EINO M. JACOBSON

John P. Frank* and Kathryn E. Underwood**

An insignificant fact in common among Dudley Windes, Levi Udall, Duke Cameron, and Eino Jacobson is that one of us has written essays on each as they left the judicial scene; they are the only Arizona judges thus saluted.[1] This was no grand design; it is true coincidence. But there are two other coincidences. One is that each had major roots in the non-metro counties. Dudley Windes' parents rode a mule-hauled wagon from Chicago to Prescott in 1878. His father was the first Baptist missionary in Prescott and the Justice was born there in 1888. Levi Udall came from St. Johns, from a pioneering Mormon family. Duke Cameron was born in Phoenix, but his political career and his judgeship were in Yuma. On his father's side, Eino Jacobson is the grandson of Finnish immigrants who settled first at Bisbee about 1904 and then progressed to Miami and to Globe where he was born; the maternal family came from Germany. Prescott remained his personal home for all his adult life.

There is another coincidence: Each has been one of Arizona's great judges. Dudley Windes was on the trial bench in Maricopa County from 1922 to 1930 and again from 1940 to 1952; he served on our Supreme Court until 1959. His was an incredibly keen mind; what was said 35 years ago was, "Far and away the most distinctive aspect of Windes's judicial work was his instinct for the point. His fire was always reserved for the fundamental of the case, and his skill in hitting it was his art."[2]

Of Levi Udall, coming to the Supreme Court earlier than Windes and ending mid-service in 1960, it was said, "He did not lighten his labors with the brilliant insight of his colleague Windes nor the occasional burst of exceptional scholarship of our late Justice Alfred Lockwood. If a one-word sketch of him were required, that word would be 'solidity.' The quiet quality of stability was upon him...."[3]

In 1991, Cameron retired. By then very heavy dockets and more law clerks put limits on readily defined style, but Cameron in his own writing and, as his clerks have reported, in his editing, was sparing of words. His facts were always clear; as was said, he "never plays the hidden ball game. While there are long opinions, he is never windy and can be very concise. The opinions are short or long, as the situation warrants; they are never overblown."[4]

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1. John P. Frank, ARIZ. WEEKLY GAZETTE, April 1959 (Windes); John P. Frank, ARIZ. WEEKLY GAZETTE, Aug. 1960 (Udall); John P. Frank & Jenae R. Bunyak, *James Duke Cameron*, 33 ARIZ. L. REV. 735 (1991) (Cameron).
2. John P. Frank, ARIZ. WEEKLY GAZETTE, April, 1959.
3. Frank, ARIZ. WEEKLY GAZETTE, *supra* note 1, at 12-13.
4. Frank, 33 ARIZ. L. REV., *supra* note 1, at 752-53.

These are all judges who had to work to climb up in the world. When Cameron lived in Phoenix, it was in a house with a dirt floor. Dudley Windes, according to his own sketch, was born in a log cabin and also lived on a dirt floor as a boy. "In the summertime we went without shoes and my mother made our clothes," he reported. Levi Udall, as a boy, studied by lamp light and worked hard on the family farm. As a child, Jacobson did not think he was poor because all the other kids in Globe were in the same boat. His paternal grandfather had been a carpenter, and in the Globe/Miami area grandfather and father established a construction business. His maternal grandfather was a hard rock miner who came to Globe with his wife in a covered wagon. Eventually, his father got a civil engineering degree at the University of Arizona and was in ROTC. This led to two years in the Civil Conservation Corp., then into the army for World War II, and then into peace-time military service. The family followed the father on assignments in Cincinnati, Oklahoma, and Texas. While the father served for four years on the Navajo reservation, Jacobson lived with a grandmother in Globe for his high school years. The agreed euphemism for family finances in those years was "minimally prosperous." He was never hungry; grandmother raised chickens and rabbits, and there was always chicken on Sunday.

There are, of course, differences, the differences of generations. There was nothing intellectually sophisticated about Windes or Udall, nothing intellectually unsophisticated about Cameron or Jacobson; but an impressive commonalty is here: Arizona's countryside, small towns and up-from-hardship backgrounds gave something very special and very wonderful to the State of Arizona and to its legal system. Jacobson combines the qualities of these three great predecessors. Like Windes, he unerringly and swiftly gets to the point. Like Udall, his work has a solid quality; he never chases butterflies or is distracted by non-essentials. Like Cameron, his natural instinct is for conciseness and clarity, but, as befits the more difficult modern age, he can deal comprehensively with very complex problems.

To this he adds one other quality which is peculiarly his own. Windes was a crosspatch, as famed for his irritability as for his insights. Udall was quite humorless; wherever his son Congressman Morris Udall got his famed wit, it was not from his father's gene pool. Cameron has an amusing and playful aspect, but it is subordinated, and mostly he is earnest.

Jacobson is playfully funny. It is not that he tells jokes. It is that he sees the absurd and the amusing in any situation, often finding what would not occur to another. There are inevitably tensions in a collegial court. A fellow judge can go to Jacobson's chambers to banter off the strain of the day, and come away feeling happier. His regular earnestness has no substratum of the unpleasant. If one may, even on these dignified pages, slide into a colloquialism of the day, on the bench, in chambers, away from the court, he is a nice guy to be around.

BEGINNINGS

Judge Jacobson's Finnish-born grandparents came to this country at different times. His grandfather went to Bisbee, his grandmother to northern Michigan but eventually to Bisbee. Judge Jacobson understands that a marriage broker for the Finnish community arranged the trip, and it was not coincidence

that two immigrants from Finland landed in Bisbee and were married there. The family moved to Globe/Miami in 1916-17; Eino was born in Globe in his maternal grandmother's house and within the limits of his father's itinerant military assignments was brought up and went to school there. He went to the Globe High School, graduating in 1951, second in a class of 49 students; as he says, "When you've only got to compete with 48 other people, good class standing is not hard." He was a healthy and energetic boy, string bean thin and fast. His speed made him an All-State end on the Globe football team and also got him an athletic scholarship, along with a Baird scholarship, at the University of Arizona. That made the difference. The scholarships at U. of A., where he enrolled in 1951 and stayed for seven years of college and law, gave him room and books and fees. Odd jobs took care of the rest, jobs like sweeping out the stadium after a football game, or truck driving for printing companies; he could earn seventy-five cents to a dollar an hour.

Education and track took only part of his time at U. of A. In his freshman year, he came to know Patricia Collier, a Miami girl first met courtesy of a fraternity brother on the U. of A. campus, and in the summer before his sophomore year they were married. There were five more years of college and law school ahead and two of the Jacobson's five children were born during those years. They were happy years, but hard ones. Both parents worked, he at odd jobs and she in the office of the Dean of Education. Jacobson's parents visited from time to time and stocked the house with groceries for another month or so.

Jacobson's enthusiasm in his undergraduate years was English. He worked on the literary magazine, did some short story writing, and was headed to become an English teacher. Friends persuaded him that law would be a better career. With a wife and two children by the time he was in law school, he was working eight hours a day on the side, two years as a truck driver and thereafter as assistant manager of a gas station: that was a fancy title for pumping a good deal of gas, as well as doing the deposits and taking care of the books. When Jacobson finished law school and went to work in a Prescott law office, he took an income cut of $50 a month.

The Law School of his day had a fixed curriculum aimed primarily at passing the bar. The top student in particular classes thereby won a publisher's book. As law school slang puts it, Jacobson "booked" in secured transactions and corporations and received the award as the outstanding third-year student in the school. During several law school summers the family took their trailer back to Globe; this permitted Jacobson to work in the mines in Globe/Miami. Another summer was spent with the Legal Department of the Navajo Tribe, the family living at Fort Defiance.

Upon graduation, Jacobson became the first associate for the firm of Favour & Quail in Prescott. He was lucky enough to find a job. The pay until he passed the bar was $300 a month with a raise to $350 on admission. The office secretary earned more, but she and Jacobson both thought she was worth it. Prescott has been home for Jacobson ever since. In 1962, the family bought the house they live in today. In his 25 years as a judge in Phoenix, Jacobson never moved to the capitol, instead commuting to court. He bunked in Phoenix when he had to, which was not often, and had his main office in the court building; but his ancillary office was in the courthouse in Prescott for the full

25 years. He spent as much time there as he could; his life was in Prescott, its schools, its people, its activities — particularly those outdoors.

When Jacobson moved to Prescott, it had a population of approximately 8,000 people, with a total of ten actively practicing lawyers and one judge.[5] This was small-town life and small-town and country practice. He helped his seniors, interviewed witnesses, got matters ready for trial, and dealt with land law, grazing law, all sorts of ranch problems and mining law. In the beginning, he handled small matters, justice court matters and finally (a practice I endorse to this day for beginning lawyers) was sent to Flagstaff to the Superior Court to argue a sure loser motion for summary judgment. Novice lawyers have troubles enough without worrying about the results.

After two years, Jacobson and an older lawyer formed a two-lawyer firm with offices in one of the two buildings in which all of the lawyers of Prescott were located. Each lawyer had an office, there was a reception room with one secretary for the two, and a conference room. There weren't many books; the County Library was across the street. This firm had a general civil litigation practice and also criminal defense work. Jacobson's biggest plaintiff's verdict was $10,000 and he celebrated for a month. At the bottom of the economic scale were the $50 divorces; that was the going rate. Many of the criminal cases were wholly uncompensated or were by court appointment. Frank X. Gordon, Jr., later Chief Justice of the Arizona Supreme Court but then a Superior Court judge in Kingman, recruited Jacobson to defend a triple murder. This was a three-week trial and Jacobson was compensated $800.

Jacobson was active in the Lions Club, the Boys Club, and in the Smoki organization which supported the rodeo. He was chairman of the Red Cross fund drive and of the cancer fund drive; friends clutched their wallets when they saw him coming. He was president of the Prescott Jaycees and for many years before and after becoming a judge a board member of the Prescott YMCA. He was keenly aware that in serving the community he was serving himself, broadening his acquaintance and building self-confidence.

The position of County Attorney in Yavapai was part-time, and the lawyer holding the post could also maintain his individual practice. In 1964, he ran as a Republican when there were very few Republicans in Yavapai County. He thinks that his early Republican association was a reaction against his father who was so partisan a Democrat that while his mother voted for Jacobson in the 1964 race, his father did not.

By 1962, he had become active in Republican campaigning. A retired oil company executive had been seeking to build the Republican Party and Jacobson was one of the five or six young persons in at the beginning. This energetic coterie would load into the back of a pick-up truck, drive to the small towns, gather a little crowd by violin playing and shouting, and in 1962, elected a county sheriff. In the 1964 Republican primary, Jacobson had no opposition. He distributed leaflets, put up billboards, and posted a big sign on top of his car; he knocked on doors, campaigned hard and in a vote of 3,000 won by approximately 200. The campaign was without animus; his Democratic adversary later served with him as Deputy County Attorney for three years.

5. Because of courtesies shown our partners by the Yavapai County bar, Lewis and Roca sometime in the 1950s gave a dinner for the entire County bar. We then outnumbered it.

Each of the two gave morning or afternoon to the County business and then in a separate office did their private practice the rest of the time.

For Jacobson these were years of plain professional fun. The County Attorney's job was not very demanding — about ten felony cases a year in the Superior Court in Prescott and miscellaneous drunk driver and other matters in the justice courts of smaller towns. His private practice flourished; economically, when he became a judge a little later, there was a drop in income. Money beyond essentials has never much mattered to the Jacobson family.

The most colorful single case of the County Attorney was the murder prosecution of C. Lee Mast, charged with murdering his wife just inside the border of Yavapai County by hitting her on the head, driving her vehicle over a precipice, and setting fire to the vehicle in an attempt to cover up the murder; it appeared to be an insurance murder. The case came up for trial three times. The first time the jury divided, not on guilt or innocence, but on first- or second- degree murder. The second time the jury hung again, this time ten voting for conviction and two for acquittal. The third time on the eve of the trial the defense attorney ran away to Mexico, and when the trial was called there was no one to appear for the defense. The trial court fined the absconding lawyer $10,000 but declared a third mistrial. At this point, the County ran out of funds to pursue the defendant, who thereby got away with it, though not with the insurance. With a little help from Jacobson, the insurance company was never required to pay Mast.

FROM BAR TO BENCH

In January, 1969, the legislature created a second panel for the Arizona Court of Appeals sitting in Phoenix. Under the law, there would be three appointments for the then-Governor Jack Williams to make, of whom two would come from Maricopa County and one from the other counties of the northern portion of the State.

There is an insignificant difference on the details of the appointment. Governor Williams, not a lawyer himself, was in the habit of asking for advice on judicial appointments from old friends; the present merit selection system had not yet been created. One of those old friends was Harold Wolfinger, a prominent Prescott attorney who later became president of the State Bar. Wolfinger's recollection in 1994 of these events of May 1969 was that Williams asked advice from a committee of Irving Jennings, senior partner of the Jennings, Strouss & Salmon firm in Phoenix, Frank Snell, senior partner of Snell & Wilmer, and Wolfinger, and they concluded to recommend Jacobson.

Wolfinger then went to Jacobson's office in Prescott and said, "Would you like to be on the new State Court of Appeals?" According to Wolfinger's 1994 memory, Jacobson forthwith said "Yes." According to Jacobson's memory, he went home to talk the proposal over with his wife. One clear problem was financial; the Court of Appeals position paid $19,000 a year in 1969 and acceptance would mean a severe cut in income. Mrs. Jacobson asked her husband if he would really like to do it, he responded that he would, and she undertook to manage. Jacobson reported back to Wolfinger that afternoon, and the next day Governor Williams appointed him; the entire process from proposal to appointment was less than 24 hours. The new panel came into

existence on July 1. On July 11, 1969, Judge Jacobson was sworn in and went to work, and 25 years later he wound up the job.

The appointment brought a colossal professional change to Jacobson's life, but he successfully combined it with a minimal change of lifestyle. The life of Prescott, coupled with a good deal of exposure to the outdoors, he kept. He kept his home in Prescott and was there as much as possible. His recreations of hunting, boating, fishing and golf remained what they were. For more than 25 years there has been the "High Line Judicial Conference." The nuclear conferees were Judge Frank Gordon, then of Kingman, and later Chief Justice of the Arizona Supreme Court, the late Judge Larry Wren of Flagstaff, Jack Ogg of Prescott, and Jacobson, who used that splendid conference name for a fishing trip each spring. These were not entirely placid events; witness Judge Levi Ray Haire being dragged instead of skiing over the water, or the collective judiciary of Northern Arizona diving for the contents of a beer float which sank. More judges and occasionally some lawyers were added, but none of the women judges, a matter of some banter between Jacobson and his good friend, Judge Mary Schroeder, who served with him for four years on the State Court of Appeals before going to the Ninth Circuit. The Conference will continue after Jacobson's retirement, and on a strictly male basis. In many of the summers, Jacobson served as a trial judge in Prescott, but in more recent years he and his wife have increased their traveling. Recent summers have been in Mexico learning to scuba dive. Yet our outdoorsman judge had and retains an informed interest in Gregorian chants.

LIFE IN CHAMBERS

In the early years, the two Court of Appeals panels simply took the cases as they came, with no particular effort to organize the docket by subject matter. In later years, there was some experimentation with specialized panels, for example, a panel which for a protracted time would hear nothing but Industrial Commission cases. This kind of specialization proved to be extremely unsatisfactory and the current pattern groups subject matter cases by panels for a week at a time.

The expanding docket has forced radical changes in the work methods of the Court. In the beginning, Jacobson was responsible for at most 40 to 50 opinions a year. These could be all his own work; the law clerks were used only for memorandum research, cite checking and general legal handiwork. This has changed. Writing 50 cases, as one judge of three, meant considering 150 cases a year. At the present time, that number has increased to about 400 cases a year and Jacobson in his last years was personally responsible for 130 to 140 published and unpublished opinions.

This increase changes every aspect of the job. If there are an effective 250 working days in a year, the 130 to 140 cases average approximately one opinion every two days, and no one can actually perform that work alone. The most conspicuous mechanical change is the device of summary dispositions, short and informal statements which dispose of the particular case without indicating a particular author among the panel of three. They do not need to be polished or scholarly and are not citable as authority in the future. About 80 percent of the cases are now decided as memorandum decisions or summary dispositions. Each judge now can have two in-chambers clerks, or elbow clerks

as they are frequently called. In addition, there is a central staff of the Court which prepares some bench memos and proposed draft opinions on many cases, as do the individual clerks.

At its most extreme, the central staff system can, as a practical matter, simply eliminate the judge from the judicial process. The briefs go to the central staff clerk, a draft opinion or order comes out, and in some courts around the country one more than suspects that a judge's name is attached to the product without it ever having been subject to the "judicial" process at all. Division One of the Court of Appeals has determinedly and successfully combated that form of judicial abdication. Cases to be argued on any given day are taken up by the judges at a one to two-hour, pre-oral argument conference at which staff briefs them. In clear cases the matter may pretty well be effectively decided at that point before there has been any oral argument. However, if at the conference the matter appears open, the oral argument can be used to check the dubious points. The conference includes the central staff attorney responsible for the day's cases and the elbow law clerks of the judges on the panel; discussion among the working team is open and either central staff or the elbow clerks may be making presentations on particular cases. At the post-argument conference, the cases are assigned to a particular judge, and at this point central staff drops out of the process; its work product is turned over to the judge and his own law clerks to finish the matter.

Fact determinations of the trial court will be upheld in almost all instances, and hence 90 percent of the appeals are affirmed. Nonetheless, Jacobson regards the oral argument as important in two respects. A real but small value is the result itself, which within Jacobson's experience is affected by oral argument less than ten percent of the time. By the time a case has been briefed, worked up by staff and discussed at conference, the panel well understands the case and the result is likely to be fairly well ordained. But Jacobson believes that it is important both that the lawyers see judges and that the judges hear live people. He wants the lawyers and the public to feel that there are three judges who are going to decide a particular case and that the parties should get a chance to be heard directly by them. But he wishes that some oral arguments were better and not simply retreads of the briefs.

The big difference, because of the enormous increase in the number of cases, in Jacobson's work practice over the years is that he must rely heavily now on his law clerks to do those pre-drafts of opinions in which central staff does not prepare a draft. For a practical illustration of the system, assume a civil calendar of four cases to be heard on a particular day. Central staff does the work-up on one case. The Presiding Judge then assigns a third of the remaining cases to each of the individual chambers for pre-conference drafts. It may be that the pre-draft function in chambers will prove too difficult for the allotted time; the matter may be so difficult that there is no clear answer and discussion is needed both between the judge and his elbow clerk and among the judges themselves in order to make a draft useful. About 30 percent of the cases fall into this category. The remainder have pre-drafts and in almost every instance the case will be assigned after argument to the judge who prepared the pre-draft.

In an interview a hard question put to Judge Jacobson received this answer:

Q. The concern of the Bar is that we are realistically appealing from one judge to one judge and that the remainder of it is fundamentally window dressing because one judge will be writing the opinion in advance and it is going to wind up with that judge so that the other two are basically just sitting there. How do you deal with that observation?

A. Our problem is to deal with an enormous volume of cases. We must fight to avoid letting meritorious cases wait two or three years before we can get to them. At the same time, no one should have any more of a vested interest than is inescapable in a particular position before conference and argument. This is why I oppose the practice in Division Two [the Court of Appeals in Tucson] of circulating draft opinions not merely to fellow judges but to the parties.

To meet my own responsibility as a judge, I never look at a pre-draft, either from staff or from a fellow judge's chambers until I have read the briefs myself, have made extensive notes, have determined how I would probably decide the case, and then look at the draft to see if I agree with it. Remember that this is followed up by the extensive open conference of all of the judges before the oral argument. This is the only assurance I can give to the Bar that it is getting an independent product. We are forced by the numbers to adopt policies that in a kinder and gentler world would not have been adopted.[6]

In Jacobson's case, it is a rare opinion in which he has not done major editing and revisions, especially on staff drafts. With a permanent law clerk of his own, he and the clerk merge into one style and approach, and he can rely more heavily than otherwise.

Concurring and dissenting opinions don't appeal to him any more than they do generally to the bar. In 25 years, he has had a total of some 28 dissents and fewer concurrences. The rare dissents are to aid the Supreme Court on petitions for review, the concurrences to reserve positions for the future. On memorandum decisions, since they have no precedential value, if he agrees with the result he simply signs off and lets them go.

Jacobson reads the briefs meticulously, especially in areas where he does not know the law thoroughly. He hopes for briefs that make clear the facts and the issues and exhaust the subject matter. When he is in doubt, he goes to the library to read cases; he has not mastered the computer.

Part of a judge's duty is administration, and for three two-year terms, spaced over the 25 years, Jacobson has served as Chief Judge of the Court; ("And that's about as much as you can stand," he adds.) In the earlier years, the chief judge assigned the individual judges to panels and assigned the particular cases to the particular panels. But by now, as the Court has expanded and the volume increased, the assignment of cases to panels after conflicts checks is done randomly and mechanically in the Clerk's Office. Previously the chief judge passed on motions; this duty has now been delegated to panels with staff help as it now involves some 50 to 60 motions per week. But running the court now is a big business, with needs for equipment, budgets, space planning and

6. Interview with Eino Jacobson (Nov. 4, 1994).

staff planning. The chief judge has serious executive functions, which the Court now believes could well occupy more than half the time of one judge.

With the rotating system among chief judges, there become differences in what chief judges do. For illustration, one recent chief judge effectively devoted herself to getting the Clerk's Office computerized. Judge Jacobson's concern with the Clerk's Office is less technological; he was concerned primarily with the efficiency of that office so that it got to the judges whatever the judges were supposed to have when they were supposed to have it. The purely legislative side, appearing before committees in support of the court budget, is also part of the duty and this he enjoyed. He believes it to be important that a judge should make those appearances rather than send a court employee. Aside from this function, although he always knew the legislators from his own county well, he was in no wise a lobbyist.

Pretty nearly the beginning and end of his function as a judge, as he sees it, is to decide cases. But he is also concerned with the efficiency of that process. From 1974 to 1976, he was co-chairman of the Arizona Appellate Project, an American Bar Association program to speed cases and reduce costs by expanding and accelerating oral argument. This is an ancestor of present ARCAP Rule 19 on accelerated appeals; he reported on the project in the UCLA Law Review.[7] For this and other labors, he received the American Judicature Society Award in 1985.

A CROSS-SECTION OF OPINIONS

During his 25 years on the bench, Judge Jacobson produced for the court 782 opinions, 28 dissents, and virtually no concurrences. The opinions are invariably clear, precise but thorough, and done in a simple, unostentatious English. Because the Judge has high technical skill, he can make good sense out of technical matters.

An illustration is *Bowman v. Board of Regents*.[8] The court was dealing with a technical mess which had been created by the Arizona Supreme Court. The underlying dispute was whether Northern Arizona University had properly terminated a faculty member. The trial court held that it had, and the faculty member appealed. The University cross appealed for counsel fees, but then added a "cross issue," asserting that not only was the faculty member properly terminated, as the trial court found, but that the trial court in any case should have dismissed the faculty member's cause because he had not prosecuted it diligently. The issue on this phase of the case is the highly technical one of whether the University needed to raise that issue by a "cross appeal" or whether it could do so by a "cross issue." The problem arose because of an extremely unfortunate Supreme Court decision, *Walters v. First Federal Savings and Loan Association*,[9] which held that an appellee could not offer as an alternative ground a claim rejected in the trial court without a cross appeal.[10]

We pause at this minute case, which has about it some of the elements of a dispute over how many angels can dance on the point of a pin, because it

7. Eino Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 UCLA L. REV. 480 (1976).
8. 162 Ariz. 551, 785 P.2d 71 (Ct. App. 1989).
9. 131 Ariz. 321, 641 P.2d 235 (1982).
10. *Id.* at 324.

illustrates both Jacobson's methods and his jurisprudence. The Supreme Court decision, to put it kindly, was a lapse on the part of that body. It is universal law that an appellee can offer alternative grounds which had been presented below to support a result without the necessity of a cross appeal. But Judge Jacobson, as a judge of the Court of Appeals, is bound to follow the decisions of the Supreme Court and cannot overrule them; when Caesar nods, the whole rest of the legal entourage must nod with him. He gently acknowledged that the decisions of the Supreme Court on the point (there were more than one) were "confusing." He thereupon, in Solomonesque style, divided the baby: He laid out rules for the future as to when cross appeals would be required, greatly expanding the Supreme Court decisions on the areas on which they would *not* be required; but in the particular case, he held the faculty member needed a cross appeal to present his issue and that a "cross issue" was not good enough. He thus improved the situation for the future, but at the same time was a dutiful judge of a court of appeals in following its unfortunate rule of law.

The story goes a little farther. The result in the *Bowman*[11] case is grotesquely formalistic and Judge Jacobson knew it; he regretted he could do so little to improve the situation. He and a bar member set out to write a rule which would bring Arizona law on this little point into accord with the rest of the country. That rule was accepted by the appropriate Bar committee and the Bar's Board of Governors. The Supreme Court then adopted it.

Judge Jacobson thus met his duties both ways: As a judge of a court below the Supreme Court, he followed the Supreme Court precedent, doing what little he could to improve it but still following it. As a participant in the rulemaking process, he had the laboring oar in overruling not only the Supreme Court precedents which had created the problem, but also his own case. A judge with a little more vanity, a little more pride of opinion, would not have done this; he would have been content to look at his own work and consider it good. But Judge Jacobson is blessedly devoid of either pride of opinion or vanity.

We turn to a few connecting threads among the 782 diverse opinions.

A. ALR Annotations.

Three of Judge Jacobson's decisions became lead annotations in ALR. One of those cases, *Cluff v. Farmers Insurance Exchange*,[12] focused on the extreme and outrageous conduct element of an intentional infliction of emotional distress claim. The trial court initially dismissed this claim, and the Court of Appeals affirmed.

The claim stemmed from the actions of an insurance adjuster, who had allegedly threatened and cajoled the plaintiff into accepting a settlement of a wrongful death claim. The adjuster allegedly stated that the plaintiff probably could not recover damages and that he hated the fact that she had hired a lawyer.

In analyzing the plaintiff's claim for intentional infliction of emotional distress, Judge Jacobson observed:

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11. 162 Ariz. 551, 758 P.2d 71 (Ct. App. 1989).
12. 10 Ariz. App. 560, 460 P.2d 666, 39 A.L.R. 3d 731 (1969).

> The course of human conduct even in our "civilized" community has amply shown that self seeking and inconsideration are a common trait in man's relationship with man. The law does not purport to protect individuals from the minor manifestations of this human conduct.[13]

While the acts of the insurance salesman may have been unethical, they did not qualify as extreme and outrageous.

The second annotation concerned an action brought under the Employer's Liability Law for injuries the plaintiff sustained while engaged in a hazardous occupation. In *Rollette v. Myers*,[14] the plaintiff had helped start a corporation after suffering his injuries. At issue was whether the trial court properly allowed the introduction of a corporation's income tax returns as bearing on the issue of a reduction in the plaintiff's earning capacity.

In the decision, Judge Jacobson wrote that the loss of earning capacity is not necessarily the difference between plaintiff's earnings before the injury and those after, but rather the loss of earning capacity itself, which might decrease even though actual earnings increased. In order to make the loss of profits material to the issue of earning capacity, the party must show that these profits are so allied to the personal efforts of the injured party that the profits are a near reflection of the injured party's earning capacity. In *Rollette*, the defendant had failed to prove that the plaintiff's personal efforts were the predominant factor in producing the corporation's profits.

The third annotated case is *City of Phoenix v. McCullough*.[15] That appeal arose out of the denial of the City of Phoenix's right to condemn property for the purported purpose of expanding Sky Harbor Airport. The trial court had held that, as a matter of law, the City's contemplated use of the property was so remote and speculative as to negate the necessity for its taking.

The crux of the problem was that the City did not contemplate use of the property for at least nine years, and possibly not until 2015. Judge Jacobson stated that the eminent domain requirement that the acquired property be "necessary to such use" contemplates a time element. The condemning authority legitimately could consider future needs in determining whether property was necessary for use. But because the City was uncertain as to when the future use would occur, the exercise of eminent domain was improper.

B. Cases of First Impression.

Truly new cases come to the Court of Appeals. Probably his most highly charged case was the matter of the Mesa beauty parlor murders, discussed below, which came near the beginning of his service; the next for dynamite quality came near the end. This latter case was *Vo v. Superior Court*,[16] in which the state sought to prosecute the defendant for the first-degree murder of a five-month-old fetus. Judge Jacobson was well aware that this case linked to the great abortion controversy. As a good and observant Catholic, he has his own views on that topic, but he was not inclined to force the law to reflect them.

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13. *Id.* at 563, 460 P.2d at 669.
14. 13 Ariz. App. 72, 474 P.2d 196, 45 A.L.R. 3d 336 (1970).
15. 24 Ariz. App. 109, 536 P.2d 230, 80 A.L.R. 3d 1071 (1975).
16. 172 Ariz. 195, 836 P.2d 408 (Ct. App. 1992).

He found that the fetus was not a "person" for purposes of the first-degree murder statute. He flatly declared that this was a matter of interpretation of a particular criminal statute: "[W]e need to emphasize that this Court is not embarking upon a resolution of the debate as to 'when life begins.'"[17] This line appealed to him so much that in the opinion which quite possibly is the most comprehensive he ever wrote on any subject, he quoted in bold face from a Kentucky opinion on the same topic: "The much larger metaphysical question of WHEN DOES LIFE BEGIN? is *not* the subject of this opinion."[18] For criminal law and murder purposes, in the interpretation of this particular statute, the fetus was not a person.

In *Smart Industries v. Superior Court*,[19] Judge Jacobson addressed whether a plaintiff's lawyer, who hired a nonlawyer assistant formerly employed by defendant's counsel, had to be disqualified. Arizona law did not permit a "cone of silence" or other screening devices to prevent imputed disqualification of a law firm to which a lawyer moves when that lawyer possesses client confidences and the new firm's interests are adverse to that client. The courts, however, had not yet confronted the imputed disqualification question in the context of a nonlawyer who changes firms.

The Judge likened the nonlawyer to a governmental lawyer, because in both cases the employees lack a financial interest in the outcome of litigation, and have no choice of which clients they serve. Moreover, the Judge wrote, the public holds different expectations of lawyers and nonlawyers, probably based upon the independent contractor status enjoyed by lawyers as compared to the master/servant role of nonlawyers. Because screening devices are sufficient to avoid the vicarious disqualification of a governmental lawyer, they also should prevent disqualification of a nonlawyer.

In one of his most spectacular cases, Judge Jacobson reversed a judgment which found unfair labor practices and tortious interference with business relations against a union, holding that an Arizona prohibition against secondary boycotts could not be applied to conduct occurring in other states in which it might be legal. *Bruce Church, Inc. v. United Farm Workers*[20] remains the sole case of geographical overbreadth in Arizona.

C. Separation of Powers Issues.

Judge Jacobson has a keen sense of separation of powers, and that includes keeping the judiciary within its own preserve. One such example is *Appeal in Maricopa County Juvenile Action No. JV 122733*.[21] There, a juvenile court found probable cause to believe that a juvenile had committed a crime of first-degree murder. It thereupon granted the state's request to transfer the juvenile for criminal prosecution, but attempted to restrict the charge to involuntary manslaughter.

According to Judge Jacobson, "the judicial branch cannot usurp the exclusive authority of the executive branch in determining whether to initiate

17. *Id.* at 199.
18. *Id.* at 202 (quoting Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983)).
19. 179 Ariz. 141, 876 P.2d 1176 (Ct. App. 1994).
20. 169 Ariz. 22, 816 P.2d 919 (Ct. App. 1991).
21. 172 Ariz. 542, 838 P.2d 1303 (Ct. App. 1992).

delinquency proceedings in juvenile court."[22] Likewise, the juvenile court could not deprive the prosecution of its discretion to determine which charges to bring.

Similar concerns echo in *State v. Eminowicz*.[23] In that instance, the Judge distinguished between the provinces of the legislative and judicial branch. At issue was whether any exceptions existed to the statutory requirement of announcement of purpose in execution of a search warrant, thereby permitting officers to obtain and to execute a "no-knock" search warrant. The State argued that an exception should apply when there was substantial evidence to cause officers to believe that the evidence sought would be destroyed if their presence and purpose were announced. Judge Jacobson concluded that although strong public policy reasons could support such an exception, it was up to the legislature, not the courts, to make it.

The *Arizona Daily Star*[24] editorially agreed: "The Arizona Court of Appeals has taken an important step in restoring the protection of personal privacy and individual rights by ruling that the use of 'no-knock' search warrants is without legal basis in Arizona."[25]

In another case, Judge Jacobson concluded that a justice court has the inherent power to require the personnel necessary for its functioning as a court.[26] This power, however, can only be exercised when there is no established method for obtaining personnel or when reasonable and good faith efforts to use such methods fail.

D. Struggles with Growth.

Sometimes the legislature is too cute for its own good. The Arizona Constitution art. IV, pt. 2, §19, prohibits "local or special laws." In the 1970s and 1980s, a number of Arizona municipalities engaged in "strip annexations." By this device, the municipality would annex a thin strip of land surrounding open country with a plan of later engulfing the large interior; as Judge Jacobson put it, this was "artificially extending their boundaries to include potentially high value taxable areas, or to defend against the encroachment of equally aggressive neighboring municipalities."[27] The legislature thereupon in a series of acts, under the leadership of the representative from the Litchfield Farms area, passed a statute which, in its final form, affected only twelve communities in Maricopa County and actions for deannexations could be brought only within so short a time that as a practical matter the Litchfield Farm area was the only one realistically likely to get any use from the statute.

Judge Jacobson's opinion goes to the reason for the rule, and in the course of it rejects a decision from Division Two of the Court of Appeals. He found that the local law restriction in the Arizona Constitution was deliberately enacted because of "fear of legislative favoritism."[28] The restriction, he found,

22. *Id.* at 545.
23. 21 Ariz. App. 417, 520 P.2d 330 (1974).
24. *Court Knocks 'No-Knock'*, ARIZ. DAILY STAR, March 18, 1974, at 20.
25. *Id.*
26. Reinhold v. Board of Supervisors of Navajo Cty., 139 Ariz. 227, 677 P.2d 1335 (Ct. App. 1984).
27. Petitioners for Deannexation v. Goodyear, 160 Ariz. 467, 468, 773 P.2d 1026, 1027 (Ct. App. 1989).
28. *Id.* at 470, 773 P.2d at 1029.

has a "broader egalitarian purpose."[29] In holding the statute unconstitutional, he said, "Such favoritism subverts the explicit mandates of our constitution and contravenes the admonition against imposing greater burdens on some while granting privileges to others."[30] From the standpoint of judicial artistry as well as thoroughness, this opinion belongs in the circle of the finest judicial work Judge Jacobson has ever done.

An earlier case, *East Camelback Homeowners Association v. Arizona Foundation for Neurology and Psychiatry*,[31] arose out of the expansion of Camelback Hospital. The tussle between neighboring homeowners and the hospital spanned several years. The homeowners contended that the hospital already had expanded its patient capacity beyond its original use permit and should not be allowed any further expansion of this non-confirming use. Ultimately, the zoning board of adjustment granted a nonconforming use permit for the hospital's proposed expansion, subject to certain conditions. The Board restricted bed capacity to the current size, limited construction to that described in the submitted plans and specifications, and limited the number of parking spaces. On review, the Superior Court affirmed the grant of the permit but modified the conditions.

The Court of Appeals affirmed the decision. The homeowners had attacked the insufficiency of jurisdictional facts to grant the hospital's use permit. Specifically, they argued that the Board had no power to hear applications or to grant permits because the building would be detrimental to area residents, workers, adjacent property, or the public welfare in general. Their brief emphasized the prior unsanctioned expansion of the patient load. Judge Jacobson rejected the argument, because the lower court already provided safeguards against the unsanctioned growth.

E. Upholding the Constitution.

As a former county attorney, Judge Jacobson could be expected to be tough on crime, and he was. But at the same time, he scrupulously observed constitutional limitations, and was prepared to take the heat without flinching when he did. For example, in *State v. Swanson*,[32] the Judge held that a motorist arrested for possession for sale and transportation of six kilograms of cocaine was entitled to suppression of the evidence. He found that the motorist's consent to the police's request to "take a look in the vehicle" did not authorize them to remove the rear door panel. *Swanson* was included in a *Reader's Digest*[33] collection of cases purportedly illustrating abuses of justice. The article complained that "[j]udges let the criminal go"[34] and asked "Why do we tolerate abuses of justice that let the innocent suffer and wrongdoers go unpunished?"[35]

Judge Jacobson lost no sleep. It was enough for him, as he concluded in the opinion, that "[t]he officers' removal of the door panel invaded the structure

29. *Id.* at 471, 773 P.2d at 1038.
30. 160 Ariz. at 473.
31. 18 Ariz. App. 121, 500 P.2d 906 (1972).
32. 172 Ariz. 579, 838 P.2d 1340 (Ct. App. 1992).
33. *Crime & Punishment (U.S.A.): Why Do We Tolerate Abuses of Justice That Let the Innocent Suffer and Wrongdoers Go Unpunished?*, READER'S DIGEST, November 1992 at 100-01.
34. *Id.* at 100.
35. *Id.*

of the automobile and far exceeded the scope of 'taking a look in the car'...."[36] He believed that no "typical reasonable person would find that consent to 'take a look in the car' for drugs, weapons, or large sums of money included consent to dismantle the car in the process."[37]

The instance in which Jacobson received the most abuse for doing his job was *State v. Smith*.[38] The defendant had murdered five women in a Mesa beauty parlor and wounded two others. He was convicted, sentenced to death, and appealed to the Arizona Supreme Court. Judge Jacobson was called upon to sit with the Supreme Court in that matter and was assigned the opinion of the court. The defense was insanity. Key evidence were notes which Smith had written to another prisoner which tended to show that he was sane; the trial judge expressly found that if they had been excluded, the result might have been different. The second convict, who received the notes and turned them over to the County Attorney, was very clearly acting as an agent of the County Attorney at the time in return for a reduced penalty, and he got his reward. If the informer was acting as an agent for the County Attorney, the notes were properly held to be inadmissible. As Jacobson put it, "this Court does not live in the never, never land of Peter Pan,"[39] and the informer "received his *quid pro quo*."[40]

The *Smith* case, with its multiple murders, was the most spectacular criminal news in Arizona in its day, and the opinion received wide attention. So did the Judge. There were calls for impeachment. In retrospect, the result reached seems clearly required by existing United States Supreme Court decisions by the facts. Jacobson was no Peter Pan, and he realized that criticism sometimes goes with the job of being a judge.

At the same time, criminals who had no merit to their position got short shrift from Jacobson. For example, in *State v. Mott*,[41] Judge Jacobson wrote that a criminal defendant who knowingly and intelligently waives the right to counsel and chooses to represent himself may not later assert ineffective assistance of counsel based on his own misconduct at trial. During the course of representing himself, the defendant referred to himself as a "living legend in my own time."[42] As part of his testimony, the defendant sang an Elvis gospel song to the jury. The Court found no evidence that the defendant was denied a fair trial.

F. Judge Jacobson in Dissent.

Judge Jacobson averaged about one dissent per year. When he did dissent, however, he would do so in ringing terms. *Mancillas v. Arizona Property and Casualty Insurance Guaranty Fund*[43] is illustrative. The majority gave uninsured motorist coverage to someone who had insurance but was underinsured and had deliberately chosen to be so. By the decision, the motorist, Judge Jacobson concluded, received coverage for which he had not

36. United States v. Swanson, 172 Ariz. 579, 584 n.5, 838 P.2d 1340, 1344 n.5.
37. 172 Ariz. at 584.
38. 107 Ariz. 100, 482 P.2d 863 (1971).
39. *Id.* at 104.
40. *Id.*
41. 162 Ariz. 452, 784 P.2d 278 (Ct. App. 1989).
42. *Id.* at 459. 784 P.2d at 285.
43. 179 Ariz. Adv. Rep. 67 (Ct. App. Dec. 15, 1994) (Jacobson, J., dissenting).

paid. This approach, he felt amounted to more than liberal construction; it was judicial largess.

CONCLUSION

When Judge Eino M. Jacobson put down his gavel at the end of his 25 years of service, Arizona lost one of the ablest judges who has ever sat in this state. His diligence, depth, and everlasting decency are rarely seen. This state has been fortunate in his service.