JUSTICE STANLEY G. FELDMAN

John P. Frank*

I. INTRODUCTION

Stanley G. Feldman of Tucson served on the Arizona Supreme Court from 1982 through 2002, and was its chief justice from 1992 to 1997. In his twenty years on the court, he gave a lively time to many an Arizona attorney in oral argument. His impact as a Justice has been, in a word, immense.

There is nothing neutral about Feldman. He has warm friends and sharp critics. At the practice, he was a successful tort lawyer in Tucson and not everyone enjoyed combating him. The Author was on the Merit Selection Committee that sent his name to Governor Bruce Babbitt; the Committee's vote was not unanimous. Some strongly opposed his 1982 appointment to the court.

Over a lifetime, Feldman's friends have vastly outnumbered his critics. His honors are many; one that particularly pleases him is the designation of a courtroom at the University of Arizona law school, his alma mater.[1] As he ends his judicial career, he is overwhelmingly and appropriately respected as a major contributor to the growth of Arizona law.

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* John P. Frank practiced with the Lewis and Roca law firm in Phoenix, Arizona from 1954 until his death in September 2002. His numerous writings include several articles on Arizona judges (some brief appreciations) as they ended their judicial careers. *See* John P. Frank & Kathryn E. Underwood, *Eino Jacobson*, 37 ARIZ. L. REV. 402 (1995); John P. Frank & Jenae R. Bunyak, *James Duke Cameron*, 33 ARIZ. L. REV. 735 (1991); John P. Frank, *A Tribute to Fred Struckmeyer*, ARIZONA BAR NEWS NOTES, Feb. 1982, at 16c; John P. Frank, *Justice Lorna Lockwood: Reflections of an Appellate Attorney*, 1975 ARIZ. ST. L.J. vii; John P. Frank, *The Supreme Court Work of Levi S. Udall*, ARIZ. WEEKLY GAZETTE, Aug. 1960; John P. Frank, *Charles Dudley Warner Windes*, ARIZ. WEEKLY GAZETTE, April, 1959. Anticipating Justice Feldman's retirement, Mr. Frank prepared this Article in 2002, but his death prevented him from completing the final editing. The Editors of the Arizona Law Review acknowledge the assistance of lawyers at Lewis and Roca in this Article's publication.

1. Reflecting the esteem with which Justice Feldman is held, the courtroom was funded by an over-subscribed public subscription. The courtroom is merely the most tangible of many honors, including the America Judicature Society's Herbert Lincoln Harley Award for judicial administration and a galaxy of awards from the University of Arizona.

II. BIOGRAPHICAL SKETCH

Feldman was born in New York in 1933. While he was a young child, his mother helped support the family by modeling furs. Feldman sardonically recalls his early years as "poverty lined with mink." He moved with his family to Tucson in 1938, a move made to benefit his mother's health. The transition was difficult for the family. Feldman's father worked as a grocery distributor for a Los Angeles concern and later started his own business selling window coverings, such as venetian blinds. His father eventually prospered and Feldman grew up in some comfort.

As a youngster, Feldman was bright but rather undirected. He feels indebted to a junior high school English teacher, Ms. Herlimen, for "straightening him out." She evidently did well. Feldman went on to finish first in his class at both Tucson High School and, after a successful college career, at the University of Arizona law school. When he took the oath as a supreme court justice, Feldman brought Ms. Herlimen as a guest to the ceremony.

When Feldman graduated from high school in 1950, his goal was to become a history professor. He spent a year at the University of California at Los Angeles, but gave it up because his mother became ill and he was needed at home. Feldman completed college and law school at the University of Arizona. While in law school from 1953 to 1956, he found his métier; he enjoyed every part of it. He remembers particularly happily Dean John Lyons and J. Byron McCormick, variously president of the university, dean of the law school, and a professor of water and mining law.

Any sketch of Feldman would be incomplete without mention of his family, his religion, and basketball. During his law school years, he married his first wife, Frieda, who died in 1974. They had one daughter, Elizabeth, who served as a judge pro tem for the Maricopa County Superior Court and is now in private practice in Phoenix. He married his second wife, Norma Arambula, in 1978; it has been an extraordinarily happy relationship. Participating in the Jewish religion has always been a significant part of Feldman's life. He studied Hebrew as a youngster until it interfered with basketball practice, but first things first; he gave up Hebrew. He is a member to this day of the same synagogue in Tucson with which his parents were affiliated and he has helped support the development of a Division of Judaic Studies at the University of Arizona. He also has long been an ardent fan of the University's basketball teams.

When Feldman graduated from law school in 1956 there were about 800 lawyers in Arizona and only about 100 in Tucson. Feldman and five other young lawyers rented office space in a warehouse on Court Street. They shared a secretary but practiced separately, waiting for clients to arrive. Across the street worked two slightly older lawyers, Stewart and Morris Udall. They referred work to Feldman, whose early practice years were a mix of nearly every type of legal matter.

In 1968, Feldman and his friends Robert Miller and Don Pitt formed the Miller, Pitt & Feldman firm, which became a major plaintiff's personal injury firm in southern Arizona. Feldman, following Morris Udall, had become deeply

involved in tort law and joined a little group that met regularly with the Udalls at the Pioneer Hotel to talk law and share experiences.

The new firm boomed. Feldman became something of a lawyer's lawyer. He never wanted or needed to advertise. His clients were pleased and kept returning; his practice grew with his clients and referrals from other lawyers. In time, his partner, Pitt, founded the Phoenix Suns basketball team and Feldman represented the team on some matters. In addition to auto accidents, the firm was busy with toxic tort cases and product liability cases, as well as business litigation. The tort practice was accompanied by condemnation practice; he regards the last few miles of the highway from Tucson to Yuma as the Feldman Highway because, as a Special Assistant Attorney General, he condemned some of the land on which it runs.

Feldman also made time to be involved in bar activities, politics, and the Tucson community. He became president of the Pima County Bar, a member of the State Bar Board of Governors, and in 1974, president of the Arizona State Bar. Meanwhile, he supported Morris Udall in his various campaigns for Congress and in his 1976 race for the presidency, an enterprise in which Feldman was a fund-raiser and general aide.

By 1982, Feldman was sufficiently financially secure that he could afford to become a judge, and he successfully sought appointment to the Arizona Supreme Court. Under the practice of that court, he was elected by his colleagues to be chief justice from 1992 to 1997.

While chief justice, Feldman kept up a full caseload while also handling extensive administrative duties.[2] As chief justice, he was the one person in charge of the entire judicial branch. In Arizona, that covers all of the city magistrates, the justices of the peace, superior court judges, court of appeals judges, and the supreme court, as well as all court employees, such as bailiffs, clerks, and probation officers. The supreme court also has certain non-judicial duties assigned by the Arizona Constitution or the legislature.[3] By the time Feldman ended his term as chief justice, there were over 7,000 employees in the entire court system.[4] All those people need rules, manuals, training, organization, and supervision, so that the administrative task of the chief justice is very large.[5]

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2. One exception is that the chief justice does not have a duty justice assignment, which is to say, passing on emergency applications. The administrative duties themselves are almost a full time job; the chief justice does have an administrative assistant.

3. For example, the court supervises the foster care review boards, confidential intermediaries, the administration of the child support guidelines, and the process for admitting lawyers to practice.

4. ARIZONA SUPREME COURT, 1996 REPORT OF THE ARIZONA JUDICIAL DEPARTMENT (1996).

5. To assist with all these things, there is the Administrative Office of the Courts, and the chief justice relies on support from its director and some 350 staff members.

Because the state bar is a creature of the supreme court, the court directs how it functions.[6] Under Feldman's regime, the various committees of the state bar and the court were opened to a broad group of applicants. As a result, the committees increasingly included women and people of diverse backgrounds. The bar exam itself was made a bit less lethal; from two-thirds to seventy-five percent now pass as a result of various reforms.

Feldman's tenure as chief justice was also marked by efforts to maintain and improve the quality of our court system. He successfully resisted several attempts to change the merit selection process for the appointment of state judges, organizing legislative presentations and support throughout the state. He tussled with Governor Fife Symington over juvenile justice issues. Feldman persuaded the legislature to keep the juvenile criminal code within somewhat tolerable limits, so that the courts could treat children as children with hopes for rehabilitation. There also was an important jury reform project which has been very successful. Another major development was the discovery reform project chaired by Justice Zlaket. This effort resulted in the so-called "Zlaket Rules" which aim to reduce the delay and cost of civil litigation by requiring prompt disclosure of relevant information by each side.

After completing his term as chief justice, Feldman did not slow his energetic pace. He continued his work as an active member of the court, and by the end of his career, he had written more than 500 opinions. He also served as the court's liaison to the State Bar Board of Governors, taking a particular interest in matters related to bar admissions and discipline. He sometimes further occupied himself by teaching a course on state constitutional law at the University of Arizona law school. His retirement from the court in 2002 gave Feldman the opportunity for a third, high-energy career; as of this writing, he has returned to private practice and teaching.

III. JUSTICE FELDMAN'S IMPACT ON THE LAW

A. Torts

As a practitioner, Feldman was a tort lawyer and many assumed that plaintiffs would do well with him at the supreme court. To some extent, this was true; the constitutional protection for tort law was in safe hands with Feldman. In a concurring opinion, he wrote to emphasize that the tort damage action "was taken from its status as one subject to the will of the legislature and imbedded in the Constitution."[7] Feldman also exhibited a great faith in the ability of juries to fairly resolve issues of tort liability, particularly those related to fault and causation.

Illustrative is a case in which Feldman wrote the opinion striking down a law that made a plaintiff's drunkenness an absolute defense in an action against a

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6. The Arizona State Bar was initially created by statutes which the legislature later repealed. The supreme court proceeded to recreate the state bar, exercising an inherent power.

7. Hazine v. Montgomery Elevator Co., 861 P.2d 625, 631 (Ariz. 1993) (quoting Alabam's Freight Co. v. Hunt, 242 P. 658, 665 (1926)).

city or the state.[8] He relied on Article XVIII, Section 5 of the Arizona Constitution, which declares that "[t]he defense of contributory negligence . . . shall, in all cases whatsoever, . . . be left to the jury."[9] But there is careful balance to his opinion: "We do not believe the taxpayers sitting on juries will be eager to give their tax dollars to drunk drivers or their negligent passengers except in the most compelling cases," and in any case, comparative fault should keep liability in check.[10]

There were days when a plaintiff found it difficult to lose in Feldman's hands. In *Petolicchio v. Santa Cruz County Fair*,[11] the court held that a person from whom liquor was stolen could be held liable for an accident immediately caused by another person who received the liquor from the thief. Another case, *Hayes v. Continental Insurance Co.*,[12] reflects Feldman's reluctance to construe statutes as eliminating common law causes of action. In *Hayes*, the statute gave the Industrial Commission "exclusive jurisdiction . . . over complaints involving . . . bad faith."[13] Holding that this language did not eliminate all bad faith cases, Feldman's opinion concluded that if the legislature desires to eliminate a common law remedy, it must do so by a "clear statement" in the statute itself or the legislative record.[14]

But it would be grossly unfair to pigeonhole Feldman as a plaintiff's justice. The cases just cited were marginal and in each he wrote for a unanimous court; in a number of cases at least as marginal, he came down for the defendants. In *Gurule v. Illinois Mutual Life and Casualty Co.*,[15] Feldman's opinion reversed a punitive damage award against an insurance company because, after several pages of close analysis, there simply was not enough evidence to show that the insurance company had acted with an evil mind.[16] In another case, a youngster riding a bicycle was killed in an intersection after failing to heed a stop sign. Because someone who stopped could have seen approaching traffic, Feldman concluded the city defendant could not be liable for failing to remove brush on adjacent property that obstructed the view.[17] Hence, any suggestion that Feldman had merely a knee-jerk response in favor of plaintiffs would be entirely unwarranted.

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8. *See* City of Tucson v. Fahringer, 795 P.2d 819 (Ariz. 1990).
9. ARIZ. CONST. art. XVIII, § 5.
10. *Fahringer*, 795 P.2d at 823.
11. 866 P.2d 1342 (Ariz. 1994).
12. 872 P.2d 668 (Ariz. 1994).
13. *Id.* at 672 (quoting ARIZ. REV. STAT. § 23-930(A) (1987)).
14. *Id.* at 677. With regard to legislative history, the opinion asserts that little or no weight should be given "to comments made at committee hearings by nonlegislators." *Id.* at 673. This is unfortunate. Statements at legislative hearings are routinely used as important legislative history, and should be. *See e.g.* Dawson Chem. Co. v. Rohm Haas Co., 448 U.S. 176, 204 (1980).
15. 734 P.2d 85 (1987).
16. The opinion distinguishes and limits as Arizona precedent a California decision that was something of a blessing to the plaintiffs. *See* Little v. Stuyvesant Life Ins. Co., 136 Cal. Rptr. 653 (Cal. Ct. App. 1977).
17. Coburn v. City of Tucson, 691 P.2d 1078 (Ariz. 1984).

Feldman's opinions reflect sensitivity to both the deterrent purpose of the tort system and the fact-finding role of the jury. For example, in *Thompson v. Sun City Community Hospital*,[18] he considered a hospital's liability for transferring an indigent patient to another hospital for emergency care. Earlier authority had held that the transferring hospital could not be liable unless there was evidence showing it was "probable" that the transfer had aggravated the original injury. In a meticulous opinion, Feldman reconsidered this rule in light of "one of the primary functions of the tort system—deterrence of negligent conduct."[19] Overruling a prior decision, Feldman concluded that if there is evidence showing that the defendant hospital's negligence increased the risk of harm, the jury may from this fact find that the defendant's negligence was the cause of the damage.[20]

Faith in juries is combined in Feldman's opinions with a reluctance to conclude that legislative action has precluded common law claims. Illustrative is *Hernandez-Gomez v. Leonardo*,[21] where the plaintiff was severely injured in a Volkswagen rollover accident. The car had an over-the-shoulder strap but not a manual lap belt, and the question was whether the absence of the lap belt was a design defect. The federal National Traffic and Motor Vehicle Safety Act authorizes extensive federal regulations of cars.[22] Making a point of somewhat astonishing nicety, Feldman concluded that the federal regulations preempted state control for purposes of frontal crashes, but not for purposes of rollovers; hence, the federal regulations did not preempt the state law of negligence in this case.[23]

Perhaps the most well-known of Feldman's tort opinions is *Wagenseller v. Scottsdale Memorial Hospital*,[24] where the court held that an at-will employee may sue for wrongful discharge where the termination violates public policy. The plaintiff in *Wagenseller* was a nurse who allegedly was fired for refusing to participate in "mooning" while on a river rafting trip with other hospital personnel.[25] Tracing the history of the at-will employment doctrine, Feldman noted that the trend was to reject an "absolutist formulation" of the rule that would allow employers to fire employees for "bad cause" as well as no cause.[26] Instead, Feldman weighed the interests involved, and concluded:

> It is difficult to justify this court's further adherence to a rule which permits an employer to fire someone for a "cause morally wrong." . . . It may be argued, of course, that our economic

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18. Thompson v. Sun City Cmty. Hosp., Inc., 688 P.2d 605 (Ariz. 1984).
19. *Id.* at 615.
20. *Id.* at 615–16.
21. 917 P.2d 238 (Ariz. 1996).
22. *Id.* at 240.
23. *See id.* at 245–46. In another seatbelt case, Feldman's opinion for the court held that failure to wear a seatbelt was not an absolute bar to recovery, but should be considered by the jury as comparative negligence. Law v. Super. Ct., 755 P.2d 1135 (Ariz. 1988).
24. 710 P.2d 1025 (1985).
25. Mooning, the court noted, is a public exposure of the bare buttocks. The court further observed that "[w]e have little expertise in the techniques of mooning." *Id.* at 1035 n.5.
26. *Id.* at 1031.

> system functions best if employers are given wide latitude in dealing with employees. . . .We also believe, however, that the interests of . . . the society as a whole will be promoted if employers are forbidden to fire for cause which is "morally wrong."
>
> We therefore adopt the public policy exception to the at-will termination rule. We hold that an employer may fire for good cause or for no cause. He may not fire for bad cause—that which violates public policy.[27]

In concluding his opinion for the court, Feldman again showed his balanced approach and trust in juries. He explained that mere disputes over an issue involving public policy would not entitle a plaintiff to prevail. "In face of conflicting evidence or inferences as to the actual reason for a termination, the question of causation will be a question of fact."[28]

Feldman did not casually write concurring opinions, so it is notable that he concurred in one of Arizona's most important tort cases. In *Sparks v. Republic National Life Insurance Co.*,[29] the insurance policy stated that it would terminate if premiums were not paid after an accident but before a claim. However, the brochure under which the policy was sold warned of no such termination. The issue was whether the insurance company had continuing liability for damages from an accident that occurred while the policy was in effect, even though premiums were not continued. The court, in an opinion written by Justice Hays, held that the company had continuing liability.[30]

Feldman concurred on the ground that the sales brochure for the policy did not inform the insured that payments would not be made unless the policy was continued after the accident. In his view, it was immaterial whether or not the policy itself was ambiguous:

> Because the insurer advertised and sold the coverage through the brochure, and provided the insured with no other information, I would simply hold that the insurer is bound by the writing which contains all the coverage agreements given its insured. . . . It cannot rely upon the provisions of a master policy never shown the insured.[31]

The rule endorsed by Feldman is that "[s]ignificant policy exclusions contained in an undistributed master contract but omitted from the brochure distributed to policyholders cannot be enforced."[32] These views foreshadowed Feldman's most significant decisions in the realm of contract law.

In sum, in approaching tort cases, Feldman came to the supreme court as a dean of the plaintiff's bar with a lifelong experience and knowledge of tort law from the plaintiff's perspective. His opinions reflect a richness of knowledge about

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27. *Id.* at 1033.
28. *Id.* at 1044.
29. 647 P.2d 1127 (Ariz. 1982).
30. *Id.* at 1134–35.
31. *Id.* at 1143 (Feldman, J., concurring).
32. *Id.* at 1144.

the law of personal injury, but, as much as anyone can put one's life experience aside, no fair charge of plaintiffs' bias can be made. Feldman recognized that tort law must evolve, based on its underlying purposes, to address the realities of modern life.

B. Contracts

In tort cases, Feldman's intellectual commitment was to the facts. In contract cases, it was to the intent of the parties, and in this respect, his views have greatly changed Arizona law. Some of his major contract opinions are among the most dynamic works of the court in the last two decades.

A clear declaration of respecting the intent of the parties appears in Feldman's concurring opinion in *Phoenix Control Systems v. Insurance Co. of North America.*[33] There, the court interpreted an insurance policy by applying the "last antecedent rule," which "requires that a qualifying phrase be applied to the word or phrase immediately preceding as long as there is no contrary intent indicated."[34] Feldman concurred because the meaning of the policy should be determined by the intent of the parties and not by grammatical rules:[35]

> Reliance on such arcane, judicially adopted grammatical rules does not help us reach the intentions of the parties. Surely, even if the parties had bargained for the boilerplate language in this policy—something the record does not establish at all—it would be a fiction to pretend they drafted the language mindful that its meaning would be ascertained through use of the doctrine of the last antecedent.[36]

How, then, is a court to discover the intent of the parties? Feldman answered this question in *Taylor v. State Farm Mutual Automobile Insurance Co.*[37] Taylor had been involved in an accident and received $15,000 from his insurer in 1981, when he signed a release. Some years later, another party to the underlying accident sued Taylor, who was adjudged liable for $2.5 million over his policy limits. Taylor then sued State Farm for bad faith in failing to settle the third party's claim. Although the trial judge permitted parol evidence to interpret the 1981 release, the court of appeals reversed on the grounds that the release agreement was not ambiguous, and that, based on the "four corners of the document," the release had been total.[38]

Feldman approached the case in terms of the parol evidence rule. His opinion followed the view of Professor Arthur Corbin at Yale that parol evidence may not be accepted to vary a written contract, but it may be considered to interpret the contract to carry out the parties' intent. Under this view, "there is no need to make a preliminary finding of ambiguity before the judge considers extrinsic evidence."[39] The court is to consider all of the proffered evidence to

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33. 796 P.2d 463 (Ariz. 1990).
34. *Id.* at 466.
35. *Id.* at 470 (Feldman, J., concurring).
36. *Id.*
37. 854 P.2d 1134 (Ariz. 1993).
38. *Id.* at 1137.
39. *Id.* at 1139 (emphasis omitted).

determine its relevance to the parties' intent. This approach permits parol evidence for "interpretation," but not for "contradiction." In a contract case in which parol evidence is offered for interpretation, "the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties."[40] In *Taylor*, the 1981 agreement had released "all *contractual* rights, claims, and causes of action."[41] Because the later lawsuit was for bad faith, which is a tort, Feldman concluded that the contract was sufficiently inconclusive to allow parol evidence for its interpretation.[42]

Taylor followed *Darner Motor Sales v. Universal Underwriters Insurance Co.*,[43] probably the Feldman opinion most important to Arizona's commercial world. In *Darner*, the issue was the scope of an insurance policy for a car leasing business. The policy was lengthy and the plaintiff acknowledged that he had not read it; the claim for enlarged coverage was based on asserted oral conversations with the insurer's representative. Feldman's opinion poses the basic question thus: will "the courts . . . enforce an unambiguous provision contrary to the negotiated agreement made by the parties because, after the insurer's representations of coverage, the insured failed to read the insurance contract which was in his possession?"[44]

Before *Darner*, many cases in Arizona and elsewhere had held that an oral agreement cannot "vary the terms of the insurance policy."[45] This reflects the view that the intent of the parties must be determined from "the four corners of the instrument." Writing for the court, Feldman rejected this approach, noting that it fails "to recognize the realities of the insurance business and the methods used in modern insurance practice."[46] Instead, Feldman's opinion follows the view of the *Restatement (Second) of Contracts* and Professor Corbin that insurance contracts should be interpreted in light of the "reasonable expectations" of the insured.[47] But how are such reasonable expectations to be determined? Consistent with the

40. *Id.* at 1140.
41. *Id.* at 1142.
42. *Id.* at 1141.
43. 682 P.2d 388 (Ariz. 1984).
44. *Id.* at 392.
45. *Id.*
46. *Id.* at 394.
47. The opinion followed RESTATEMENT (SECOND) OF CONTRACTS § 211, which concerns standard form contracts. Section 211 provides that where one party knows that the other would not have agreed if he knew that the writing contained a particular term, that term is not binding. According to the RESTATEMENT, the understanding on that score "may be shown by the prior negotiations or inferred from the circumstances." This view rejects the "four corners" approach of Professor Samuel Williston to the interpretation of contracts and adopts the views of Professor Corbin and Professor E. Allan Farnsworth of Columbia, the reporter for the RESTATEMENT (SECOND) OF CONTRACTS.

Restatement, *Darner* focuses on those expectations that "have been induced by the making of a promise."[48]

How are these views to be applied? The court began with the fact that "the usual insurance policy is a special kind of contract."[49] Some of the terms of the policy are bargained for, but others are "boilerplate, not bargained for, neither read nor understood by the buyer, and often not even fully understood by the selling agent."[50] The terms of a standardized contract will not be followed when, because they are contrary to the reasonable expectations of the parties, they reflect a bargain that was never really made.[51]

The form contract, as *Darner* acknowledges, is an essential of modern commercial life, and it "binds the customer," but not "to boilerplate terms which are contrary to either the expressed agreement or the purpose of the transaction as known to the contracting parties."[52] This rule applies only to "standardized forms which, because of the nature of the enterprise, customers will not be expected to read."[53]

Darner is possibly the most significant of all of Feldman's opinions in its general scope and consequence. A dissenting justice thought that the opinion overruled "the major part of past precedent on the subject,"[54] and this may be correct. Concurring, Justice Cameron accepted the Feldman opinion and wrote only to note disagreement with the dissent, saying that "[t]he impact of the day's decision is merely to formulate the rules of construction for standardized contracts."[55] Nonetheless, in a world in which most purchases are made on the basis of standardized contracts, the rules for their interpretation are of enormous import.

Restraints on competition are another important topic in contract law, and Feldman was reluctant to enforce unduly restrictive agreements. One of his opinions set a new course for Arizona's law. *Valley Medical Specialists v. Farber*[56] concerned the enforcement of agreements not to compete after the termination of employment. Writing for the court, Feldman held that a restrictive covenant between a health organization and one of its doctors for three years was unreasonable and thus invalid.[57] Recognizing that the public might suffer from restraints on competition in health care, Feldman concluded that no more than six-

48. *Darner Motor Sales*, 682 P.2d at 395 (quoting 1 ARTHUR L. CORBIN, CONTRACTS § 1, at 2 (1963)).
49. *Id.* at 395.
50. *Id.*
51. *Id.* at 396.
52. *Id.* at 394.
53. *Id.*
54. *Id.* at 406 (Holohan, J., dissenting).
55. *Id.* at 405 (Cameron, J., concurring).
56. 982 P.2d 1277 (Ariz. 1999).
57. *Id.* at 1285.

month limits on practice were enforceable and that the doctor could be restrained only from practicing the same type of medicine he had handled for the employer.[58]

In an aspect of the ruling with general application, the court refused to "blue pencil" the agreement to adopt reasonable limits. "Employers [under the blue pencil rule] may . . . create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable."[59] Instead, *Farber* held that a "blue pencil" may be applied only in the sense of allowing a court to ignore parts of a contract that can be severed; it does not allow a court to add or rewrite provisions. The court disapproved an earlier decision by the court of appeals allowing a court to alter the terms of a restrictive covenant.[60]

C. Lawyer Conduct

The supreme court is ultimately responsible for lawyer discipline and Feldman, as an experienced trial attorney and former president of the state bar, wrote some forty opinions in this area. Some were routine. For example, he did not hesitate to conclude that failure to communicate with a client or to remit client funds, as well as failure to cooperate in disciplinary proceedings, warrants sanctions.[61] He also believed that attorneys should not casually keep track of client funds or expenses. Accounting on odd slips of paper is unacceptable; the attorney should comply with accepted accounting principles or bookkeeping standards.[62]

Feldman's opinions reflect the view that clients should suffer for their lawyers' misdeeds only as a last resort. For example, in a case where a lawyer engaged in misconduct by presenting an improper closing argument, Feldman's opinion for a unanimous court nonetheless refused to set aside the jury verdict in favor of the client.[63] Although the argument had involved an improper appeal to passion and prejudice, the court could not conclude that it had actually affected the verdict. Sixteen law firms joined an *amicus* brief asking for reconsideration of the ruling to ensure ethical trial practice, but the court refused to alter its conclusion. Recognizing that disciplinary proceedings might be appropriate for the lawyer's improper behavior, Feldman's opinion on denial of rehearing embraced "the traditional rule that the verdict will not be disturbed merely to punish the lawyer."[64]

Where, however, the client had suffered from the misdeeds of the attorney, Feldman was a tough disciplinarian. He had no doubt that it is the duty of the supreme court to determine the "appropriate sanction" in disciplinary cases.

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58. *Id.* Moreover, the court ruled that an additional five-mile radius restriction was too broad because the employer had several offices and, as a result, the aggregate restraint was for some 235 square miles, and that a restriction as to all existing patients was contrary to public policy as unduly limiting the doctor-patient relationship. *Id.*

59. *Id.* at 1286.

60. *Id.* (disapproving Phoenix Orthopedic Surgeons, Ltd. v. Peairs, 790 P.2d 752 (Ariz. Ct. App. 1989)).

61. *See, e.g., In re* Wolfram, 847 P.2d 94 (Ariz. 1993) (involving similar but less egregious offenses which required suspension from the bar and further education).

62. *In re* Castro, 793 P.2d 1095 (Ariz. 1990).

63. Grant v. Ariz. Pub. Serv. Co., 652 P.2d 507 (Ariz. 1982).

64. *Id.* at 530.

For example, an attorney was disbarred after he had failed to communicate with the client, failed to remit client funds, and misrepresented facts to the client.[65]

Because the supreme court has final responsibility in disciplinary cases, Feldman reviewed such cases thoroughly and did not merely rubber-stamp the underlying disciplinary proceedings. For example, in a matter involving incompetence as criminal defense counsel, Feldman analyzed the lawyer's trial preparation meticulously and concluded it "was clearly deficient in the light of what was at stake."[66] Where the client faced a mandatory sentence from twelve to twenty-two years, "we fail to see how, for example, not reading the grand jury transcript, not examining physical evidence, and not discussing the possibility of lesser included offenses can be reconciled with *any* sensible defense strategy."[67]

In an unusual instance, Feldman concurred specially with the remainder of the court in imposing a two-year suspension on a lawyer who had represented himself in the disciplinary proceedings. Feldman noted, "Twelve years on the bench have made it obvious to me that the behavior problems leading lawyers to err are often made apparent by self-representation in disciplinary proceedings . . . .The best that one can say for him is that he represents himself no better than he represented his clients."[68]

Feldman had little patience for lawyers who charged unreasonable fees or made misrepresentations to their clients. In his practice days as a plaintiff's lawyer, Feldman had often received contingent fees. As a member of the supreme court, he sometimes was required to pass on the propriety of such fees. He had no trouble concluding "the contingent fee is proper and has substantial social utility because such arrangements are often the only method by which a person of ordinary means may prosecute a just claim to judgment."[69]

He recognized that contingent fees in a particular case might be "clearly excessive" and thereby warrant discipline. One example involved a workman who had lost a leg in an accident and was indisputably entitled to a $100,000 insurance payment. His attorney sued on his behalf and recovered $150,000, of which the attorney kept $50,000. Thus, as a practical matter, the attorney had gained nothing for the client by the lawsuit. In requiring the return of the fee and suspending the attorney for six months, Feldman's opinion concluded that, irrespective of any agreement by the client, "the agreed fee was unreasonable and clearly excessive."[70] The opinion went on to add:

> There was nothing novel or difficult about the case and it was not even necessary to file a legal action. At the most, only thirty hours of time were expended on the case. There was, in short, no contingency, no difficult problem and little work. There was also no result for the client. Under these circumstances, we agree with the

65. *In re* Grant, 821 P.2d 159 (Ariz. 1991).
66. *Wolfram*, 847 P.2d at 100.
67. *Id.*
68. *In re* Augenstein, 871 P.2d 254, 260 (Ariz. 1994) (Feldman, J., concurring).
69. *In re* Swartz, 686 P.2d 1236, 1242 (Ariz. 1984) (quotation omitted).
70. *Id.* at 1243.

> Bar's expert that a fee of $50,000 is both clearly excessive and shocking.[71]

Feldman also wrote on the issue of lawyer advertising. Where a two-person law firm claimed its members were seasoned and effective trial attorneys, when, in fact, they had never tried anything, Feldman's opinion found that this was false advertising and took the occasion to specify proper conduct. His opinion for the court noted, "[i]t matters less which brand of beer or soap consumers choose than what kind of lawyer they choose. . . . [C]onsumers easily can discard a disappointing beer or bar of soap and try a different brand next time."[72] The opinion has served as a warning on the limits of grossly excessive advertising.

When lawyers have been disciplined, Feldman believed they should have some opportunity for redemption. One example comes from a case involving substance abuse. In *In re Lehman*,[73] the attorney was disbarred after his conviction for possession of cocaine. Five years later, the state bar recommended his readmission, but the supreme court denied his application without issuing an opinion.[74] Feldman dissented for himself and Justice Gordon.[75] Feldman believed that the court, by refusing to give an opinion, "ha[d] treated the applicant with profound injustice and ha[d] deprived him of constitutional rights." He continued, "Applicant committed a seriously improper act, was punished for it, has paid for it, appreciates the impropriety of his conduct, and in view of his rehabilitative efforts presents no greater danger to the public than the ordinary applicant for admission." He believed that the court had some duty to make clear to the applicant whether he might ever be readmitted. Failing to do so, he believed, "not only deprives petitioner of due process, it deprives him of any process."[76]

The supreme court also considers disciplinary problems involving the courts, which include the justice courts where the justices of the peace are often not attorneys. Feldman believed strongly in upholding the integrity of the courts. Accordingly, Feldman voted to remove a justice of the peace who had engaged in significant *ex parte* communications and failed to disqualify himself where his impartiality could be questioned.[77] In another case where the supreme court merely censured a justice of the peace who made sexual advances to a party, Feldman, quite properly, would have removed him.[78]

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71. *Id.*

72. *In re* Zang, 741 P.2d 267, 279 (Ariz. 1987). The attorneys also accepted a fee paid in error for the benefit of a client. The court required some restitution to the client and temporarily suspended each of the lawyers. *Id.*

73. 704 P.2d 807 (Ariz. 1985).

74. *Id.*

75. *Id.* at 807 (Feldman, J., dissenting).

76. *Id.* at 807–08.

77. *In re* Peck, 867 P.2d 853 (Ariz. 1994).

78. *In re* Ackel, 745 P.2d 92, 101 (Ariz. 1987) (Feldman, J., dissenting); *see, e.g.*, *In re* Braun, 883 P.2d 996 (Ariz. 1994); *In re* Lehman, 812 P.2d 992 (Ariz. 1991); *In re* Anderson, 814 P.2d 773 (Ariz. 1991); *see also In re* Jett, 882 P.2d 414 (Ariz. 1994) (magistrate disciplinary case).

D. Death Sentences

Under Arizona's rules, all death sentence cases must go to the supreme court.[79] Feldman is personally strongly opposed to the death penalty. As a judicial officer, his oath to uphold the law required him sometimes to enforce it. But if there were a rational basis for reducing a sentence of death to life, he would take that alternative.

Feldman described his views on the death penalty as follows:

> Sadly, our history shows that death sentences have been arbitrarily, wantonly, and freakishly imposed, often on grounds of race, religion, or minority status. Although we all hope this sad chapter of American history is over, there is no evidence that the consequences of bigotry have been completely eliminated. Even if they have, it is obvious the rich man is much more likely to evade the death penalty than the poor man, the defendant with a good lawyer has a much better chance than the defendant with a poor lawyer, and variations in prosecutors, judges, juries, community emotions, and the type of victim all play some part in the results.[80]

These statements come from a case in which the court was closely divided over how to review death sentences. Three justices, including Feldman, thought the court should consider whether the death penalty in the immediate case was proportional to other cases coming before the court. Two concurring justices regarded proportionality review as "strictly a judicial invention by which this court assumes authority to modify an otherwise appropriate death penalty."[81]

Feldman's thin victory did not hold. With the appointment of Justice Frederick J. Martone in 1992, the court had a three to two majority in favor of ending proportionality review, and it did so.[82] Feldman ruefully concurred:

> We are not smart enough to know the answer to the age-old question of who should live. It is one that can be correctly answered only with divine knowledge of proportionality and purpose. Because we must stumble on with human intelligence, we should use every tool in our possession to hold error and injustice to a minimum.[83]

Although Feldman consistently supported proportionality review,[84] he was not nullifying death sentences, even though he personally opposed them. In

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79. *See* ARIZ. R. CRIM. P. 31.2(a); *see also* ARIZ. REV. STAT. § 13-703.05(A) (Supp. 2002).

80. State v. White, 815 P.2d 869, 894 (Ariz. 1991) (Feldman, J., concurring) (emphasis omitted).

81. *Id.* at 886 (Corcoran, J., concurring).

82. *See* State v. Salazar, 844 P.2d 566 (Ariz. 1992).

83. *Id.* at 586 (Feldman, C.J., concurring).

84. *See, e.g.*, State v. Atwood, 832 P.2d 593 (Ariz. 1992); State v. Rossi, 830 P.2d 797, 802 (Ariz. 1992) (Feldman, J., concurring).

cases where guilt was clear and the sentencing requirements were met, Feldman voted to uphold the death sentences.[85]

A recent illustration of Feldman following the law despite his personal views is *State v. Ring*.[86] The defendant there argued that Arizona's capital sentencing scheme was unconstitutional in light of *Apprendi v. New Jersey*.[87] In *Apprendi*, the United States Supreme Court had noted that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Writing for the Arizona Supreme Court in *Ring*, Feldman explained that under Arizona's then-existing statutes, a jury verdict could not itself result in a death sentence. Instead, a defendant could only be sentenced to death if the judge made separate factual findings that at least one aggravating factor was present. Recognizing that *Apprendi* raised questions about the continuing viability of *Walton v. Arizona*,[88] where the United States Supreme Court had approved Arizona's judge-sentencing procedure, Feldman noted that he was bound by the Supremacy Clause to follow *Walton* as the controlling authority.[89] His opinion rejected the *Apprendi* challenge and otherwise upheld Ring's death sentence. Subsequently, the United States Supreme Court granted certiorari in *Ring*, overruled *Walton*, and held that Arizona's capital sentencing statutes were unconstitutional because the judge, and not the jury, made certain factual determinations.[90]

Fair procedures, Feldman believed, are critical in capital cases. Consistent with this view, he wrote an opinion holding that state public defenders could appear in federal court on petitions for habeas corpus challenging death penalties. In holding that the state public defenders could be paid by federal funds, Feldman's opinion overruled an earlier decision.[91] On several occasions, Feldman wrote for the court in reducing a death sentence to life imprisonment. One example

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85. *See, e.g.*, State v. Moorman, 744 P.2d 679 (Ariz. 1987) (upholding death sentence where prisoner on furlough killed his mother); State v. Smith, 707 P.2d 289 (Ariz. 1985) (upholding death sentence where the defendant had three previous convictions for dangerous crimes and had murdered a clerk to get at a convenience store cash drawer); *see also* State v. Willoughby, 892 P.2d 1319 (Ariz. 1995); State v. Hill, 848 P.2d 1375 (Ariz. 1993); State v. Williams, 800 P.2d 1240 (Ariz. 1987). Feldman choked a bit, but voted to affirm the execution of a sixteen-year-old. State v. Jackson, 918 P.2d 1038, 1051 (Ariz. 1996) (Feldman, C.J., concurring) (noting that by imposing the death penalty on this defendant "we say almost as much about our society and ourselves as we do about Jackson and his crime").

86. 25 P.3d 1139 (Ariz. 2001).

87. 530 U.S. 466 (2000).

88. 497 U.S. 639 (1990).

89. *Ring*, 25 P.3d at 1152.

90. Ring v. Arizona, 536 U.S. 584 (2002). Arizona's legislature then amended the capital sentencing statutes to provide that the jury will determine if aggravating factors exist and whether to impose the death penalty in a particular case. ARIZ. REV. STAT. § 13-703.01 (Supp. 2002).

91. Smith v. Lewis, 759 P.2d 1314 (Ariz. 1988).

is *State v. Stuard*,[92] where the defendant had some mitigating factors, including a low IQ and severe organic brain damage resulting from a boxing career.[93]

Feldman himself aptly summarized his general approach to the imposition of death sentences. "While the law may require us to play God by choosing who shall live and who shall die, I believe it is incumbent on us to recognize our own fallibility and use every method available to reduce our errors."[94]

E. State Constitutional Questions

Feldman's opinions on state constitutional law reflect several themes. He believed strongly that the court should recognize the Arizona Constitution as a source of rights independent of the federal Constitution. Feldman also thought the court should respect the democratic nature of our state constitution and recognize the distinct setting in which constitutional issues arise in Arizona, given our history and geography.[95]

Interpretation of the federal Constitution and the Bill of Rights by the United States Supreme Court became less liberal as the Burger Court succeeded the Warren Court. This led to a counter-movement, especially inspired by Justice William Brennan of the United States Supreme Court and Justice Hans Linde of the Oregon Supreme Court, to place greater weight on state constitutional provisions in protecting individual rights.[96] Feldman joined exuberantly in this

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92. 863 P.2d 881 (Ariz. 1993).

93. *Id.*; *see also* State v. Cornell, 878 P.2d 1352, 1369 (Ariz. 1994) (noting that "self-representation does not signal playtime for prosecutors" in reducing sentence to life).

94. State v. White, 815 P.2d 869, 895 (Ariz. 1991).

95. Although Feldman taught and wrote on state constitutional law, his constitutional opinions were not a major part of his work on the supreme court. *See, e.g.*, State v. Youngblood, 844 P.2d 1152, 1158 (Ariz. 1993) (Feldman, C.J., concurring) (failure to preserve evidence); State v. Noble, 829 P.2d 1217 (Ariz. 1992) (*ex post facto* laws); Perkins v. Komarnyckyj, 834 P.2d 1260 (Ariz. 1992) (separation of jurors); State v. Wiley, 698 P.2d 1244, 1261 (Ariz. 1985) (Feldman, J. concurring) (anticipating Batson v. Kentucky, 476 U.S. 79 (1986) with regard to use of peremptory challenges to exclude blacks from juries); State *ex rel.* Collins v. Seidel, 691 P.2d 678 (Ariz. 1984) (blood alcohol content).

A repeated note in the criminal cases is Feldman's view that the legislature should not deprive the courts of discretion in sentencing. *See* State v. Hutton, 694 P.2d 216, 222 (Ariz. 1985) (Feldman, J., concurring); State v. Williams, 698 P.2d 678, 691 (Ariz. 1985) (Feldman, J., concurring); State v. McNair, 687 P.2d 1230, 1242 (Ariz. 1984) (Feldman, J., concurring); State v. Gonzales, 687 P.2d 1267, 1268–69 (Ariz. 1984) (Feldman, J., dissenting); State v. Noriega, 690 P.2d 775, 789 (Ariz. 1984) (in banc) (Feldman, J., concurring); State v. Goswick, 691 P.2d 673, 678 (Ariz. 1984) (Feldman, J., concurring).

96. *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1971); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

view. In a 1988 law review article, he characterized Arizona's constitution as embodying a populist, progressive and democratic vision.[97]

An illustration of Feldman's view of the role of the state constitution is *State v. Bolt*.[98] In the face of ambiguous Fourth Amendment precedent, Feldman's opinion considered whether police, absent exigent circumstances, could enter a house to "secure" it before obtaining a warrant. Noting the specific wording of Article II, Section 8 of the Arizona Constitution, which declares that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law," and previous state court decisions, Feldman concluded that such entries are "per se" unlawful under our state constitution.[99] His opinion went on to consider whether the state exclusionary rule should apply more broadly than does the federal rule. After carefully weighing the costs and benefits of the rule in terms of allowing some guilty to go free versus promoting police compliance with constitutional requirements, he concluded that "for the present . . . the exclusionary rule to be applied as a matter of state law is no broader than the federal rule."[100]

Perhaps the largest constitutional matter to reach the court during Feldman's tenure was the school finance problem. The Arizona Constitution directs the legislature to establish "a general and uniform public school system."[101] In fact, there had long been gross disparities among Arizona schools because school districts depended on local property taxes. As a result, some districts were able to pay for domed athletic centers or indoor swimming pools, while others had buildings that literally were falling down and threatening the safety of students. In *Roosevelt Elementary School District No. 66 v. Bishop*, the court ruled by a 3-2 vote that the school financing system violated the constitution's "general and uniform" provision.[102]

Feldman concurred on the grounds that the Arizona Constitution's equal privileges clause was controlling.[103] He began with the fact that "Arizona's children have the right to receive a free, public, basic education through high school."[104] He found that the disparities could be justified only by compelling state interests, and there is "no compelling state interest in a school financing scheme that inescapably creates gross disparities in capital facilities."[105] The existing system, he concluded, relegated students in poor districts to "substandard facilities

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97. Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115 (1988).

98. 689 P.2d 519 (Ariz. 1984).

99. *Id.* at 524 (quoting ARIZ. CONST. art. II, § 8).

100. *Id.* at 528.

101. ARIZ. CONST. art. XI, § 1(A).

102. 877 P.2d 806, 815–16 (Ariz. 1994).

103. *Id.* at 817 (Feldman, C.J., concurring) (discussing ARIZ. CONST. art XI, § 6).

104. *Id.* at 817. Justice Martone's opinion for the court focused on the "general and uniform" provision. *Id.* at 813–14. Concurring, Feldman concluded that the general and uniform clause requires the State to finance public education that will allow students to meet the "minimum educational standards" of the State School Board. *Id.* at 821–22. Under either interpretation of the constitutional requirements, Arizona's schools should improve, sooner or later, and inch by inch. The pace has not been rapid.

105. *Id.* at 817.

and equipment."[106] The State may not be responsible for ensuring that all districts have the facilities of the most luxurious, but there is a minimum standard that all districts must at least meet. Because the Arizona State Board of Education is required to prescribe "a minimum course of study" with "minimum competency requirements for . . . promotion,"[107] the legislature cannot, by its funding scheme, prevent some Arizona districts from offering the facilities needed for "an equal opportunity to attain the Board's prescribed minimum course of study."[108]

In interpreting the state constitution, the court often confronts issues that affect the economy of Arizona.[109] Some matters are of the most immense importance. One example is the extent to which water is subject to appropriation by different users. The State has both surface water in streams and lakes, and underground water. Arizona has long followed the doctrine of prior appropriation both as to surface water and to the "subflow" of water directly under or adjacent to the stream that is part of the surface water.[110] In contrast, underground water that is percolating generally through the soil is not subject to appropriation, but belongs to the overlying landowner. The court is fully cognizant that any decision involving these rights may significantly affect the State's future.

On these issues, Feldman's opinions are appropriately sensitive to protecting well-settled expectations based on pre-existing law. Writing for a unanimous court in the Gila River water adjudication, Feldman began by announcing that the court completely accepted its previous rules for appropriation and would only interpret them.[111] "Arizona's agricultural, industrial, mining, and urban interests have accommodated themselves to those frameworks. [An earlier decision] has been part of the constant backdrop for vast investments, the founding

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106. *Id.* at 818.

107. *Id.* at 821 (quoting ARIZ. REV. STAT. § 15-203(A)(15), (16) (Supp. 1993) (emphasis omitted).

108. *Id.* at 821.

109. Opinions by Feldman on economic matters include decisions that, although not having much to do with each other, on the whole promote the business life of the State. *See* Martinez v. Woodmar IV Condos. Homeowners Ass'n, 941 P.2d 218 (Ariz. 1997) (holding that homeowners associations have some duty to protect property owners from crime); Bus. Realty of Ariz. v. Maricopa, 892 P.2d 1340, 1346–48 (Ariz. 1995) (holding that shopping centers must be taxed based on fair market value); *In re* Am. West Airlines, Inc., 880 P.2d 1074, 1078–81 (Ariz. 1994) (holding that because the uniformity clause in the state constitution imposes greater limits on the ability of state authorities to tax than does the federal equal protection clause, America West's fleet of small aircraft is entitled to the benefit of a tax rate cap); Arizona Corp. Comm'n v. State *ex rel.* Woods, 830 P.2d 807, 816–18 (Ariz. 1992) (holding that the Corporation Commission has power to adopt rules under its rate-making authority and may prevent utilities from endangering their assets through transactions with their affiliates); Tanner Cos. v. Super. Ct., 696 P.2d 693, 698–700 (Ariz. 1985) (Feldman, J., dissenting) (arguing that the statute barring non-resident contractors from government work, although possibly legitimate in 1933 when adopted, is unconstitutional now).

110. *See, e.g.*, *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 9 P.3d 1069, 1072 n.1 (Ariz. 2000).

111. *In re* Gen. Adjudication of All Rights of Use under the Gila River Sys., 857 P.2d 1236, 1243 (Ariz. 1993).

and growth of towns and cities, and the lives of our people."[112] The principle of stare decisis "must be applied with particular care when the prospective effect of change threatens important vested rights and may affect every Arizonan's well-being."[113]

Feldman's opinion strongly adhered to the earlier rule that prior appropriation applies to both the stream and its subflow. Arizona streams often may appear dry, "but water flows underneath the surface. This underground water is not a separate underground stream but still a part of the surface stream."[114] The opinion also recognized the distinction between subflow below the stream and "tributary waters" that may percolate to a stream from a distance. Thus, the emerging rule is that appropriation of a stream's water does not bar wells nearby that do not directly affect either the surface flow or the subflow.

On water rights, as in other natural resource cases, Feldman recognized that the legislature has a role to play, subject to constitutional limits. His opinion in the Gila River water adjudication noted that the court should not be regulating water use on a case-by-case basis: "Simply put, there is not enough water to go around. All must compromise and some must sacrifice. Definition of those boundaries is peculiarly a function for the legislature."[115] At the same time, he wrote the leading case holding that the legislature cannot impair vested water rights.[116] Similarly, Feldman was insistent that state trust lands be sold for the fully appraised value in order to comply with the Enabling Act and state constitution.[117] His bent generally was to preserve Arizona's natural resources.

Another very important area of state constitutional law is that of elections, and Feldman believed strongly in preserving the right of Arizona's voters to engage in "direct democracy" through the initiative and referendum process. Often after initiative petitions are circulated or matters are referred to the voters, there is rapid-fire emergency litigation as to whether the particular matter should be on the ballot. The frequency of such attacks irritated Feldman.

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112. *Id.* (discussing Maricopa County Mun. Water Conservation Dist. v. S.W. Cotton Co., 4 P.2d 369 (Ariz. 1931)).

113. *Id.*

114. *Id.* at 1244 (discussing 2 CLESSON S. KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS § 1161, at 2106–10 (2d ed. 1912)).

115. *Id.* at 1247 (quoting Ariz. Pub. Serv. Co. v. Long, 773 P.2d 988, 995 (Ariz. 1989)). By familiar rubric, consistency is a hobgoblin of little minds. Feldman was more willing to defer to the legislature on the vital matter of water rights than he was on the vital matter of public education. This is a descriptive, not a critical comment. The court can only make disastrous trouble if it tinkers with traditional rules of water law, because money cannot solve the water shortages; this is not true of education, where money can make an enormous difference.

116. San Carlos Apache Tribe v. Super. Ct., 972 P.2d 179, 205 (Ariz. 1999).

117. Ewing v. State, 745 P.2d 947, 950 (Ariz. 1987) (Feldman, J., concurring). In *Deer Valley Unified School District v. Superior Court*, 760 P.2d 537, 540–41 (Ariz. 1988), Feldman wrote for the court in holding that a school district may not condemn school trust lands for an elementary school because such a process "does not guarantee the highest possible return for the trust." *Id.*

Feldman basically thought that so long as the proper procedures were followed, the merits of ballot propositions should be left to the will of the voters.[118] He dissented, for example, when the court held that certain city council resolutions were not subject to referendum.[119] But he also dissented when the majority held that a procedural challenge to a given initiative challenge was barred by laches.[120] Feldman recognized that the review of ballot measures before the election should only concern procedural matters, such as the sufficiency of the signatures or the form of the ballot language. Thus, he wrote for the court in declining to consider a pre-election attack on an initiative measure where the challengers argued the initiative, if adopted, would violate a federal statute.[121] Substantive challenges must await the outcome of the election.

In the area of procedural challenges to ballot measures, Feldman worked himself into a hole on the issue whether the analysis prepared by the legislative council fairly describes a proposition. Under Arizona law, the legislative council is to prepare an "impartial" analysis of each ballot measure, and the analysis is reproduced in the publicity pamphlet distributed to voters by the Secretary of State.[122] With regard to a "tort reform" proposal, Feldman's opinion concluded that the council's analysis did not meet the required standard of impartiality.[123] This invited litigation over the language for nearly every ballot measure. A few years later, Feldman revisited this issue and concluded that the courts should review the legislative council analysis only to determine if it is "reasonably impartial" and fulfills the statutory requirements.[124] Closely scrutinizing the descriptive language for all initiatives and referenda would indeed leave the court with very little time for anything else!

IV. METHOD AND STYLE

Reflecting his independence and energy, Feldman did his own work as a justice and worked hard at his job. State supreme court justices are assisted by two or three law clerks, typically recent law school graduates who serve for a year or

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118. In another context, Feldman's respect for the will of the voters and sense of justice overcame any personal bias. As a lifelong Democrat, and in many respects a liberal, Feldman was as personally hostile to Arizona's former Governor Evan Mecham as anyone was likely to be. After Mecham was impeached and removed from office, the supreme court considered whether he was eligible to again run for governor. In holding that Mecham could run for future office, Feldman's opinion for the court noted "[t]he Arizona Constitution leaves the question of whether the impeached official should again hold public office in Arizona to the will of the people." Ingram v. Shumway, 794 P.2d 147, 152 (Ariz. 1990).

119. Wennerstrom v. City of Mesa, 821 P.2d 146, 153–54, 157 (Ariz. 1991) (Feldman, J., dissenting).

120. Mathieu v. Mahoney, 851 P.2d 81, 84–86 (Ariz. 1993) (Feldman, J., dissenting).

121. Winkle v. City of Tucson, 949 P.2d 502, 504 (Ariz. 1997).

122. ARIZ. REV. STAT. § 19-124(B) (2002).

123. Fairness & Accountability in Ins. Reform v. Greene, 886 P.2d 1338, 1348 (Ariz. 1994).

124. Ariz. Legislative Council v. Howe, 965 P.2d 770, 775 (1998) (discussing *Greene*, 886 P.2d at 1338).

two.[125] Justices also rely on the court's staff of long-term employed lawyers, who are called "staff attorneys." For petitions for special actions or discretionary review, the staff attorneys analyze the petition, summarize the decision below, and briefly describe the facts and the issues.

Feldman himself reviewed the petitions and staff memoranda, rather than delegating these tasks to his own law clerks. This reflects his view that the court's decision whether to take a particular case is often as important as the decision on the proper outcome. Sometimes a petition's merits (or lack thereof) were obvious from the staff memorandum. But if the merits were unclear, Feldman would go to the underlying briefs and record and review them himself.

Working on the move was a common practice for Feldman. Wherever he might be—in his office, a car, or airplane—he would dictate notes while reading petitions, identifying key facts and noting whether he thought the court should accept or deny jurisdiction. Feldman even had a dedicated phone line to his office, which allowed him to use every spare minute to send dictation. If Feldman was away from his office and concluded a petition lacked merit, he would shed paper as a snake sheds skin, discarding the rejected documents; the court had copies in its own files. If, on reading those papers, he thought more research was needed, he would sometimes ask a staff attorney to answer a particular question. After his notes were completed, Feldman might give them to a law clerk to further research a particular issue. In this manner, Feldman thoroughly prepared for every case that the court discussed at conference for possible review.

When a case was set for oral argument, Feldman would take his notes with him to the bench. If he had questions about the record or doubts about legal arguments, Feldman was not shy about telling counsel that aspects of a case troubled him. He would ask for a response to his concerns, and was rarely patient with evasive or non-responsive answers. Feldman thought the hard points should be brought out in open court so that counsel would have a chance to persuade him and the other justices.

Feldman usually formed a tentative opinion from his preparation, but he viewed himself as having a mind disposed to being persuaded. On occasion, the oral argument would change his views on some aspect of the case. Feldman estimated that in slightly more than ten percent of the cases the oral argument changed his mind, particularly where he may not have understood the facts correctly. He would take his notes from the oral argument to the court's post-argument conference, where the justices cast their votes and one justice was assigned the task of drafting an opinion.

Feldman's method of writing opinions changed with time. In the beginning, he wrote his own opinions, leaving it to staff and law clerks to do the editing and correcting. More recently, he often allowed the clerks to draft opinions, which he then rewrote freely. He would reorganize, remove whole sections, and

125. Several clerks have been from the University of Arizona, but some have come from Arizona State University and other schools around the country. More recently, he had clerks who first worked for court of appeals judges. As he contemplated retirement, he arranged with the clerks that they could leave on sixty days' notice and so could he.

insert sections of his own as he reworked the draft, which he then would return to the clerk for additional work. An opinion might go back and forth through six, seven, or even eight drafts. The occasionally colorful sentences were pure Feldman, as was a considerable portion of the opinions in the more important or controversial cases.

A dominant element of Feldman's style in writing opinions was also a dominant element of his personality: the freshness of view. An idea is not sanctified merely because we are used to it. For example, he dissented from a decision in which the court affirmed the revocation of probation after construing a statute to prohibit consensual sexual contact between minors.[126] This outcome, Feldman believed, violated the right of sexual privacy.[127] In another case, the majority adopted the traditional view that criminal defendants must admit the elements of a charged crime before they can plead entrapment.[128] Dissenting, Feldman thought this rule lacked any basis and was "an example of the common law process at its worst."[129]

His prose was never stodgy or pretentious, and a felicitous phrase or wry sense of humor sometimes lightened the opinions. In one case involving an injury to someone who dived into a shallow pond in a state park, Feldman observed that "[t]he government would *not* be negligent in failing to post a sign warning visitors to the Grand Canyon that it is a long way to the bottom and those who stand too close to the edge may lose their balance, fall and get hurt."[130] But Feldman aspired more to clarity than to effect. No idea was too novel to be considered, but odd turns of phrase did not occur. His opinions also reflect his view that important legal conclusions should be based on "facts, facts, and more facts."

Although Feldman has a quick tongue, he usually avoided biting prose in his opinions. A rare exception was his dissent when the court declined to disbar former United States Attorney General Richard Kleindienst. [131] Feldman believed disbarment was warranted for Kleindienst's "*tour de force* of ethical legerdemain"[132] and the court should "maintain the distinction between the practice of law and the practice of anything you can get away with."[133]

Feldman's opinions show that passionate arguments can be made without being offensive. If there is anything in the law on which Feldman is passionate, it is the belief that the Arizona Constitution preserves tort remedies. In *Bryant v. Continental Conveyor & Equipment Co.*, the court voted 3-2 to uphold an Arizona statute that barred strict products liability claims for products more than twelve

126. *In re* Pima County Juvenile Appeal No. 74802-2, 790 P.2d 723, 733–35 (Ariz. 1990) (Feldman, J., dissenting).

127. *Id.*

128. State v. Soule, 811 P.2d 1071, 1072–74 (Ariz. 1991).

129. *Id.* at 1075 (Feldman, J., dissenting).

130. Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 369 (Ariz. 1985).

131. *In re* Kleindienst, 644 P.2d 249, 256, 258–59 (Ariz. 1982) (Feldman, J., dissenting).

132. *Id.* at 257.

133. *Id.* at 259.

years old when the injury occurred.[134] Dissenting for himself and Chief Justice Gordon, Feldman noted that "[u]nless, like Alice, we have tumbled into Wonderland, law and common sense tell us that we cannot sustain a statute that requires victims to sue before they are injured."[135] Five years later, after a change in its membership, the court overruled *Bryant*.[136] Feldman could not resist writing a concurring opinion, but with no trace of "I told you so."[137]

An occasional burst of modesty did overcome him. In a case in which he thought the majority was guessing what a jury had in mind, he observed, "We are not given the gift of divination, only the duty of decision."[138]

V. CONCLUSION

It is hard to avoid superlatives when writing of Justice Stanley Feldman. Since 1982, he has been a vital force in the development of Arizona's law.

Feldman vigorously defended the constitutional status of tort remedies and the role of the jury in determining issues of causation and fault. He sought to ensure that contract law recognizes the realities of modern life and does not elevate "boiler plate" forms over the actual understanding or expectations of the parties. The Arizona Constitution, for Feldman, should be given independent force and applied in a manner consistent with its democratic, populist and progressive origins. Neither common law nor constitutional law were static in Feldman's view. Instead, legal principles must evolve in light of their underlying purpose and practical effect.

Feldman's contribution has been large and often colorful. He rates with Justice Lorna Lockwood and her father, Justice Alfred Lockwood, as one of the great builders in the history of Arizona law.

We have had a giant in our midst.

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134. 751 P.2d 509, 513 (Ariz. 1988).

135. *Id.* at 513–14 (Feldman, J., dissenting).

136. Hazine v. Montgomery Elevator Co., 861 P.2d 625, 630 (Ariz. 1993).

137. *See id.* at 630–31 (Feldman, J., concurring).

138. State v. Carriger, 692 P.2d 991, 1012 (Ariz. 1984) (Feldman, J., concurring in part and dissenting in part).

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