



THREE THINGS

A TRIBUTE TO JUDGE MORRIS SHEPPARD ARNOLD

Nicole Stelle Garnett

On February 20, 2015, the Arkansas Bar Association hosted a tribute to Judge Morris Sheppard Arnold. I had the privilege of clerking for Judge Arnold two decades ago and the great honor of being asked to speak about the Judge at the event. My remarks follow.



I'm so honored to be here today to speak about Judge Arnold. In many ways, and for many reasons, I wouldn't be who I am or where I am today without him. I met Judge Arnold in a blizzard in Boston, during the 1993 Federalist Society National Convention. Finding ourselves stuck until the snowplows arrived to clear the roads, we struck up a conversation in the hotel lobby. That turned out to be one of the most Providential conversations of my life. A year later, Judge Arnold not only hired me as his law clerk (without a formal interview), but he also made his brother, Judge Richard Sheppard Arnold, hire my husband as *his* law clerk too – giving us the gift of a wonderful year together in Little Rock under

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the tutelage of the Arnold brothers. I might add that, a year later, he told Justice Clarence Thomas to hire me as well. Judge Arnold can be very bossy.

But more importantly, I am honored to be here not because Judge Arnold opened doors for me, although he certainly did that, but because he is one of my most important mentors and probably the best teacher that I ever had. He taught me how to write; he taught me how to think; and he modeled each and every day – in word and example, in the respect and compassion he showed everyone, from the Chief Judge (who happened to be his brother) to the maintenance staff – the kind of person that I hope to be.

When I teach, and write, and interact with the janitors and secretaries, with my students and my colleagues, I try to channel Judge Arnold. I want to be the person that he is, and taught me to be. And I want to make him proud.

So, Judge, although you may not know it, you're there with me when I'm teaching Property, when I have a student in my office who needs more time than I have to give, and when I am trying not to roll my eyes at certain comments made in faculty meetings. I'm told I'm not as funny as you are, and my husband says my poker face needs significant work. But I'm still trying.

We were asked to reflect upon Judge Arnold through the lens of a case or two that we worked on during our terms as law clerks. I would like to focus on two cases. The first highlights the Judge's approach to the rule of law, which is informed deeply by his view of the appropriate role of government. The second highlights this as well, but it also highlights the Judge as a scholar and a teacher.

Ok, so Judge Arnold, Part I: Judge Arnold, as many of you may know, is a bit of a libertarian. He used to joke, or maybe he wasn't joking, that he had no particular objection to the private ownership of nuclear weapons. As a judge, his libertarian tendencies didn't manifest themselves in a free-ranging mandate to impose his policy preferences through the courts. Far from it. They manifested themselves in a deep commitment to the rule of law.

There is a wonderful scene in the movie, *A Man for All Seasons*, when William Roper tells Thomas More that he would cut down all

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the laws in England to get to the Devil. More responds, “And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? Do you really think that you could stand upright in the winds that would blow then?”

The Judge understands the role of the rule of law as St. Thomas More understood it. As a bulwark of liberty. And, and as a judge, he was particularly determined to hold the government to its obligation to uphold it. He tells a story about how, early during his tenure as a district judge, he was the assigned task of charging a grand jury. And charge them he did. As any good libertarian medieval historian would, he told them about the historical importance of the grand jury, how it was designed as a gatekeeper standing between the citizens and the state. And he let the grand jurors know about the solemn nature of their obligation to weigh the facts carefully, against the presumption of liberty and the risk of error. And the grand jury – for the first time that just about anyone could remember – didn’t indict. As Judge Arnold tells it, he never saw a grand jury again. He never even knew if they were in the building, “cept when I caught them sneaking them in the back door.”

But I digress. Enter Radar the Over-Eager Drug Dog. In a case called *United States v. Martinez*, the North Dakota Bureau of Criminal Investigations had secured a search warrant based in large part on the evidence gathered by a certain dog named Radar. Now, the government assured the judge issuing the warrant that Radar had indicated that drugs were present on the premises covered by the warrant. (This was true, and marijuana was found in the subsequent search.) But, the government failed to note in the warrant application that Radar had indicated that drugs were present just about everywhere. In fact, Radar had been wrong in eleven of his twelve jobs.¹

As Judge Arnold detailed in his dissent, Radar had alerted on drugs, to be sure, but he had also alerted on “money, a shotgun, an empty cabinet, a kitchen chair, some papers marked ‘tax info,’ a sofa, a pillow and a television. And no drugs were found in any of these places.” Judge Arnold chided, “the police knew that Radar had an

¹ 78 F.3d 399 (8th Cir. 1996)

extraordinarily bad track record, yet they failed to mention that very pertinent fact in the warrant application.” Now the majority disagreed with Judge Arnold, but he stuck to his guns. “When the police decided not to include information about Radar’s unreliability,” he argued, “they exhibited, as a matter of law, a reckless disregard for whether the omission made the application misleading; and suppression is required because when the omission is supplied the application does not support a finding of probable cause.”² The bottom line, as he told us clerks more than once, was a simple one: “The Government needs to play by the rules, and it doesn’t always get to win.”

On to Part II: Judge Arnold the teacher and scholar of the law. The second case I would like to discuss couldn’t more different than the curious case of Radar the unreliable drug dog, except perhaps for the fact that it took place in northwest Arkansas, in an area of the country where I hear people are known to grow dope. The case, *Patterson v. Buffalo National River*,³ was about an implied easement over government land – a case so complex and deep in the weeds of Arkansas property law (no pun intended) that perhaps only a property professor, like myself and Judge Arnold, could appreciate it. But I hope not.

The Pattersons’ story began in 1976, when the U.S. Government began assembling land for the Buffalo National River. Under the threat of eminent domain, their predecessors – a family named the Halls – transferred a portion of their land to the Park Service in a quitclaim deed that released “all interest in any means of ingress and egress” over the ceded property. The record suggested that, from that time, the Halls were effectively landlocked. A decade later, the Pattersons purchased what remained of the Halls’ parcel and unsuccessfully attempted to negotiate the right to cross the Park Service’s property. When the negotiations failed, they sued the federal government, claiming that they had an implied easement – that is, an easement by implication or necessity – over the land that the Halls

² *Id.* at 401-403.

³ 76 F.3d 221 (1996).

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had sold the Park Service. The district court rejected this claim, reasoning that the Pattersons could not have an easement over the government's property because the Halls had transferred any possible easement to the government a decade previously.⁴

I have to admit that my initial impression was that this conclusion made sense. How could the Pattersons have an easement if their predecessors gave it away? Besides, this simple logic relieved me of any need to understand all that utterly befuddling property-law talk in the briefs. Even the excellent brief written by the Pattersons' counsel – a sole practitioner from Jasper, Arkansas – did not initially lead me eager to delve into the arcane world of servitudes, a world dominated by words like “quasi-easement,” “appurtenant,” “dominant tenement,” and “servient tenement.” (The government's brief was considerably less illuminating. It assumed a form that I am familiar with from grading Property exams – something known as “word salad,” which is generated by students who know the words they are supposed to write, but are not quite sure about the order in which to assemble them.)

But, Judge Arnold explained – to me, to his fellow panel members, to the U.S. Attorney, and to the district court – that those words mattered. Moreover, he explained to all of us why the government, which was clearly as exasperated as it was befuddled by the Pattersons' demand, was wrong. He explained that implied easements arise by law, when, and only when, a parcel of property is severed and a portion of the property is effectively “landlocked,” necessitating an easement. Since implied easements arise only when property is severed, they don't exist before it is severed. In other words, the Halls couldn't have transferred an implied easement to the government in 1976; they didn't have one to transfer. Any implied easement came into being at the moment *after* they transferred their property to the Park Service.⁵

⁴ *Id.* at 223.

⁵ *Id.* at 224-25. There is an amusing postscript to *Patterson*: The Pattersons' case was remanded to the District Court, which found after a bench trial that they were entitled to an easement by necessity across the Park Service's land. The District Court, however, denied the Pattersons' motion for attorney's fees, reasoning that

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I was so darn proud to have worked on that opinion that I sent it to my own property professor, Bob Ellickson, a former colleague of Judge Arnold's who is widely considered the godfather of modern property scholarship. Bob responded, "Please tell Buzz that his decision deserves to be in a casebook. And tell him that I consider implied easements to be the pinnacle of the law."

You know what? I know that I'm a property geek now, but even then I agreed. Implied easements are magic. What an incredible idea the common law courts conceived and developed over generations and generations. Something from nothing.

If the Pattersons had drawn another panel, they might well have remained landlocked in northwest Arkansas. But they won because Judge Arnold understood, and made the rest of us understand, the magic of Arkansas property law. He took that case seriously, and not just because he was a Property professor before he was a judge. He took it seriously because he took them all seriously. He took the law seriously. And he made it a magical thing.

I teach *Patterson v. Buffalo National River* every year in Property. I teach it because it is clearer and better written than the implied easement case in my casebook. I teach it so I can tell my students about the excellent brief written by a sole practitioner in Jasper, Arkansas – and the less-than-excellent one written by the Assistant United States Attorney assigned to the case. But, I mostly teach it so that I can tell my students what working on that case with Judge Arnold taught me about what it means to be a lawyer. Three things: The law matters, even the mundane can be magical, and the government doesn't always get to win.

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the government's position was "substantially justified" and therefore that the Pattersons were not entitled to attorney's fees under the Equal Justice Act. 42 U.S.C. § 2412(d)(1)(A). The Pattersons' appealed yet again, and the case wound up back on Judge Arnold's desk. He, yet again, reversed, reasoning ruled that the government's position could not be said to be substantially justified since the Arkansas law of servitudes was perfectly clear throughout the litigation. *Patterson v. Buffalo National River*, 144 F.3d 569 (8th Cir. 1998).