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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.

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JUDGE ARNOLD’S FOUR RULES: A MODEL FOR A LIFE IN THE LAW

Sean Unger*

I. THIS IS A DAUNTING TASK

Judge Arnold used to tell his law clerks that a good opinion explains to the loser why he lost. A good opinion uses plain language. It uses short sentences. It applies the law. By analogy, my task in this tribute is to explain my love for the Judge in terms understandable to my intended audience—lawyers and law students. It should be fair, and it should tell you things you do not already know.

My task is to explain why the law should remember the Judge and how we, as a community of lawyers, can honor him. My task is to share with you my reflection on a wonderful human being and a wonderful judge. My task is to share with you how being a wonderful person helps make one a wonderful judge. This may sound like puffery, but I assure you it is not. All who knew the Judge will attest that he was a brilliant man and an exceptional jurist. But, I suspect, they will not tell you he was a great judge because he was brilliant. His brilliance only tells part of the story. His compassion, his concern, his common sense, and his commitment to a conception of fairness are equally important parts of the story.

Another of the Judge’s law clerks has described him as the Learned Hand of his generation: the greatest Judge never to serve on the Supreme Court.¹ I think that is probably right. A lawyer going toe-to-toe with the Judge on some technical, legal point was likely to lose. The Judge could see the law both globally and as applied to a specific case. But, to the degree that the analogy is limited to Judge Hand’s legal brilliance, I think Judge Arnold was more than that. We need a better analogy, and perhaps there is not one.

So how do I do this? I would like to suggest a thesis. It may be a bit far afield, and it may be overly influenced by the awe with which I revere him,

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¹ Richard S. Arnold: U.S. Appeals Court Judge, ST. LOUIS POST-DISPATCH, Sept. 26, 2004, at C13 (citing former law clerk and Emory University law professor Polly Price as stating that Judge Arnold “will be remembered as ‘perhaps the best judge never to serve on the Supreme Court’”).
but I think it has some merit. My thesis is the following: the Judge lived the law. Simplistic, I grant you, and I do not mean it in a trite way. It is easy to say that he lived the law. He was a judge, and what he said, if he convinced others, went. But, that is not what I mean. What I mean to suggest is that the Judge seemed to structure his life around certain maxims. These maxims carried over to his jurisprudence and are instructive to all lawyers. I would like to suggest four: (1) follow rules, (2) think, (3) be respectful and have dignity, and (4) know what the law is. I will take each in turn.

A. Follow Rules

The Judge was a modern, Southern gentleman. What do I mean by that? I mean he lived his life by a certain code. He wore three-piece suits and a bow tie. He stood to meet new people. He was a deeply religious man, and he prayed every day. There was structure in all parts of his life. He always used the same pen. He always drank out of a glass, never out of the can. When he went to St. Louis for court, he always used the same cab driver, Marvin.

For law clerks, this code, this adherence to structure, was most noticeable in his writing. I suspect the Judge explained the unit-modifier rule to every law clerk at one time or another.\(^2\) *Ibid.* is short for the latin, *ibidem,* and thus a "." at the end is a must. Same with *id*.\(^3\) Commas were not to be spared but used appropriately. He once told me that I had a "pathetic fallacy" in one of my sentences. Thinking I was surely fired, he reassured me, explaining that it was a common mistake, but that a good writer "minds his modifiers."\(^4\)

His life was a life of rules, and rules were meant to be followed. Judge Arnold’s judicial philosophy was no different. Although he wrote lots of opinions, perhaps the one that caused the most uproar in legal circles is *Anastasoff v. United States.*\(^5\) In it, the Eighth Circuit held that unpublished

\(^2\) The unit-modifier rule is a rule of grammar. It holds that when an adjective modifies a noun, which itself modifies an immediately subsequent noun, a hyphen is needed between the first noun and the adjective. For example—*The District Court heard the summary judgment motion*—is incorrect. It should read: *The District Court heard the summary-judgment motion*.

\(^3\) It should be noted, however, that *id.* is short for *idem* instead of *ibidiem*. In legal jargon, *id.* refers to the immediately previous source. *Ibid.* refers to same source, same page.

\(^4\) According to Judge Arnold, a writer commits a pathetic fallacy when he gives human characteristics to a noun wholly incapable of having that characteristic. Thus, my sentence—*I hope you find my changes amenable*—was incorrect. Changes cannot be amenable. It should have read: *I hope you are amenable to my changes.*

opinions had, as a matter of Constitutional law, precedential value. He wrote the following:

Inherent in every judicial decision is a declaration and interpretation of a general principle or a rule of law. Marbury v. Madison, 5 U.S. 137 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); Cohens v. Virginia, 6 Wheat. 264 (1821).6

Regardless of what one thinks of the opinion (and I, for one, think it was correct), there is value in the message. Implicit in the holding is Judge Arnold’s conception of the judicial role. A judge follows rules. He is part of the continuum of the law: both beholden to it and generative of it.7 One need look no further than the cases he cites to understand his approach. A case from 200 years ago is as valid today as a case from ten years ago. That is the point. Judges, especially judges of the inferior courts, follow rules. They should. In an article he wrote before Anastasoff, he argued:

Article III of the Constitution of the United States vests “judicial power” in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. We can exercise no power that is not “judicial.” That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called “judicial”? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions?8

Judges, to Judge Arnold, have a job to do. It is simple. “The job of a judge is to decide cases . . . .”9 It is not abstract. Judges decide cases, and they do it in a particular way. They apply law to fact. In his words:

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7. Richard S. Arnold, Mr. Justice Blackmun: A Tribute, 28 CREIGHTON L. REV. 589, 589 (1995) (“Still less should individual judges change their own minds about legal propositions. Once your judicial mind is made up, you should stay hitched. Precedents should not be like railroad tickets, good for one day and one train only.”).
Courts ... are not, or should not be, simple expressions of human will. We’re supposed to make our decisions by reference to something, other than our own personal opinions, by reference to the law, reason, the facts, concepts like that. This is so basic that I’m almost embarrassed to say it, but many members of the public seem to feel that judges are just politicians in another guise. Sometimes some of us are, but we should not be. We should decide cases on the basis of the law and the facts in the record, and on no other basis. And when we do decide our case, it’s our duty to explain the decision in an opinion. We depend on the consent of the governed, just as the other branches do. If we make decisions affecting people’s lives and don’t explain them adequately, we are in trouble.10

Why is this important? As most of the readers of this essay know, there is a continuous conversation within legal circles about the appropriate role of judges. The buzz word is “activism.” Some authors use “judicial activism” or “judicial activist” almost synonymously with choice four-letter words.11 But where does that get us? Nowhere. It is a trap. One side says “You are.” The other side says “I am not.” Ultimately, the discussion descends into a third-grade brawl where the winner is the kid who hits the hardest and spits the farthest. Unless used in a political election, though, victory in a name-calling battle is ephemeral, not convincing, and ultimately unsatisfying. Is there a way out? I think there is, and as I interpret it, Judge Arnold’s point gives us the way.

It starts with his baseline: judges should decide cases based on the law and the facts. If they do, and the People accept that they do, there cannot be an “activism” debate. Now, that won’t end disagreement—lawyers are trained to disagree—but, it will be disagreement of a different, particular,
and elevated type. It will be an argument about reasoning, about deduction, and ultimately about logic.  

Is it really that easy? Probably not, but it certainly is a starting point. How do we get there? We elevate integrity as a virtue. Judge Arnold was a man of unquestioned integrity. When the Judge rendered an opinion, be it for the majority or in dissent, everyone knew that he believed what he said was correct under the law. It was not the end he wanted. It was what he thought the law required. He never deviated from that code. And, perhaps most importantly, informed litigants knew it. Even the loser walked away knowing that Judge Arnold looked at the facts and applied the law. 

B. Think

The Judge was a man of remarkable faith and forgiveness. I never heard him say a negative comment about any one. The closest he came was after reading a particularly poorly written brief he said: “I don’t understand

12. Judge Arnold did overrule precedent. See, e.g., Robbins v. Prosser’s Moving and Storage Co., 700 F.2d 433 (8th Cir. 1983) (en banc) (overruling three cases). Overruling precedent had to be done in the right circumstances though—when the law changed or in an en banc setting—and only when reason dictated the change. See, e.g., Brown v. First Nat. Bank in Lenox, 844 F.2d 580, 582 (8th Cir. 1988) (stating that “one panel of this Court is not at liberty to overrule an opinion filed by another panel. Only the Court en banc may take such a step . . . and we have no alternative but to affirm this judgment.”); cf. Arnold, supra note 7 at 589 (“So, it takes a big person, a big judge, to admit that a mistake has occurred. From time to time, good judges are forced to do this, and this is one of the characteristics that made Justice Blackmun a great judge. When convinced that he has erred, he admits it, and he carefully explains to his constituency—the public—the reasons that have led him to take a new position.”).

13. See, e.g., Pasco M. Bowman, Tribute to the Honorable Richard S. Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit, 1 J. APP. PRAC. & PROCESS 188, 188 (1999) (“[H]is tact, courtesy, good judgment, and respect for others, as well as his unflagging attention to the business of judicial administration, have set the standard for all his successors as chief judge.”).

14. My goal here is not to suggest that the Judge was unique among federal Judges in his virtue. What set the Judge apart is the degree to which his virtue was transparent. To meet the Judge was to understand integrity. In this day of unfounded attacks on the judiciary, it is our duty, as a community of lawyers, to respond and to respond vigorously. The easiest way to do this, it seems to me, is to invite comparison and to educate the People on who the judiciary is and what it does. It is axiomatic in our society that the legitimacy of the law is dependent on the consent of those who are bound by its enforcement. In the face of a baseless attack on the law’s legitimacy, it is our duty to show our heroes. It is our duty to let the People know of Judge Arnold.

15. Judge Arnold’s wife, Kay Kelley Arnold, has been quoted as describing the Judge as “the man who is always the last to judge and the first to forgive.” Gilbert S. Merritt, Tribute to the Honorable Richard S. Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit, 1 J. APP. PRAC. & PROCESS 191, 194 (1999).
how this poor lawyer makes a living. He is a very nice man, but his cases always lose." It was the case, and not the lawyer, that was bad.

The Judge’s faith was something of interest to me. I was born into a mixed-faith home. My mother is Episcopalian, and my father is Jewish. I have been both connected and disconnected from my faith. Not so with the Judge. His faith in God and in prayer was an everyday thing. While I was clerking, I read Chaim Potok’s The Chosen, a wonderfully thought-provoking book. One of its central questions deals with the interplay between faith and science and asks whether the two can comfortably co-exist. The book made me want to ask the Judge a question. I wanted to know if he ever found that being a lawyer made it difficult for him to be a man of faith. Did his reason get in the way of his faith? His answer revealed much about him as a person and as a judge. He said no. His faith and his reason were never in tension. As a man of faith, he accepted certain things as true, unquestionably. God exists. But, he also believed that God had given him reason for a purpose. Reason helped him understand his faith. Prayer for him was a thinking process. He attempted to understand and apply the commitments of his faith.

Now, I suspect most readers of this essay are a bit surprised by my discussion of the Judge’s faith. Do not be. To truly know the Judge, you have to know that he was a man of intense faith. The point I want to make, however, is something different. I want to call your attention to the Judge’s belief in reason. The Judge’s faith in reason, and his use of reason in his faith, was emblematic of his approach to all things. He genuinely believed that all legal questions were answerable with enough thought. He once called us into his office to discuss cases. I forgot how we got on the subject, but he told us: “Thinking is hard, but we don’t do it enough. The job of a lawyer is to slow down and think.”

How did this work in practice? I want to give you an example. When the Law Review first asked me to write this essay, I initially thought I wanted to write about the Judge’s Fourth Amendment, criminal-procedure jurisprudence. The Judge has a reputation as being a brilliant First Amendment scholar, and I wanted to chronicle how his legal brilliance carried over to all areas of the law. To that end, I read all of the opinions he authored

16. The Judge was also a strong advocate for the Establishment Clause. See, e.g., ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1042–43 (8th Cir. 2004) (Arnold, J., concurring in part and concurring in the judgment).

17. See, e.g., Richard W. Garnett, A Tribute to the Honorable Richard S. Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit, 13 APP. PRAC. & PROCESS 204 (1999). Ironically, while Anastasoff likely sparked the most debate, Judge Arnold’s opinion that likely sparked the most criticism was a First Amendment case, United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983), rev’d sub nom. Roberts v. United States Jaycees, 468 U.S. 609 (1984); see, e.g., Patricia M. Wald, Judge Arnold and
where the Fourth Amendment was a central issue and many of the dissents. Two things struck me from the research. First, I was surprised at how consistent the Judge was in his reasoning. Second, I was surprised by how he reasoned—what drove his inferences.

As all first-year law-school students know, Fourth Amendment, criminal-procedure jurisprudence is really about balance. On one hand, the Fourth Amendment is one of the clearest individual rights in the Constitution. Individual Rights, 78 MINN. L. REV. 35, 56 (1993) ("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."). The question presented by Jaycees was the forced inclusion of women in its membership. Jaycees, 709 F.2d at 1561. In Jaycees, Judge Arnold wrote: The regulation at issue here, though not overtly related to the content of what the Jaycees are saying, nevertheless has the potential of changing that content, because it purports to specify, in one respect at least, the identity of those who may be Jaycees, and who therefore determine the content of what Jaycees say. Speech and advocacy are not the only things Jaycees do, but they are a significant part of it.

Id. at 1576. Say what you will about the opinion and the position it takes, but note that subsequent law has clarified the error in Judge Arnold's reasoning. Judge Arnold was not wrong on the law. He was wrong on the facts. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 657-658 (2000) ("In Roberts, we said '[i]ndeed, the Jaycees has failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association."). It is hard to understand how Judge Arnold could have been wrong on the facts, and there is a fairly compelling argument that the Supreme Court in Dale reversed, in principle, what it did in Roberts. See, e.g., Noah Feldman, The Theorist's Constitution—And Ours, 117 HARV. L. REV. 1163, 1180-81 (2004); Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 COLUM. L. REV. 274, 297-98 (2001). Having said all that, an argument can be marshaled that Dale was wrongly decided. See Jed Rubenfield, The Anti-Discrimination Agenda, 111 YALE L. J. 1141, 1158 (2002). Having gotten into a nuanced discussion, I want you to note what has happened. The argument has shifted from an individual, Judge Arnold, being wrong to an argument about what the First Amendment means. That, my friends, is what law is supposed to be about: reasoned discussion and disagreement about ideas. Somewhere Judge Arnold is smiling.

18. See, e.g., William J. Stuntz, Local Policing After the Terror, 111 YALE L.J. 2137, 2144 (2002) ("[T]he tendency is to think that rights like those contained in the Fourth and Fifth Amendments should not change in response to events like those of September 11, 2001. That tendency is wrong. It is also futile: The scope of these rights is, has been, and will be responsive to change in context. It follows that the productive move for those who value civil liberties is not to resist change, but to strive to produce good change instead of bad."); see also Jeffrey Rosen, The Purposes of Privacy: A Response, 89 GEO. L.J. 2117, 2135 (2001) ("I endorse the idea of a statute that might allow judges, grand juries, or magistrates to balance the seriousness of the offense against the intrusiveness of the search (and, perhaps, the importance of the relationship being invaded) in deciding whether or not a particular subpoena violates the Fourth Amendment.").

19. United States v. Mar James, 353 F.3d 606, 612-13 (8th Cir. 2003) ("The Warrant Clause is not a technicality. It is a basic protection of a citizen's right of private property. To endorse the detectives' disregard for the Amendment would be to grant a broad power to law
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.20

On the other hand, crimes happen. To catch criminals, the police need some flexibility, and mind you, when we talk about catching criminals, there is some element of victim vindication at stake.21 So, reconciling those conflicting ends is important—one of the most important things judges do. In that process, the starting point is often outcome determinative.

The facts from most Fourth Amendment, criminal cases do not generate a lot of sympathy for the aggrieved party. The right asserter was normally found guilty of a crime, but was captured by suspect means or prosecuted with evidence that the State questionably acquired.22 If you start from the belief that the defendant is guilty, his individual Fourth Amendment rights seem less important. He did the crime; he should do the time. The problem with that position, as we all know, is that the rule creates no incentive to honor the rights of the innocent. If the police can do anything while investigating, is there any substance to the right? Freedom comes at a cost, and one of those costs is, in certain circumstances, letting the guilty go free to protect the rights of the innocent. It is from this protectionist-position that Judge Arnold approached all of his Fourth Amendment cases. In United States v. Little,23 a case about the expectation of privacy on a private plane, he wrote:

Obviously the word “legitimate” in the phrase “legitimate expectation of privacy” is being used in a special sense. An agreement to use an airplane to transport illegal drugs, and an undertaking to guard the plane to prevent detection, are by no means legitimate. The cases must be analyzed on the hypothesis that no illegal activity is occurring or contemplated. The illegality comes to light through only through execution of the warrant or court order whose validity is the very point at issue. Otherwise Fourth Amendment analysis would be pointless, because motions

enforcement going beyond the evils even of the infamous General Warrant.”) (emphasis added).

20. United States Const. amend. IV.


22. See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 910–18 (1991) (arguing that the unsympathetic nature of right asserters in Fourth Amendment cases leads judges to underenforce the Fourth Amendment).

23. 735 F.2d 1049 (8th Cir. 1984).
to suppress are never made in the first place unless evidence of criminality has been seized. So the ‘expectation’ that must be taken as predicate for analysis in this case is the expectation of any innocent person who has arranged with an owner or lessee to use an airplane.\(^{24}\)

Although we never talked about it directly, I am comfortable asserting that Judge Arnold was not insensitive to the needs of police officers. I think he knew the police had a tough job. It is one of a handful of jobs where an individual, acting alone, can violate the Constitution. Aside from putting their lives on the line every day, think about the pressure of having to go home and tell a loved one: “I violated the Constitution today.” The depth of the likely anxiety becomes clear when you recognize that there are hundreds of different scenarios a police officer can face. How do they know what to do in each situation?

I suspect, however, that police officers loved Judge Arnold. Yes, he was willing to punish them, even sustain civil damages against them.\(^{25}\) But, he was remarkably consistent.\(^{26}\) The police knew how to satisfy Judge Arnold’s rules. His approach was the same with each case. Although I do not know if he ever reduced it to a written rule, I would summarize Judge Arnold’s approach to Fourth Amendment cases as the following: police officers have to investigate before they act.\(^{27}\) The rights protected by the Fourth

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24. Id. at 1052.
25. See, e.g., Doran v. Eckold, 362 F.3d 1047 (8th Cir. 2004).
26. Professor Stuntz has recently argued that Fourth Amendment jurisprudence, by necessity, must be flexible. See generally Stuntz, supra note 18. The Fourth Amendment adapts to the necessity of the times. Id. I don’t think Judge Arnold necessarily would disagree with that proposition. See, e.g., United States v. Nunley, 873 F.2d 182 (8th Cir. 1989) (holding an airport, drug-search stop permissible, but starting from the proposition that “[t]he intrusiveness of the encounter must be judged from the perspective of an innocent person similarly confronted.”). The Judge, it should be recalled, grounded his Fourth Amendment jurisprudence in the belief that reason was the guiding light. Reason is context driven. See United States v. Hatten, 68 F.3d 257, 260 (8th Cir. 1995) (“The touchstone of the Fourth Amendment’s promise is ‘reasonableness,’ which generally—though not always—translates into a warrant requirement.”). Similarly, like Professor Stuntz, Judge Arnold was willing to tolerate some administrative searches under the Fourth Amendment. See, e.g., Rushton v. Neb. Pub. Power Dist., 844 F.2d 562, 566–67 (1988) (permitting random drug and alcohol testing of employees at a nuclear-power plant under the “administrative-search exception”). I do not think, however, the Judge ever deviated from his personal conviction that the Fourth Amendment required police to have a suspicion grounded in investigation, not mere speculation. See id. (permitting administrative searches in part because information is not shared with the police); see also United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (holding that an airport Terry stop was unconstitutional because the officers relied on the sort of “fragmentary facts” that the Supreme Court found to be invalid). Thus, while the Judge had some flexibility, that flexibility did not bend his core commitments.
27. I concede that this summary does not cover all Fourth Amendment, criminal-procedure cases, especially those dealing with consent issues or the plain-view doctrine. See, e.g., United States v. Hatten, 68 F.3d 257 (8th Cir. 1995) (holding that it is appropriate for
Amendment ensure that a police officer has to corroborate his hunches, he must be looking for individuals as individuals, and he must be operating on more than mere guess work. Two cases prove the point. Neither case is of great importance in terms of the development of the Fourth Amendment, but combined they reveal the Judge’s general approach.

In United States v. Boyd, the Judge wrote that an informant’s tip provided probable cause to support a search warrant. The police had received a tip from a known informant that drugs were being sold out of a particular house. The tip explained the manner of the sales, the time of the sales, and the type of drugs being sold. The police then conducted their own surveillance of the home and corroborated the tip.

In Thompson v. Reuting, the Judge, writing for the court, overturned a district court’s denial of a directed verdict on behalf of a plaintiff in a 42 U.S.C. § 1983 action. The question on appeal was whether the police officer could have had an objectively reasonable suspicion that the plaintiff was involved in a criminal activity sufficient to detain him. The relevant facts were as follows. The defendant officer received a dispatch call of a suspicious brown Chevy Nova at a certain intersection. It was dark when he received the tip. When he arrived at the intersection, there was only one Nova parked in the area. The vicinity was a low-traffic area, and one of the streets in the intersection led to a dead end. The officer was experienced, lived in the general vicinity, and knew it to be a high-crime area.

the police to look into a car window using a flashlight). I think my reduction speaks to the Judge’s larger approach. If I were to add qualifiers to my summary of the Judge’s approach, I would include this sub-rule: The police must have a right to be in the place where they conduct their search or execute their seizure. See, e.g., Radloff v. City of Oelwein, 380 F.3d 344 (8th Cir. 2004) (finding that probable cause and exigent circumstances existed for police officers to enter home and detain minors where police officers approached home where teenagers were having a party, and a police officer witnessed a person he knew to be a minor drinking a beer inside.); United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir. 1994) (holding that but for an independent cure, a consent to search would have been invalid as defendants should have been allowed to go); United States v. Duchi, 906 F.2d 1278 (8th Cir. 1990) (holding that there were no exigent circumstances to enter a home where the police had probable cause hours before the search and could have started the warrant process earlier in the day).

29. Id. at 64.
30. Id. at 65–66.
31. Id. at 66.
32. 968 F.2d 756 (8th Cir. 1992).
33. Id. at 759; see also Terry v. Ohio, 392 U.S. 1 (1968).
34. Thompson, 968 F.2d at 759.
35. Id.
36. Id.
37. Id.
38. Id.
When he approached the Nova, he could not tell the number of people in the car, their sex, or their race. 39 In overturning the district court, the Judge wrote:

Facts such as being in a high-crime area, in the dark, and unable to see the occupants of the car are very general and provide no information about the people in the Nova . . . [a] report that a particular car is 'suspicious' simply does not indicate whether its occupants may be engaged in criminal activity. 40

*Boyd* differs from *Thompson* in many ways, but I would like to discuss the key difference. The officers in *Boyd* corroborated the tip. They investigated before they searched. The officer in *Thompson* relied, almost wholly, on a hunch. Mind you, the hunch was correct. The plaintiff had an outstanding warrant for his arrest. But remember the starting point. Judge Arnold always assumed the defendant's innocence when deciding a Fourth Amendment challenge. For Judge Arnold, hunches were not enough to detain an innocent person.

Why? I suspect there were two reasons. Rights meant something to Judge Arnold. To have a right, there must be an entitlement, and it must be enforced. The Fourth Amendment at its core is a *process* right. 41 Yes, it protects privacy, the person and the home, but it also details how and when those rights can be invaded. 42 I suspect the Judge disliked hunches because they were informal. They involve very little process. If allowed to be operative, police work by hunches allows for essentially no oversight. It is police guesswork, and guesswork, although perhaps a critical part of police work, 43 cannot, standing alone, support a search or a seizure. Second, I think the Judge disliked hunches because they are easily abused. Not assigning mo-

39. *Id.*
40. *Thompson*, 968 F.2d at 759-60.
41. See Lewis Powell, Jr., *Justice Potter*, 95 HARV. L. REV. 1, 3 (1981) (quoting Justice Stewart's language for the Court in *Katz* v. *United States*, 389 U.S. 347 (1967)) ("that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions"). But see *Griswold* v. *Connecticut*, 381 U.S. 479, 481-85 (1965) (arguing that the penumbra of the Fourth Amendment supports a finding of a fundamental right of marital privacy).
42. As opposed to the First Amendment, which is absolute in tone: "Congress shall make no law . . . ." UNITED STATES CONST. amend. I.
43. Cf. Margaret Raymond, *Police Policing Police: Some Doubts*, 72 ST. JOHN'S L. REV. 1255, 1264 (1998) ("The judicial role could be further enhanced by reducing judicial deference to police expertise. That is not because police expertise does not exist; it does. But the basis for real expertise can and should be articulated."); Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1050 (1998) ("Like professionals or craftsmen in other areas, a trained officer with experience in a community can often sense something wrong, even where it cannot easily be articulated.").
tive, hunches allow for prejudice to creep in. They are fact ambivalent and circumstance intensive. The Judge deplored stereotyping, and hunches are in large part driven by stereotypes.\(^4\)

To the degree that *Boyd* and *Thompson* demonstrate the Judge's commitment to Fourth Amendment process rights, they indicate something larger about the Judge—his commitment to a text-heavy interpretation of the Constitution based on deductive reasoning. The mere language of the Fourth Amendment did not necessarily resolve either case. In *Boyd*, for example, the central question was the definition of probable cause.\(^4\) The Fourth Amendment says you can not get a warrant without probable cause, but what is probable cause? In *Thompson*, the court had to determine whether a police officer had an objectively reasonable suspicion.\(^6\) The Fourth Amendment does not, by its terms, provide the test. So how did Judge Arnold decide? By reason of a particular type. Just as he did with his faith, he did with the law. Judge Arnold did not look outside the text, but he certainly looked inside it. He looked at the meaning behind the words. He did not start from a pro-police or a pro-defendant disposition. He started with the Constitution and the available precedent, and he deduced the answers.

A raging debate is occurring in academia over the proper mode of legal interpretation. How should judges make the tough calls? There are some who believe that judges should apply their own moral values to the tough calls as long as they defend their positions.\(^4\) Others believe that the best moral values should apply,\(^4\) and still others who think that judges should

\(^4\) See, e.g., United States v. Weaver, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, J., dissenting):

Finally, a word about the reliance placed on Weaver’s race. This factor is repeated several times in the Court’s opinion. I am not prepared to say that it could never be relevant. If, for example, we had evidence that young blacks in Los Angeles were more prone to drug offenses than young whites, the fact that a young person is black might be of some significance, though even then it would be dangerous to give it much weight. I do not know of any such evidence. Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.


\(^6\) See, e.g., Christopher Eisgruber, *Constitutional Self-Govern ment* 135 (2001) (“Neither textual exegesis nor historical research can save judges from the need to make independent judgments in hard Constitutional cases. In cases that are genuinely difficult, the Constitutional text inevitably raises rather than answers them. . . . No judge, however, can produce a useful interpretation of American history without invoking her own, independent moral intuitions.”).

\(^4\) See, e.g., Ronald Dworkin, *Freedom's Law* 37–38 (1996) (“This book does indeed offer a liberal view of the Constitution. It provides arguments of liberal principle and claims that these provide the best interpretation of the Constitutional tradition we have inherited and whose trustees we now are. I believe, and try to show, that liberal opinion best fits our Con-
follow the popular demands of the people.\(^49\) I think the Judge had an answer to these varying camps. He described his interpretive philosophy as the following:

I regard myself as more of a "constitutionalist" or "legalist." In this regard, Justice Black is a model of mine. The job of judges, in most cases, is to ascertain and apply the will of other people, for example, the Framers of the Constitution or of a statute. In the case of the Constitution, of course, it's hardly ever possible to determine with certainty what the Framers intended about a particular question. So we lower-court judges are occupied mainly with applying precedent and, in default thereof, such scraps of history and tradition as we can lay our hands on.\(^50\)

While the Judge's description is revealing, I do not think that tells the whole of it. Our (meaning my co-clerk's and mine) year, the Judge had us read John Hart Ely's *Democracy and Distrust*, describing it as one of the top books on Constitutional Law he ever read. Professor Ely is somewhat critical of Justice Black's "total interpretation" jurisprudence.\(^51\)

So what to make of this? The Judge endorsing both Justice Black and Professor Ely?\(^52\) I think it is actually easy to reconcile. Professor Ely and Justice Black are not so different.\(^53\)

\(^{49}\) Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) ("And We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though the mechanism is not explicitly specified in Article V.").


\(^{51}\) See generally Chapter Two, *The Impossibility of Clause-Bound Interpretivism, in John Hart Ely, Democracy and Distrust: A Theory of Judicial Review* (1980). Ely argues that Justice Black's strict textual analysis left many questions unresolved. Ironically, Professor Ely's work has been similarly criticized. See Laurence H. Tribe, *The Ones I Feel Sorry For*, 117 HARV. L. REV. 1760, 1763 (2004) ("I consoled myself with the thought that John's greatest work—*Democracy and Distrust*—was curiously question-begging at its core. But I have long since come to appreciate that genius in the law consists in knowing just which questions to 'beg' and how to beg them in a way that frames the terms of discourse for generations to come.").

\(^{52}\) Judge Arnold was a fan of Justice Black's absolutism on the First Amendment.

\(^{53}\) See, e.g., Akhil Reed Amar, *Foreword: The Document and The Doctrine*, 114 HARV. L. REV. 26 (2000) ("Those in the first camp—call them documentarians—seek inspiration and discipline in the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document. I have in mind interpreters like Justice Hugo Black, Dean John Hart Ely, and Professor Steven Calabresi and Douglas Laycock.").
Professor Ely ultimately concludes that ambiguous Constitutional questions should be participation reinforcing. But what is that really? Professor Ely has picked a value, one found in the Constitution, and made that value an analytic motif. Judge Arnold, in contrast, reasoned from the text of the Constitution, like Justice Black, and deduced many Constitutional values. Once having deduced the values, he applied the values to the facts to resolve ambiguities. Thus, in his Fourth Amendment jurisprudence, he read in the Amendment’s text a process value and a respect for privacy. Faced with a Fourth Amendment question, he first looked to the prior precedent, and if that left the question unresolved, he reasoned through the authority, the Amendment’s text, and the Amendment’s values to resolve the dispute. Like Justice Black, he started with the text. Like Professor Ely, he believed that there were values implicit in the text and that those values, applied in context, were law. Transcending and embracing both, he ultimately believed in reasoning.

54. ELY, supra note 50, at 181 (“[T]he general theory is one that bounds judicial review under the Constitution’s open-ended provisions by insisting that it can appropriately concern itself only with the questions of participation, and not with the substantive merits of the political choice under attack.”).

55. A perfect example of Judge’s approach is his opinion for the court in Bissonette v. Haig, 776 F.2d 1384 (8th Cir.) aff’d 800 F.2d 812 (8th Cir. 1986). At stake was the question whether the use of the military at Wounded Knee was Constitutionally permissible. The Court held it was not. Id. at 1387. Judge Arnold reasoned for the court:

Usually, the interests arrayed against a seizure are those of the individual in privacy, freedom of movement, or, in the case of a seizure by deadly force, life. Here, however, the opposing interests are more societal and governmental than strictly individual in character. They concern the special threats to constitutional government inherent in military enforcement of civilian law. That these governmental interests should weigh in the Fourth Amendment balance is neither novel nor surprising.

Justice Breyer, in more abstract terms, has recently advocated a similar approach in a 2004 speech at Harvard stating:

But a general constitutional objective, such as that of self-government, plays an interpretive role well beyond the individual provisions that refer to it directly. Individual phrases make up a single document. The document embodies general purposes. And those purposes inform the interpretation of the phrases. By openly and clearly referring to general purposes, courts can help to create harmonious relationships among different individual provisions and among the several general constitutional purposes just mentioned.


56. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-12, at 37 (3d ed. 2000) (“But Justice Black’s fundamental insight matters most: insofar as Constitutional provisions are understood as written in a language of commitment—as statements that seem to stand as tests not simply of principle but of resolve—it will be the language of those Constitutional provisions themselves that will supply the terms to which we hold ourselves accountable.”).

57. I would be mistaken if I left you with the impression that the Judge never went
C. Be Respectful; Have Dignity

I suspect if there were a rule the Judge most wanted us to take away from our experience with him it would be this one: Be respectful and have dignity.

It is simple and yet remarkably profound. For the Judge, this was an unspoken mantra. It penetrated every aspect of his life and our jobs. Chambers etiquette is but a small example. A clerk or secretary who answered the phone finding an unrecognized voice on the line was never to ask who was calling. If a person called and asked for the Judge, he was to be put through. There was a simple lesson behind this that was immensely important to the Judge. He was a servant of the combined citizenry. Individually and collectively, they were all his boss. If a citizen called, he was not to be made to feel small by lack of recognition. The person was to be called “sir” or “ma’am” and, to the best of our abilities, have their needs met.

In his personal comments to us, when, after much belaboring and prodding, we got him to tell us “war stories” about his time clerking and his experiences in the law, what struck us (well, at least me) was what was important to him. The Judge had perhaps the greatest memory of any person I have known. Outside the Constitution in deciding Constitutional questions. He did, but only when instructed to by the text of the Constitution:

The Fourth Amendment (we begin, necessarily, with its words) forbids “unreasonable” searches and seizures. The word “unreasonable” implies that the propriety of a search or a seizure is to be judged against a background or matrix of societal expectations and assumptions. Some reference must be made to a source outside the Fourth Amendment itself to determine, for example, whether an expectation of privacy is unreasonable and therefore deserving of constitutional protection.

See Bissonnette, 776 F.2d at 814.

58. I have a revealing anecdote. I do not know if the Judge ever knew it, but I played a game with him. The Eighth Circuit is known for staying on top of its work. Around Christmas, the efficiency led to some down time. We had a week lull in between when we finished the previous month’s work and when the next round of briefs were to arrive. I filled the time by reading old Supreme Court cases. Noah Feldman had written an interesting book review discussing political theory and Constitutional interpretation, and I got interested. One of the cases I read was Texas v. White, 74 U.S. 700 (1868), a fascinating little case addressing the status of the rebelling states when they rebelled. The opinion reads more like political theory than it does like a typical legal opinion. At any rate, I was reading, and the Judge walked by. He asked what I was reading, and I told him. He then explained the case to me and went on to cite from memory the “money-line” of the opinion: “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” Id. at 725. Needless to say, I was pretty impressed—but skeptical. Maybe it was a fluke? The next day I picked an even more obscure case, The Dos Hermanos, 15 U.S. 76 (1817) which is a maritime case involving, in part, the question of reintegrated citizenship. I had it all set up so that when he walked by we could reproduce the conversation from the day before. Now, the Judge, even when healthy, did not walk briskly. He shuffled at a contemplative pace. In Little Rock’s
Court Justices and brilliant legal scholars or how statutes changed over time. He could probably quote the old and new language from memory. But that is not what he chose to tell. He always recalled the personal characteristics of individuals, and he shared only the positive ones. When given the opportunity to write about Justice Blackmun, for example, what he chose to record was that "the Justice [was] unfailingly considerate." He wanted memorialized his belief that "the Justice has integrity, perhaps the most important quality of a judge or public servant. His word is good." This was indicative of the Judge. People were to be respected and their goodness remembered.

His respect for humanity carried over to his jurisprudence. All cases were important to the Judge, big or small. He had a special fondness for technical areas of the law, like bankruptcy. Regardless of the type of case, however, all got equal effort. That is not to say that all got equal work. Lots

federal courthouse (now named in Judge Arnold's honor), his shuffle combined with the echo-chamber-like hallways created a distinctive sound. You knew it was him walking down the hall. So, he walked in, asked what I was reading, and then again explained the case's central holding. At that point, I was impressed. I wondered: is it just cases? I had read a case earlier that had cited to Thomas Reed Powell's article Conscience and the Constitution. It sounded interesting, and I had the University of Arkansas at Little Rock law library send it over. The next day, I was reading when the Judge came in. He asked what I was reading, and thankfully he did not know it. He explained that Professor Powell had taught at Harvard before he attended but that his father had known him. I asked if he knew anything about the Professor. He went on to explain, in detail, Professor Powell's public-unity theory, which, of course, was the topic of the article. Even when he didn't know, he knew!

59. The Judge loved to talk about the law, but he did so typically in response to a question, an invitation, or in the context of discussing a case.


61. Id. at 9.

62. This was not an isolated example. I recall the Judge telling me that he always wrote tributes when asked. Just the published ones include: In Memoriam: Harry A. Blackmun, 113 Harv. L. Rev. 10 (1999); Dedication to Judge Donald J. Porter, 43 S.D. L. Rev. 2 (1998); Phillip S. Anderson—A Tribute, 33 The Arkansas Lawyer 8 (1998); In Memoriam: William J. Brennan, Jr., 111 Harv. L. Rev. 5 (1997); Tribute to Judge Theodore McMillian, 52 Wash. U. J. Urb. & Contemp. L. Rev. 23 (1997); William J. Brennan, Jr. in The Warren Court: A Retrospective 204 (Bernard Schwartz ed., 1996); Mr. Justice Blackmun—A Tribute, 28 Creighton L. Rev. 589 (1995); Mr. Justice Blackmun: A Reminiscence, 71 N.D. L. Rev. 3 (1995); L. Ralph Mecham: A Tribute, 44 Am. U.L. Rev. 1479 (1995); Justice Harry A. Blackmun: Some Personal Notes, 43 Am. U.L. Rev. 699 (1994); A Tribute to Harry A. Blackmun, 108 Harv. L. Rev. 6 (1994); A Tribute to Judge Donald P. Lay, 18 Wm. Mitchell L. Rev. 561 (1992); A Remembrance: Mr. Justice Brennan October Term 1960, J. Sup. Ct. Hist. 5 (1991); Mr. Justice Brennan—An Appreciation, 26 Harv. C.R.–C.L. L. Rev. 7 (1991); Mr. Justice Blackmun: An Appreciation, 8 Hameline L. Rev. 20 (1985). He said it was an important thing to do. Law is about memory and logic, but it is also about people.

63. See, e.g., In re O'Brien, 351 F.3d 832 (8th Cir. 2003); In re Kujawa, 270 F.3d 578 (8th Cir. 2001).
of frivolous appeals get filed, and some are easily dispensed with, but that is not the point. In the Judge’s words:

The point is this: when I pick up the next apparently inconsequential case, and I assure you that most of the cases that I pick up are apparently inconsequential, I will try to think of Justice Brennan and Mr. Michalic and remember that there are no little cases. An individual’s lawsuit, although it does not raise constitutional issues, may be the most important thing in that person’s life. It’s not only my duty as a judge, but my privilege as a holder of the public trust to take up that case as it comes and do the very best job I can with it. If big constitutional issues come, and that happens occasionally, we try to step up to the plate and decide them. But for the most part, our daily task is to decide cases that never make the headlines in anybody’s newspaper. In doing that, we must never forget that we’re dealing with more than legal abstractions. We are deciding real disputes that matter to people.64

Dignity was of utmost importance to the Judge, both personally and externally. As a judge, he felt it was his duty to respect the dignity intrinsic in the very humanity of the people who came before him. While the Judge was certainly cognizant that, in the end, his job was resolving disputes, he did not use a means-ends rationality to allow him to see litigants as mere cogs. A person’s dignity was to be respected.65 Litigants were people who wanted, and in many cases needed, to be heard. The least he could do was listen.

In honoring the Judge and describing his respect of human dignity, I feel duty bound to describe the Judge’s last year. It was not an easy one, but I do not want to focus on that. What history needs to know, and what history should remember, is that Judge Arnold passed with amazing grace. My co-clerks and I were, more or less, the Judge’s last clerks.66 While I can only

64. Richard S. Arnold, Mr. Justice Brennan and the Little Case, 32 LOY. L. REV. 663, 669–70 (1999); see also, Richard S. Arnold, In Memoriam: Harry A. Blackmun, 113 HARV. L. REV. 10, 12 (1999) (“Many of [the Eighth Circuit cases Judge Blackmun heard as a Circuit Judge] don’t matter a great deal, so far as scholars and political commentators are concerned. But they were all important in their day to the people involved, and Judge Blackmun never lost sight of that fact.”).

65. One of the Judge’s best friends and law-school classmates has argued that there is intrinsic in the Due Process Clause certain process values, namely a respect for dignity and recognition value. See Frank I. Michelman, Formal Associational Aims in Procedural Due Process, in DUE PROCESS: NOMOS XVIII 126 (J. Roland Pennock & John W. Chapman eds. 1977). While I do not know that those values translated, in Judge Arnold’s mind, to any rights, the values, I suspect, certainly shaped how Judge Arnold viewed his role as judge. While a lawyer may best be analogized to a friend, see, e.g., Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L. J. 1060 (1976), I suspect Judge Arnold would have, in part, described himself as “Judge as Listener.”

66. There was a group after us that got about three weeks with the Judge. I know from
speak for myself, I suspect we would all agree that the way the Judge handled himself was the true lesson of the clerkship. Sure we gained a lot of legal knowledge. Yes, we all became better writers, but what we really took away was a model. He was a model of how to live a great life in the law. He never stopped. He never stopped fighting for life, never stopped working, never stopped thinking, never stopped worrying about others. Every minute was a treasure. The Judge was in and out of the hospital, or as he described it “jail,” much of the year, but it did not change his attitude. We would get a call with the tasks to be completed and a time we were expected at the hospital. We were always greeted by the same smile, the same graciousness, and the same “lets-get-to-work attitude.” We always left to a “thank you.” I suspect he knew we worried, but more importantly, I suspect he knew we watched. He took his job as mentor very seriously, and I doubt any of us could have had a better one. He passed as he lived: with amazing grace.

D. Know What the Law Is

Lastly, the Judge knew what the law is. I do not mean this in the literal sense, although that too was true. Nor do I mean this in the metaphysical or philosophical sense—although it may be of interest that the Judge required us to read Holmes’s The Common Law cover-to-cover.67 He lent me his conversations with them that they are grateful for the limited time they had with him.

67. The Judge’s assignment of Justice Holmes is intriguing. Justice Holmes’s approach to Constitutional analysis was vastly different from the Judge’s. As Professor Sunstein has pointed out:

[Holmes’s dissent in Lochner] is better understood as an outgrowth not of humility, but on the contrary Holmes’s personal vision. It is in fact a species of the very constitutional social Darwinism that it purports to reject. Holmes’s conception of politics—his interest-group theory—was market oriented; it stressed the inevitability of bargains and of victories by the powerful. Holmes was also skeptical that we can discuss values at all, and this skepticism brought him into conflict with the Lochner majority, which was acting on the basis of a conception of freedom.

CASS SUNSTEIN, THE PARTIAL CONSTITUTION 49 (1993). So what to make of the Judge’s assignment? I think there are a couple of things at play. First, the Judge loved common-law processes. While I doubt he would limit the Fifth Amendment’s definition of due process to constitutionalizing common-law processes, I suspect he would agree with Justice Scalia that the Due Process Clause did at least that. Hamdi v. Rumsfield, 124 S.Ct. 2633, 2661 (2004) (Scalia, J., dissenting) (“The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow, those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.”). The assignment of THE COMMON LAW was, I suspect, a ploy to get us to think about the process, itself. Second, the Judge was fascinated by Justice Holmes. While they would disagree about Constitutional values, they certainly would agree about the First Amendment’s absolute nature. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“While that experiment is part of our system, I think that we should be eternally vigilant
copy from law school, which he had annotated in Latin. No, I mean the Judge understood the law's social aspect. He understood what it means to be part of a community of lawyers. This is likely true, in part, because all of his relatives, it seems, were lawyers or judges. He loved the fellowship of the law. He loved his fellow judges (his brother more so than the rest). He loved the lawyers who argued before him (his daughters and wife more so than the rest—although they argued in the living room and not the courthouse). He loved legal scholars who made him think, and closest to home, he loved all of his former clerks. If a clerk called for a recommendation, a bit of advice, or just to share a success story, responding to the clerk became his number-one priority. He was once asked about his own clerking experience and what it was like attending a Justice Brennan reunion. He responded:

[Justice Brennan] went around the room, and he took each term beginning with 1956, recognized the law clerks by name who were there, and then mentioned the most important cases that had been decided that term and which law clerk had worked on those cases. If he had any notes, I couldn't see them. I was sitting at the table with him. I don't think he had any notes. That was a remarkable thing and I can tell you it made us feel wonderful.68

I have no doubt the Judge could and did do the same things with his clerks. The law was not just about conflict resolution for the Judge. It was ultimately about people and doing justice. He loved both: justice and the people who helped him seek it.

II. CONCLUSION

History, as it should, will remember Judge Arnold. Part of that story will be the "almost." He almost, and should have, sat on the Supreme Court.69 Hopefully though, history will recall more. It will recall his life as a lesson and a blessing. I know I will.

69. BILL CLINTON, MY LIFE 592 (2004).