh I remember that case, and it was not silly. It was my first case. Sports is very important in America.'"[73] Arnold himself later told the *Arkansas Democrat-Gazette*,

71. *Id.* at 9–10.
72. Arnold, *supra* note 48, at 314–15.
73. Telephone interview with Henry Morgan, *supra* note 452.

> [*Dodson*] was an important case to people interested in basketball, which includes everyone. I've had people come up to me and say you shouldn't be involved in anything that trivial. Basketball is not trivial. And it isn't trivial that the girls were being made to play an inferior form of the game either. Aside from other things, it put them at a disadvantage in getting scholarships. So that was important. Women's basketball is growing and a lot more people are interested in it.[74]

Other courts had trivialized the claim that half-court rules for girls' basketball violated equal protection. The Sixth Circuit, for instance, had written that the plaintiff "has succeeded in procuring the order of a federal court which imposes her own personal notions as to how the game of basketball should be played . . . ."[75] Further, the court stated,

> [I]t must be apparent that its basis is the distinct differences in physical characteristics and capabilities between the sexes and that the differences are reflected in the sport of basketball by how the game itself is played. . . . Since there are such differences in physical characteristics and capabilities, we see no reason why the rules governing play cannot be tailored to accommodate them without running afoul of the Equal Protection Clause.[76]

Similarly, the Oklahoma district court wrote,

> Much of the rest of plaintiff's allegations of injury, e. g., learning unusable skills and being denied the opportunity to plan strategy, could be measurably remedied simply by changing her position from guard to forward. This is clearly not within the scope of the purpose of the federal judiciary and does not merit the attention of the Court. It is sufficient to say that the Court will not recognize a violation of constitutional rights when based upon an athlete's assigned position on a team or when an athlete disagrees with his/her coach. . . . [P]laintiff's only real complaint is the denial of the pleasure and consequent physical development of the full court game of basketball. Surely this cannot rise to the deprivation of a constitutional right simply because it is the schools who are offering the basketball program. It is an elective activity, after all, and one which schools may or may not choose to offer.[77]

The language Judge Arnold chose for his opinion in *Dodson*, however, never demeaned the interest at stake, even though these other courts had

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74. Phyllis D. Brandon, *Richard Sheppard Arnold*, ARK. DEMOCRAT-GAZETTE, Mar. 23, 1997, at 1D.

75. Cape v. Tenn. Secondary Sch. Athletic Ass'n, 563 F.2d 793, 795 (1977).

76. *Id.*

77. Jones v. Okla. Secondary Sch. Activities Ass'n, 453 F. Supp. 150, 155, 56 (W.D. Okla. 1977).

done so. Consistent with Arnold's respect for people generally, he made an effort to understand interests he could not personally identify with. He carefully followed the testimony presented at the hearing, noting its details. Golf, not basketball, was his sport. Presumably he did not identify with the game of basketball, given that he once said of a legal standard articulated in a constitutional case, "If that's a legal test, I'm a basketball player."[78]

I believe that the extreme care with which Richard Arnold treated claims under the Bill of Rights was related to his respect of persons. His courtesy to others and careful analysis of individual constitutional claims were symbiotic, even though he also frequently ruled against individual constitutional claims. *Dodson* is an example of Arnold's sensitivity to individual rights and his view of the Constitution as primarily a limitation on government.

IV. A PERSONAL REMINISCENCE

My first job after law school was as a law clerk for Judge Richard Arnold in Little Rock, Arkansas. The experience for a newly minted lawyer and the intellectual challenge of the job were un-matched. But more mundane circumstances were ideal, too. The chambers were only one block from what was then the downtown Little Rock YMCA, an ancient building with an echoing basketball court on the top floor. At noon daily, pick-up basketball teams engaged in spirited, if not particularly talented, competition. The participants included not a few lawyers, and except for me in those games, all men. The games otherwise resembled traditional basketball at its finest. It was full court, five players per team, running the full length of the court. I thoroughly enjoyed the exercise and camaraderie, especially since I felt as though I could hold my own.

When I first learned to play basketball in Russellville, Arkansas, however, girls still played under half-court rules. (The center-court line was the edge of an abyss. If one crossed that line, a whistle blew, play was stopped, and the other team took possession of the ball.) My junior high career culminated in a district championship for the Gardner Junior High Whirlwinds. At the end of the season, our coach told us that to prepare for high school basketball, we needed to learn a different game. All girls' basketball games in Arkansas would henceforth be played according to the boys' rules. I believe it was my first real encounter with gender equity in action.

Not particularly aware of civic affairs at that time, I did not think much about the reason for the change in rules. Many years later, at work in Judge Arnold's chambers, I came across an opinion he had written as a district court judge. The case, of course, was *Dodson*, and in it was a gem of a

78. Arnold, *supra* note 47, at 2.

"small case." It was then that I realized I had learned to play full-court basketball as a high school student because the judge for whom I was clerking had ordered that it be done. I searched for and found my first high school yearbook. The yearbook noted that the Russellville Cyclones girls' basketball team, of which I was a member, were district champions that year (1980). It also noted that we had played full-court basketball for the first time, the same as the boys' team. I showed the yearbook pages to Judge Arnold, and I told him about my former teammates who had gone on to win college scholarships to play basketball. These potential scholarships had been an important element of Diana Dodson's claim that playing under half-court rules disadvantaged Arkansas female athletes because all college women's teams played full-court basketball. I remember to this day when Judge Arnold later returned the yearbook. He did so with a smile and the words, "I guess I did some good."

I have reflected many times upon the case and its unfolding. I went on to play college basketball at Emory University, at St. Andrews University in Scotland, and briefly for the Scottish Universities national team. I still play and enjoy the game immensely. Limited though my abilities are—I am only 5'3" and slower by the year—I would not have played basketball as the world plays had it not been for the critical rule change before I entered high school.

I will end this rather lengthy personal digression with a brief assessment of the lasting jurisprudential effect of this "little case." Was *Dodson v. Arkansas Activities Association* influential outside of Arkansas? Yes, but not in other courts on the direct issue of girls' half-court basketball rules. Although a handful of courts have cited the *Dodson* opinion on related questions of gender discrimination in sports,[79] on the particular issue—the constitutionality of half-court basketball rules for girls—only three other states continued to play the game after the *Dodson* decision, and in all of those states the change came about through each state's athletic association rather than by court order. In Tennessee, where the Sixth Circuit had ruled half-court basketball rules did not violate the federal Constitution,[80] the Tennessee Secondary Schools Athletic Association nonetheless voted to change to the full-court game. Some schools in Oklahoma continued the half-court game through 1995.[81]

In Iowa, like Oklahoma, the state's athletic association voted to allow individual schools to choose between the two games, providing two separate

79. *See, e.g.*, Ridgeway v. Mon. High Sch. Ass'n, 633 F. Supp. 1564, 1580 (D. Mont. 1986), *aff'd*, 858 F.2d 579, 582 (9th Cir. 1988).

80. *Cape*, 563 F.2d at 794(1977).

81. Penny Soldan, *Records Broken as Curtain Falls on 6-on-6 Basketball*, THE DAILY OKLAHOMAN, June 4, 1995, *available at* 1995 WL 6291219.

state competitions.[82] But Judge Arnold's opinion seems to have influenced the outcome in Iowa. The Iowa Girls High School Athletic Union voted to allow full-court competition only after three players sued in 1984. The lawsuit was based on *Dodson's* premise—that female students were not able to compete for scholarships on the same terms as male players. United States District Judge Donald O'Brien rejected the defendants' motion to dismiss and scheduled the lawsuit for trial.[83] The Iowa association decided to settle the case, rather than proceed to trial, by voting to allow its members to play full court if they wished. Judge Arnold was then sitting on the Eighth Circuit, of which Iowa is a member, no doubt giving the *Dodson* precedent added weight.

More than a dozen journal articles[84] also mention Judge Arnold's opinion in *Dodson*, including one that portrays *Dodson* as among the "revolutionary" decisions interpreting the Equal Protection Clause of the Fourteenth Amendment to mandate equal athletic opportunities for high school females.[85] One judge's decision, then, can have a far-reaching effect in ways measured other than by the number of subsequent court citations.

No judge can or should be summed up in a single case. Any assessment of Richard Arnold's judicial philosophy and contributions is made difficult by the sheer volume of written opinions bearing his name from his twenty-five years on the federal bench. Further, how a particular judge influenced the course of the law probably best reveals itself only with the passage of time—the endurance value of a judge's work. Nonetheless, it is already clear that Judge Arnold's decisions involving individual constitutional rights are among his most important contributions and should withstand the test of time. These opinions exhibit a lucidity and purpose apparent from his

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82. *See* Chuck Schoffner, *6-Player Basketball Strong in Two States*, HOUSTON CHRONICLE, Aug. 19, 1990, *available at* 1990 WL 2953844 (stating that Iowa permitted full-court basketball in 1984; Oklahoma did the same in 1987). The half-court game was voted out of existence entirely in Iowa schools in 1993. *6-Player Basketball Voted Out in Iowa*, THE OMAHA WORLD-HERALD, Feb. 4, 1993, *available at* 1993 WL 7176143.

83. *Dismissal Motion Denied: Judge Decides to Hear 6-Girl Basketball Suit*, THE OMAHA WORLD-HERALD, Apr. 27, 1984, *available at* 1984 WL 2516596.

84. *See, e.g.*, Neena K. Chaudhry & Marcia D. Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Association*, 13 UCLA WOMEN'S L.J. 1, 41 (2003); Patricia A. Cain, *Women, Race, and Sports: Life Before Title IX*, 4 J. GENDER RACE & JUST. 337, 350 (2001); Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. L. REV. 63, 77 (1997); Heckman, *supra* note 58; Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 348 (1988); *see generally* Janet Junttila Johnson, Comment, *Half-Court Girls' Basketball Rules: An Application of the Equal Protection Clause and Title IX*, 65 IOWA L. REV. 766 (1980).

85. Arline F. Schubert, George W. Schubert, & Cheryl L. Schubert-Madsen, *Changes Influenced by Litigation in Women's Intercollegiate Athletics*, 1 SETON HALL J. SPORT L. 237, 244–45 (1991).

first days as a district court judge, even if *Dodson* was not one of the "great constitutional questions" with which federal courts must often grapple.[86]

The role of judges in the United States political system, and how judges should decide cases, were topics Richard Arnold often reflected upon in public speeches and published articles. He had much to say on this subject, only a small portion of which I have recounted here. Certainly we all improve in our chosen vocations with experience, but one is hard pressed to suggest how Judge Arnold might have improved his method, at least on these issues, from the outset of his judicial career. He seemed primed for the job from the first day. *Dodson* reflects Judge Arnold's commitment to a particular view of the role of federal judges in our system of government and the worth of the individual. This early case reveals a judicial philosophy consistently apparent in his subsequent career.

86. Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 291 (1997).