



A DECLARATORY JUDGMENT: IN THE MATTER OF NATHAN L. JACOBS

Delivered by
*Honorable Alan B. Handler*¹

This matter, initiated without complaint or controversy, is in the nature of a declaratory judgment in respect of Nathan L. Jacobs. The judgment is that Nathan L. Jacobs, who served as an Associate Justice of the New Jersey Supreme Court from 1952 to 1975, and who died on January 25, 1989, is singularly responsible for developing a jurisprudence that has indelibly influenced the direction, style and goals of the New Jersey judiciary. His legacy to the judiciary, the government, and the people of the State of New Jersey, and, indeed, to courts and people beyond, is distinctive, profound and enduring.

This judgment of Justice Jacobs is mirrored in the eyes of knowledgeable beholders. On the occasion of Justice Jacobs' retirement from the New Jersey Supreme Court, Justice William J. Brennan, Jr., from the vantage of the United States Supreme Court, said: "Justice Jacobs' brilliant judicial career has played a major role in building the New Jersey Supreme Court's reputation throughout the nation for superior distinction," noting also the aptness of Justice Felix Frankfurter's definition of the great judge: one who, manifesting humility and disinterestedness, is committed only to reaching "the best judgment . . . through reason called law." Brennan & Proctor, *Justice Nathan L. Jacobs—Tributes From His Colleagues*, 28 *Rutgers L. Rev.* 209, 209-11 (1974). Justice Haydn Proctor, a colleague on the New Jersey Supreme Court, considered Justice Jacobs to be "a profound judicial philosopher," "a superb craftsman." *Id.* at 211. Morris M. Schnitzer, a lifetime friend said of the Justice:

Again and again he has proclaimed that justice to the litigants is the polestar. And for him, and for those who will follow his example, it has truly been a beacon of light and direction.

Schnitzer, *Justice Nathan L. Jacobs—Architect of New Jersey's Court Structure and Judicial Exponent of Civil Procedure*, 28 *Rutgers L. Rev.* 226, 250 (1974) (citation omitted).

This informed judgment by knowing peers is confirmed by even

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a cursory glance over the Jacobs' *opus*, consisting of scores of opinions covering every facet of law that can confront a state court. Mining this rich resource yields unique jurisprudential ore: the Jacobs Doctrine, the Jacobs Methodology, and the Jacobs Legacy.

THE JACOBS DOCTRINE

The vision of law held by Justice Jacobs cannot be neatly categorized or summarized. It is both idealistic and pragmatic, profound while comprehensible, compassionate but unsentimental, feeling yet objective. It values the individual without diminishing institutions. It is sensitive to vital relationships that flourish within the framework of democratic representative government. Perhaps the jurisprudence of Nathan Jacobs can best be understood as a core of related principles that collectively give content to substantive law, direction in the application of judicial procedure, definition to the judicial role, and guidance in the exercise of judicial power.

One such central, perhaps overarching principle, is the imperative of individual justice. Through the prism of innumerable opinions, the imperative of individual justice can be seen in varied shapes and hues as a paramount value in our system of law. Examples abound, but a few, illustrative opinions suffice to make the point; each of Justice Jacobs' opinions, it seems, is a decisional microcosm within a grander judicial macrocosm.

The central principle of individual justice as a legal imperative is most clearly seen in the content of substantive law. An example is Justice Jacobs' dissenting opinion in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (Jacobs, J., dissenting). There the majority of the court held that although it was malpractice for a doctor to fail to inform a pregnant patient of her option to continue or terminate a pregnancy when there was a strong probability, tragically realized, that the unborn child would be congenitally defective, the wrong was not legally cognizable. *Id.* at 31, 227 A.2d at 693. The Court felt that there was no legal right to an abortion at that time and that damages were impossible to ascertain because such a valuation would require a comparison between no life at all and an impaired life, a judgment beyond the ken of a court. *Id.* at 28-30, 227 A.2d at 692-93. Justice Jacobs disagreed, concluding that the doctor had a clear legal duty to inform his patient of the high incidence of abnormal birth. *Id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting). And, indeed, notwithstanding apparently contrary statutory con-

straints, Justice Jacobs believed that the patient might under appropriate circumstances have been able to act on such advice. It was, for Justice Jacobs, unacceptable that "a wrong with serious consequential injury . . . go wholly unredressed." *Id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting). Any breach of duty, with the ensuing birth of the congenitally defective child, justified "some reasonable measure of compensation toward alleviating the financial burdens." *Id.* Conceptual difficulties should not defeat just redress.

Surely a judicial system engaged daily in evaluating such matters as pain and suffering, which admittedly have "no known dimensions, mathematical or financial," should be able to evaluate the harm which proximately resulted from the breach of duty. Indeed, even if there were more evaluation complexities than are truly present here, they would not furnish any sound basis for the total denial of recovery.

Id. at 50, 227 A.2d at 704 (Jacobs, J., dissenting) (citations omitted).

This judicial command for individual justice sounds on all litigational fronts. Thus, in a commercial case involving unfair economic competition, *Red Devil Tools v. Tip Top Brush Co.*, 50 N.J. 563, 236 A.2d 861 (1967), conventional relief was problematic because of the absence of direct competition, along with the time and expense of an accounting that would not reflect actual loss or damage. Nevertheless, according to Justice Jacobs, the wrongful conduct was clear, demanding redress. "Surely in this day," he said, "equity will not hesitate to restrain shenanigans of this sort." *Id.* at 568, 236 A.2d at 864. Hence, a creative remedy was invoked: injunctive relief plus the recovery of litigation expenses, including reasonable counsel fees. "[T]he true judicial goal is a just decree which satisfies 'the equities of the case.'" *Id.* at 573, 236 A.2d at 867 (citation omitted).

The imperative of individual justice animates another central principle of the Jacobs Doctrine: fundamental fairness. Fundamental fairness has much to do with assuring fair treatment of the individual at the hands of government, including the courts. Thus, in *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958), the Court, through Justice Jacobs, relied on reasons of basic fairness in overturning an earlier, contrary decision, *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953), that did not allow a criminal defendant pretrial inspection of his own statements. Similarly, in *State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969), Justice Jacobs held for the majority that "[a]s a matter of [rudimentary] fairness" an accused is entitled to disclosure of his presentence report and a fair opportunity to be heard on any adverse matters relating to sentencing. *Id.* at 143, 259

A.2d at 903. In *State v. Cook*, 43 N.J. 560, 206 A.2d 359 (1965), he held that in the absence of a showing that this would improperly hamper the prosecution, a defendant was entitled to the State's psychiatric reports before trial. "The county prosecutor's function is not to convict but to see that justice is done; he must seek the truth whether it be helpful to the State or the defendant." *Id.* at 570, 206 A.2d at 364. In *State v. Fauntleroy*, 36 N.J. 379, 395, 177 A.2d 762, 770-71 (1962), as a basis for determining the admissibility of a confession, Justice Jacobs imposed a standard of "fundamental fairness," consistent with due process but independent of constitutional criteria relating to voluntariness.

There is deceptive simplicity in Justice Jacobs' articulation of the fundamental fairness doctrine. It takes on much of its meaning from the "reasonable expectations" of those involved in the litigational process. He explained this in *State v. Currie*, 41 N.J. 531, 197 A.2d 678 (1964), where the Court considered the fairness to a defendant of a subsequent prosecution for an arguably similar offense that had been earlier tried. The Court did not find a bar under double jeopardy, but strongly foreshadowed the use of broad common-law considerations as a basis for dealing with the issue of multiple prosecutions. *Id.* at 536, 197 A.2d at 681. Justice Jacobs perceived that judicial experiences regarding fairness and reasonable expectations developed in one context could be used to guide courts to sound results in variant settings. Thus, in *State v. Cormier*, 46 N.J. 494, 218 A.2d 138 (1966), also written by Justice Jacobs, the Court found a bar to a subsequent trial involving substantially the same evidence that had been used in an earlier trial. Because the double jeopardy rules were too narrow, however, the Court allowed the defendant to prevail under the principle of collateral estoppel, determining that principles in the civil context should apply to criminal defendants "insofar as they are applicable." *Id.* at 505, 218 A.2d at 144. Later, in the landmark decision of *State v. Gregory*, 66 N.J. 510, 333 A.2d 257 (1975), the content of fundamental fairness was infused with the substance of the entire controversy doctrine. Justice Jacobs observed that this doctrine had been long required in civil litigation to prevent unfairness to parties, concluding that "[t]here would seem to be even more reason for this approach in the criminal field." *Id.* at 518, 333 A.2d at 261. This, among other reasons, was sufficient to prevent a successive prosecution for an offense that could, and should, have been presented with an earlier prosecution.

Fundamental fairness also guided Justice Jacobs' commitment

to trial fairness. In *State v. Orecchio*, 16 N.J. 125, 129, 106 A.2d 541, 542 (1954), and later, in *State v. Jackson*, 43 N.J. 148, 156, 203 A.2d 1, 5 (1964), *cert. denied*, 379 U.S. 982, 85 S. Ct. 690, 3 L.Ed.2d 572 (1965), Justice Jacobs explicated the standard of "prejudicial error" as the measure for assessing trial fairness, including jury impartiality, and under what circumstances its impairment would justify a reversal of a conviction. Jury impartiality, though an indispensable ingredient of trial fairness, was viewed pragmatically by Justice Jacobs. This is exemplified by his dissent in *Wright v. Bernstein*, 23 N.J. 284, 299-300, 129 A.2d 19, 28 (1957) (Jacobs, J., dissenting), in which he determined that a party must show that false information educed during *voir dire* caused prejudice before retrial is warranted. The strength and consistency of his views in assessing jury fairness are seen twenty years later when Justice Jacobs, then retired, was recalled to sit with the Supreme Court in *State v. Singletary*, 80 N.J. 55, 65, 402 A.2d 203, 208 (1979) (Jacobs, J., concurring), in which he rendered a concurring opinion that refused to set aside the jury's verdict in a parallel situation.

Concerns based on fundamental fairness and justice also shaped his interpretation of appellate powers to reach "just results" in reviewing the consequences of lower court proceedings. For example, in *State v. Laws*, 51 N.J. 494, 242 A.2d 333, *cert. denied*, 393 U.S. 971, 89 S. Ct. 908, 21 L.Ed.2d 384 (1968), the Court, through Justice Jacobs, identified legal error in a jury's imposition of the death penalty and found original appellate power to reduce the sentence to life:

[U]pon a showing of "abuse of discretion" by the trial court we would not hesitate to reduce a sentence though it was within the outer bounds fixed by statute; indeed we could hardly take any lesser course without being faithless to our reviewing responsibilities and *the true interests of right and justice*.

Id. at 499, 242 A.2d at 336 (footnote omitted) (emphasis added).

Justice Jacobs also strongly believed that truth—completeness and accuracy of factfinding—was an essential ingredient of justice. In *In re Richardson*, 31 N.J. 391, 157 A.2d 695 (1960), the Supreme Court was required to balance the attorney-client privilege with the judicial need for truthful information. Justice Jacobs acknowledged that the privilege is to afford "to the client freedom from apprehension in consulting his legal adviser," but, it "runs counter to the widely held view 'that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice.'" *Id.* at 396, 157 A.2d at 698 (quoting *In re Selser*, 15 N.J. 393, 405, 105 A.2d 395,

401 (1954)). There must be a balance between the privilege and the need for truth; "[t]hroughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure." *Id.* at 401, 157 A.2d at 701.

The Jacobs Doctrine, while most cogently portrayed in substantive law, is also clearly found in the idea that procedure is the servant of substance. The flexible application of procedural rules to serve the interests of justice is a central principle in the Jacobs Doctrine. As his friend Morris Schnitzer observed, "[T]here is no opinion of his in which the merits have succumbed to the fetters of procedure." Schnitzer, *supra*, 28 *Rutgers L. Rev.* at 250.

The Justice expressed this philosophy while serving as a judge in the Appellate Division of the Superior Court:

Procedural rules should not in themselves be the source of any extensive litigation; they should be subordinated to their true role, *i.e.*, simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.

Tumarkin v. Friedman, 17 N.J. Super. 20, 26-27, 85 A.2d 304, 307 (App. Div. 1951) (citations omitted).

Hence, in according criminal defendants pretrial discovery in *State v. Cook*, 43 N.J. 560, 206 A.2d 359 (1965), Justice Jacobs wrote that potentially restrictive discovery rules available to the defendant "did not at all impair the inherent powers of the court to order discovery when justice so required." *Id.* at 563, 206 A.2d at 361.

This flexible and purposeful approach to achieve the ends of justice can be seen in other areas dominated by rules of procedure. One is the accessibility of the courts to the public. How accommodating must courts be to individuals seeking redress for wrongs? This was answered in part by the development of criteria governing the standing of persons to sue, as "a coefficient of the goals set for litigation." Schnitzer, *supra*, 28 *Rutgers L. Rev.* at 241. Thus, in *Crescent Park Tenants Assoc. v. Realty Equities Corp.*, 58 N.J. 98, 275 A.2d 433 (1971), the Supreme Court, through Justice Jacobs, relaxed the requirements that would entitle persons, acting through a representative organization and claiming to have been wronged, to demonstrate that their grievance presented a cognizable controversy. In *X-L Liquors v. Taylor*, 17 N.J. 444, 111 A.2d 753 (1955), one of the issues was whether a defendant partnership might be immune to process under the common-law rule that, because partnerships are not jural entities, all legal actions concerning partnership matters must be maintained by and against individual partners. In modify-

ing this rule, Justice Jacobs determined that while partnerships are separate jural entities for many purposes, "there is little doubt that the interests of justice are advanced by permitting plaintiffs to maintain actions against partnerships without necessarily naming the individual partners as defendants." *Id.* at 456, 111 A.2d at 759 (citations omitted).

Justice Jacobs perceived that the rigid application of statutes of limitations could defeat the ends of justice by unfairly denying an aggrieved party access to the courts. Thus, in *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961), a medical malpractice case, Justice Jacobs formulated the Court's "discovery" rule. He factored into the definition of the accrual of a cause of action the criterion that the basis for the action be known to or discoverable by the wronged party. *Id.* at 450, 173 A.2d at 286. In a variant context, in *Farrell v. Votator Div. of Chemetron Corp.*, 62 N.J. 111, 299 A.2d 394 (1973), the Court, through Justice Jacobs, affirmed the ability of a plaintiff to toll the statute of limitations by naming fictitiously an identifiable but as yet unidentified defendant. He ruled that the bar of the statute of limitations could be overcome with the substitution of the actual defendant by relating the substitution back to the date of the complaint provided reasonably diligent efforts were used to ascertain the defendant's identity. *Id.* at 122-23, 299 A.2d at 400.

The Jacobs Doctrine also involves distinctive views concerning the proper role of the judiciary and the exercise of judicial power. Justice Jacobs recognized the need to develop appropriate standards to assure a sound balance between serving the end of individual justice and meeting the legitimate needs of institutions.

The opinions of Justice Jacobs involving the single controversy doctrine provide a rich example of this reconciliation of individual justice and fairness to litigants with the needs of the justice system. As explained by Justice Jacobs, this doctrine "contemplates that generally all matters in controversy between the parties, whether legal or equitable, will be disposed of in a single action." *New Jersey Highway Auth. v. Renner*, 18 N.J. 485, 492, 114 A.2d 555, 558 (1955). His first opinion in this area, written while he was on the intermediate appellate court, stated that the doctrine should be invoked "in the interests of the proper administration of justice," and to avoid "the expense and delay, as well as the splitting of the controversy and the unseemly jurisdictional or procedural conflict." *Tumarkin v. Friedman*, 17 N.J. Super. at 26, 85 A.2d at 307. He later stressed the doctrine's constitutional sources, observing that the New Jersey constitutional delegates "provided generally for the expeditious ad-

judication of all matters in controversy between parties at one time and place, and the court rules contain liberal provisions toward the same goal . . . [to] serve the ends of sound judicial administration by curbing the inconvenience, delay and expense incident to independent trials." *Garrou v. Teaneck Tyron Co.*, 11 N.J. 294, 305, 94 A.2d 332, 337-38 (1953) (citations omitted).

In Justice Jacobs' subsequent explication of the doctrine, we can again see the molding of rules of procedure to serve the goals of the justice system and "sound judicial administration." Implicit in the development of the doctrine is the recognition that judicial energy is not boundless; judicial power is not an inexhaustible resource. Thus, in *New Jersey Highway Auth. v. Renner*, 18 N.J. at 492-93, 114 A.2d at 558-59, Justice Jacobs gave added vigor to the entire controversy doctrine by finding a strong analogy to the procedural rules governing mandatory counterclaims and crossclaims. This was emphasized in *Korff v. G & G Corp.*, 21 N.J. 558, 122 A.2d 889 (1956), in which the Court, through Justice Jacobs, allowed a defendant to bring a counterclaim against a nonresident plaintiff who had voluntarily instituted a lawsuit in the New Jersey courts because it comported with "[t]raditional notions of fair play and substantial justice." *Id.* at 572, 122 A.2d at 896.

Justice Jacobs was keenly aware of the vital relationships between citizens and their institutions and the special and delicate role of the courts in maintaining these relationships. A prime example is his opinion in *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791 (1961), in which he attributed public fiduciary responsibilities to a private entity. There the plaintiff, a doctor, sought full membership in the defendant medical society. Justice Jacobs determined that the medical society was a professional association as opposed to a social, religious, or fraternal organization and that it exercised virtually monopolistic control over a doctor's access to local hospitals. He stated:

It must be borne in mind that the County Medical Society is not a private voluntary membership association with which the public has little or no concern. It is an association with which the public is highly concerned and which engaged in activities vitally affecting the health and welfare of the people.

Id. at 596-97, 170 A.2d at 799. Hence, the power of the medical society to control hospital privileges for doctors through its own membership "should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful

manner for the advancement of the interests of the medical profession and the public generally." *Id.* at 597, 170 A.2d at 799.

The relationship between the judiciary and the other branches of government, which implicates the doctrine of separation of powers, likewise is an important strand of Justice Jacobs' legal philosophy. He had a healthy respect for the role of the legislature within the framework of representative democracy. For example, Justice Jacobs dissented from the Court's decision in *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (Jacobs, J., dissenting) (1953), which invoked its earlier decision, *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877, 71 S. Ct. 123, 95 L.Ed.2d 638 (1950), to rule that the Supreme Court had ultimate authority over the subject of counsel fees as part of the plenary rulemaking power. Sounding a cautionary monition, Justice Jacobs observed that the Court's holding "represented an important departure from traditional constitutional concepts, both federal and state, and its ultimate vindication may well rest upon the measure of self-restraint in its application." *State v. Otis Elevator Co.*, 12 N.J. at 25, 95 A.2d at 727 (Jacobs, J., dissenting).

Similarly, with respect to the relationship between the judiciary and the executive, we find a strong commitment to the principle of separation of powers reflected in many administrative law decisions.² Justice Jacobs believed that administrative agencies were appropriate bodies for much governmental decision-making with broad legislative and judicial powers. See *Como Farms, Inc. v. Foran*, 6 N.J. Super. 306, 313, 71 A.2d 201, 204 (App. Div. 1950). He expressed the view that the legislature could delegate executive power in accordance with a "reasonably adequate standard" to guide an administrative agency; the exercise of agency power pursuant to such a legislative guideline should not be considered arbitrary or unbridled because "the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments." *Ward v. Scott*, 11 N.J. 117, 123-24, 93 A.2d 385, 388 (1952). He also believed that administrative agencies should be given judicial powers similar to those exer-

² Judge Leo Yanoff, also a longtime friend of the Justice, noted that Justice Jacobs, before his judicial service, taught administrative law courses for almost twenty years, served for a time as Chief Deputy Commissioner and counsel to the Department of Alcoholic Beverage Control, and also wrote a report with Nathan Davis delineating the role of the administrative agency, *A Report on the State Administrative Agency in New Jersey*. During World War II, he organized the Office of Price Administration in New Jersey. Yanoff, *Justice Nathan L. Jacobs—Prelude to a Judicial Career*, 28 Rutgers L. Rev. 213, 214-19 (1974).

cised by courts, *see, e.g., Air-Way Branches, Inc. v. Board of Review*, 10 N.J. 609, 614, 92 A.2d 771, 773 (1952) (agencies, like courts, should have the power to reopen their dispositions); and, consequently, agency litigants should be treated similarly to parties appearing before regular courts, *see, e.g., Rainier's Dairies v. Raritan Valley Farms Inc.*, 19 N.J. 552, 117 A.2d 889 (1955) (where an administrative agency carries out a judicial function, participants in the proceeding should have immunity).

In the administrative process, Justice Jacobs appreciated the intricacies of modern government and understood the precarious balance to be maintained between agency fairness, agency authority and agency accountability. Fairness to parties in administrative proceedings demanded agency procedures that satisfy due process and fair dealing. Thus, Justice Jacobs wrote that interested parties in an administrative adjudicatory matter should have a "fair opportunity to be heard and refute such evidence or material as the [agency] may rely upon to support its action." *Pennsylvania R.R. v. Department of Public Utilities*, 14 N.J. 411, 426, 102 A.2d 618, 626 (1954). When an administrative agency makes an adjudicatory finding involving a particular party, he ruled while on the Appellate Division, the administrative action must be accompanied by basic findings of fact. *Family Financial Corp. v. Gough*, 10 N.J. Super. 13, 25, 76 A.2d 82, 88 (App. Div. 1950). Agency determinations demanded "exclusivity of the record":

[A]n essential of the fair hearing contemplated by the statutory provision is that the evidence or material upon which the Director may rely to support his order be appropriately disclosed and made part of the hearing record, with ample opportunity of refutation afforded to the interested parties.

Abbotts Dairies v. Armstrong, 14 N.J. 319, 332, 102 A.2d 372, 379 (1954).

While fairness to parties is vital, this obligation should not be carried to the point where it would undermine government's responsibility to govern. Justice Jacobs appreciated the vitality of agency authority and understood that even though agencies enjoy quasi-judicial powers, it is important that they be able fully to exercise delegated authority. Thus, deference to agency expertise and authority requires exhaustion of administrative remedies in appropriate cases. *See, e.g., Roadway Express, Inc. v. Kingsley*, 37 N.J. 136, 179 A.2d 729 (1962); *Central R.R. of New Jersey v. Neeld*, 26 N.J. 172, 139 A.2d 110, *cert. denied*, 357 U.S. 928, 78 S. Ct. 1373, 2 L.Ed.2d 1371 (1958). Further, administrative hearings need not conform

with the common-law rules of evidence or procedure; the agency "must be given full latitude to avail itself of the wealth of general information and expert knowledge which it obtains in the performance of its day-to-day administrative activities." *Pennsylvania R.R. v. Department of Public Utilities*, 14 N.J. at 427, 102 A.2d at 626. Indeed, this concern for agency authority in part prompted a vigorous dissent in *Mazza v. Cavicchia*, 15 N.J. 498, 105 A.2d 545 (1954), in which Justice Jacobs opposed what he considered a more aggressive standard of judicial review for administrative hearings than for judicial proceedings. He contended that it was a mistake not to embrace the same standard of review for both, out of respect for the separation of powers and deference to executive agencies. *Id.* at 527, 105 A.2d at 561 (Jacobs, J., dissenting).

But, just as fairness to the litigants should not undermine agency authority, deference to that authority cannot obviate or excuse agency accountability. Thus, as he observed in *Abbotts Dairies v. Armstrong*, 14 N.J. at 332-33, 102 A.2d at 379, findings of facts are crucial to the administrative process "not only in insuring a responsible and just determination by the Director, but also in affording a proper basis for effective judicial review." See also *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 244-45, 277 A.2d 193, 196 (1971).

In Justice Jacobs' wide grasp of administrative law we find the judiciary in a supervisory role assuring that executive agencies operate with fairness, freedom of action, and accountability. The doctrine of the separation of powers, in his view, did not entail the imposition of static relationships, but rather a balancing act that called for extraordinary feats of judicial skill.

In sum, there are, we discover, internally consistent and recurrent themes in the numerous opinions of Justice Jacobs. These themes build and harmonize to become a mighty composition of law. They reveal, in variant contexts, a perception of law that encompasses the imperative of individual justice, a felt mandate for the redress of wrongs, the pervasiveness of fundamental fairness, the yoking of truth to justice, and malleable legal principles and rules of procedure shaped to the contours of justice. We see, further, the continuing concern for important relationships among individuals, institutions, and governmental branches and bodies, which, within the framework of representative democracy, impose both singular responsibility and discrete limitations on the judiciary.

These themes give us some understanding of the Jacobs Doctrine. This Doctrine, not unsurprisingly, is a potent influence over

the special way Justice Jacobs went about rendering decisional law: the Jacobs Methodology.

THE JACOBS METHODOLOGY

Methodology is a significant aspect of the law according to Justice Jacobs. His methodology was a unique combination of a distinctive approach in determining the law and fine craftsmanship in explicating the law. We can find in his approach a perception that all knowledge informs the law, both respect and skepticism for legal precedent and authority, comprehensive scholarship, and the significance of historical perspective in exposing the contemporary relevance of legal principles. His methodology consisted, also, of a writing style that was both precise and emotive; it encompassed a mode of expression that reflects a commitment to rhetoric in its classic sense, that is, the need to explain and persuade. The Jacobs Methodology gave configuration to the content of substantive law, and, concomitantly, clarity and completeness in its exposition.

Almost any opinion of Justice Jacobs embodies these elements. We have noted that justice and fairness, which are both standards and goals, are at the heart of the Jacobs Doctrine. The common law was, for him, the optimal source and process for applying and achieving these ideals. Although precedent and conventional authority might, in a given case, indicate that no wrong existed and no remedy was available, for Justice Jacobs the essence of the common law was its resilience and mutability. "The common law has always had the inherent capacity to develop and adapt itself to current needs; indeed if this were not true it would have withered and died long ago rather than have grown and flowered so gloriously." *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 43-44, 141 A.2d 276, 284-85 (1958).

The common law was understood by Justice Jacobs as a process as well as a body of received law. In working within the framework of the common-law process, indeed, in creatively extending the possibilities of that process, the common law for Justice Jacobs held unlimited possibilities as a dynamic for achieving the goals of justice and fairness:

The genius of our common law has been its capacity for growth and its adaptability to the needs of the times. Generally courts have accomplished the desired result indirectly through the molding of old forms. Occasionally they have done it directly through frank rejection of the old and recogni-

tion of the new. But whichever path the common law has taken it has not been found wanting as the proper tool for the advancement of the general good.

A.P. Smith Manufacturing Co. v. Barlow, 13 N.J. 145, 154, 93 A.2d 581, 586 (1953) (citations omitted).

Justice Jacobs' resourceful use of common-law precedent could often lead to an elegant and compelling solution in a case. This creative scholarship is exemplified in his famous charitable-immunity decision, *Collopy v. Newark Eye and Ear Infirmary*, decided in 1958, which was constructed on a foundation laid in his dissent the year before in *Lokar v. Church of the Sacred Heart*, 24 N.J. 549, 133 A.2d 12 (1957). The controversy centered on the common-law doctrine that charitable institutions possess immunity from actions in tort. Historical perspective reveals that the rule of charitable immunity had less than substantial roots; nineteenth-century English cases showed that the initial appearance of the rule not only followed mere dictum in a prior case, but also was overturned shortly thereafter. And that, ironically, in relying on this rule, an American court failed to recognize that reversal had already occurred. *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. at 33, 141 A.2d at 278-79 (citing *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (Sup. Jud. Ct. 1876)). The critique of precedent and reconstruction of historical antecedents augmented the indispensable examination of the public policy implications of charitable immunity. Justice Jacobs confronts and rebuts each major argument for charitable immunity and concludes that the charitable immunity doctrine must be rejected:

The primary function of the law is justice and when a principle of the law no longer serves justice it should be discarded; here the law was embodied not in any controlling statute but in a judicial principle of the law of torts; it had no sound English common law antecedents and found its way into American law through a misconception; it runs counter to widespread principles which fairly impose liability on those who wrongfully and negligently injure others; it operates harshly and disregards modern concepts of justice and fair dealing; it has been roundly and soundly condemned here and elsewhere and the time has come for its elimination by the very branch of government which brought it into our system.

Collopy v. Newark Eye and Ear Infirmary, 27 N.J. at 47-48, 141 A.2d at 287.

This conception of the common-law process encompasses more than the manipulation of legal rules. The Jacobs Methodology uses and reconciles diverse doctrinal sources to determine operative

principles of law. Thus, in *State v. Gregory*, 66 N.J. at 510, 333 A.2d at 257, in reaching a result that comports with fundamental fairness, Justice Jacobs adopts a rule beyond conventional authority, a recommendation of the Model Penal Code for compulsory joinder of known offenses based on the same conduct or arising from the same criminal episode: "We are satisfied that the time for the adoption of such provision is well due and that this case is an appropriate vehicle for such action," even though the precise contours could be developed later. *Id.* at 521, 333 A.2d at 263. "For present purposes we need not rest on constitutional grounds for the just result we seek may readily be attained by our exercise of the broad administrative and procedural powers vested in us by our State Constitution." *Id.* at 518, 333 A.2d at 261. Similarly, in *State v. Laws*, in molding appellate court procedure to the words of substantive law, Justice Jacobs drew on the 1947 Constitution as instituting a duty on appellate judges to move passionately towards fairness and justice.

The delegates who adopted the 1947 Constitution deliberately vested this Court with sweeping judicial power to the end that it would be fully equipped to see that justice is soundly administered. Surely, if we are to keep their faith and match their vision, the power may not be found wanting here.

State v. Laws, 51 N.J. at 514, 242 A.2d at 344-45. This fusion of legal sources is also exemplified in *State v. Currie*, 41 N.J. at 535-36, 197 A.2d at 681, wherein he established wide authority for double jeopardy in the common law, rather than in the narrow language of the state constitution, tracing common-law protections against double jeopardy from Blackstone to its present day evolution.

Considerations of public policy constituted for Justice Jacobs a fundamental source of law. He fully appreciated the subtlety and complexity of plumbing the implications and ramifications of public policy. In *State v. Monahan*, 15 N.J. 34, 104 A.2d 21 (1954), the Court held that a fifteen-year-old charged with murder should be subjected only to the juvenile justice system. The analysis of Justice Jacobs again exemplifies his eclectic scholarship, his insight that all sources of law become relevant to the just resolution of a controversy. His analysis in the case thus includes the historical treatment of youthful offenders, the evolution of the juvenile justice system, and its correlation to the state's historic *parens patriae* duty. In analyzing legislative action, he points to legislative steps that led to separate institutions for placement of juvenile offenders, the creation of juvenile courts, and eventual adoption of legislation that did not exclude murder and manslaughter from juvenile court jurisdiction encompassing children under sixteen years of age. He deals openly

and critically with contrary judicial precedent. Justice Jacobs thus enlists different sources of knowledge and several levels of policy in determining whether juveniles can be held criminally liable.

Social relevance is a constant benchmark of his methodology. The case of *Ekalo v. Constructive Service Corp.*, 46 N.J. 82, 215 A.2d 1 (1965), authored by Justice Jacobs, first allowed women to bring claims for loss of consortium due to negligent infliction of serious bodily injury to their husbands. He begins the opinion with a short exegesis on actions for loss of consortium that contrasts the ability of husbands to bring such actions for intentional or negligent injuries with the existing limitations on corresponding suits by women, who at the time could bring such actions only for intentional injuries. Historical perspective again is marshalled. He illustrates the extent to which this distinction was rooted in archaic legal principles, referring to Blackstone's *Commentaries* explaining the "medieval concept that, during the marriage, the legal existence of the wife was suspended or incorporated into that of the husband." *Ekalo v. Constructive Services Corp.*, 46 N.J. at 86, 215 A.2d at 3. This provides a springboard for the essential and fully documented argument that in this day and age there is no valid rationale for differentiating the availability of loss of consortium actions on the basis of gender.

Further, intellectual rigor and skepticism are always present, sometimes reflected in what might appear to be impatience or displeasure with formalistic *formulae* incapable of meeting the demand of just determination of controversies. Thus, in *Breen v. Peck*, 28 N.J. 351, 146 A.2d 665 (1958), the Court, through Justice Jacobs, overturned the common-law rule that a release of one tortfeasor served to discharge all joint tortfeasors. Justice Jacobs' opinion attacked the doctrine by illustrating the "technical, and even fictitious" distinctions drawn by differentiation of releases from covenants not to sue as artificial, looking to form rather than substance, and tending to trap the unwary. *Id.* at 356, 146 A.2d at 668. Such distinctions and rules, he observed, "evolved when metaphysics rather than justice was the dominant factor [,] [obviously tending] to defeat the fair expectations and intentions of the parties." *Id.* (citations omitted).

Complete and clear exposition and total disclosure of reasoning are also hallmarks of the Jacobs' style. In *Korff v. G & G Corp.*, as earlier noted, the Court reinforced the entire controversy doctrine by upholding the filing and service of counterclaims on non-resident parties. 21 N.J. at 558, 122 A.2d at 889. The organization of guiding principles and the sequential development of reasons are carefully chronicled. The opinion by Justice Jacobs begins with a

recitation of early rulings holding that non-residents should enjoy immunity to civil process while entering the state for court proceedings; it proceeds to analyze the implications and policy dimensions of such a rule, drawing on academic commentary and recent case law for articulations of the policies disserved by such a rule. These are brought to bear on principles of law endorsed by our own courts: "[I]t must be well known that our courts are firmly committed to the enlightened policy which points generally to the joinder of all matters in controversy between all of the parties in a single proceeding for just and expeditious disposition at one time and place." *Id.* at 567, 122 A.2d at 893-94. The opinion is capped by the inevitable analysis of whether the result in the case comports with individual justice and fairness, focusing on the extent to which the non-resident parties in the case might have known or should reasonably have anticipated that their actions could subject them to jurisdiction.

We can thus see that the Jacobs Methodology brings to the decisional process vigorous, intellectual honesty, comprehensive scholarship, and an eclectic view of law as founded on and extrapolated from all sources of knowledge that can serve to enlighten us. It recognizes the importance of historical perspective as a necessary backdrop for understanding contemporary events. The law, however, is rooted in reality, it deals with people, it serves to govern and regulate human affairs. Hence, the law of courts, decisional law, cannot be issued as edicts or fiat; this law must earn the consent of the governed. Such law, as Justice Jacobs crafted, must be embodied in decisions that can engender wide understanding and public acceptance. Such decisional law was thus marked by an exposition that was clear and cogent. About the Jacobs' approach and style, his colleague Justice Proctor noted, "[i]f [an] opinion results in a change in the law, Justice Jacobs states clearly the policies involved and the reason for change. No intellectual dissembling is found in his opinions." Brennan & Procter, *supra*, 28 *Rutgers L. Rev.* at 212.

These methodological elements so skillfully wielded by Justice Jacobs in combination ultimately serve in successive opinions both to anchor and advance the law, to found and free the law. His methodology is part of his legacy.

THE JACOBS LEGACY

Justice Jacobs' decisions, encompassing his distinctive philosophy and compelling style, have deeply influenced the New Jersey courts. His imprint on the judiciary is indeed a legacy.

The contributions of Justice Jacobs to New Jersey as one of the creative authors of the Judiciary Article of the Constitution of 1947 have been chronicled. See, e.g., Yanoff, *supra*, 28 *Rutgers L. Rev.* at 221-25. In a sense these contributions foreshadowed and became a springboard for his contributions as a jurist. These, and his many decisions, like sown seeds have multiplied and flowered.

We see in the decisions of his successors the abiding concern for individual justice. The imperative of individual justice and the importunate responsibility to assure redress for wrongs endure as vital principles; our courts continue to feel and respond to the same steady, gravitational pull toward the goals of justice and fairness. E.g., *Buckley v. Trenton Saving Fund Society*, 111 N.J. 355, 544 A.2d 857 (1988) (redress for emotional distress from commercial wrong); *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 495 A.2d 107 (1985) (recovery for economic loss for tortious business interruption); *Portee v. Jaffe*, 84 N.J. 88, 417 A.2d 521 (1980) (redress for emotional suffering from injury to another). Justice Jacobs' dissenting opinion in *Gleitman v. Cosgrove*, 49 N.J. at 22, 227 A.2d at 689 is the doctrinal source for a cause of action involving wrongful life and wrongful birth recognized in later years. E.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984). His treatment of the historic or traditional immunities, illustrated by the *Collopy* decision, pointed the way for courts to examine critically such legal enclaves and to discard or modify them in light of contemporary thinking. E.g., *Weinberg v. Dinger*, 106 N.J. 469, 524 A.2d 366 (1981) (public utility immunity); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978) (spousal immunity); *Willis v. Department of Conservation & Economic Development*, 55 N.J. 534, 264 A.2d 34 (1970) (sovereign immunity). His articulation and application of the doctrine of fundamental fairness have become a constituent element of the State's jurisprudence. E.g., *State v. Abbati*, 99 N.J. 418, 427, 493 A.2d 513, 517 (1985) (fundamental fairness warrants bar to successive trials). The molding of procedure to the ends of justice remains a judicial way of life. Access to the courts, as expounded by Justice Jacobs, has had continuing reverberations in areas such as standing to sue, e.g., *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 411 A.2d 168 (1980); fictitious party practice, e.g., *Viviano v. CBS, Inc.*, 101

N.J. 538, 503 A.2d 296 (1986); and the discovery rule, *e.g.*, *Vispiano v. Ashland Chemical Co.*, 107 N.J. 416, 527 A.2d 66 (1987); *Lynch v. Rubacky*, 85 N.J. 65, 424 A.2d 1169 (1981); *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973). The single controversy doctrine continues to evolve, blending fairness to litigants with the constraint that judicial power is not an unlimited resource. *E.g.*, *Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 560 A.2d 1169 (1989); *Crispin v. Volkswagenwerk A.G.*, 96 N.J. 336, 476 A.2d 250 (1984).

Justice Jacobs' balanced view of the relationships between citizens and their institutions and government remains instructive. His perceptions of the fiduciary responsibilities of important institutions that deal with the well-being of individuals have currency. *See, e.g.*, *Desai v. St. Barnabas Medical Center*, 103 N.J. 79, 510 A.2d 662 (1986); *Berman v. Valley Hospital*, 103 N.J. 100, 510 A.2d 673 (1986). His view of the separation of powers and the equipoise between judicial initiative and restraint underscores the symbiotic as well as the autonomous relation between the judiciary and legislative branch. *See, e.g.*, *Knight v. Margate*, 86 N.J. 374, 431 A.2d 833 (1981). It is reflected in the conscientious effort of the judiciary to effectuate legislative intent when dealing with legislative law. *See, e.g.*, *Kolitch v. Lindedahl*, 100 N.J. 485, 497 A.2d 183 (1985) (the Tort Claims Act); *State v. Des Marets*, 92 N.J. 62, 455 A.2d 1074 (1983) (the Graves Act). It can as well be seen in judicial initiatives in determining important and controversial issues, while concomitantly acknowledging the propriety of ultimate legislative solutions. *See, e.g.*, *Matter of Farrell*, 108 N.J. 335, 529 A.2d 404 (1987) (right-to-die); *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (right-to-die); *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (social host liability). In the area of administrative law, Justice Jacobs still reminds us of the need to understand the function of the executive and to maximize its opportunity to effectuate its own governmental responsibilities. *See, e.g.*, *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985); *Matter of Kallen*, 92 N.J. 14, 455 A.2d 460 (1983); *Texter v. Department of Human Services*, 88 N.J. 376, 443 A.2d 178 (1982). Justice Jacobs' virtuosity within the common-law tradition reconfirms the progressive potential of that process. His understanding that a court decision should not be regarded as self-ratifying, but rather should strive to foster understanding, generate confidence and earn acceptance, can be found in decisions that are marked by comprehensive scholarship and persuasive exposition. *See, e.g.*,

Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (employee rights founded in employer practices); *State, Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) (responsibility for environmental harm); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (at-will employment governed by considerations of public policy).

The law for Justice Jacobs represents a continuum or confluence of doctrinal streams—the common law, decisional law, constitutional law, statutory law, regulatory law, as well as other embodiments of knowledge drawn from any other source. The law also seems a living phenomenon: even as it exists, it declines and withers, and, even as the law both survives and expires, it is being conceived and renewed.

Justice Jacobs has thus left us a panoramic rendition of the law. His jurisprudential legacy is both rich and deep. The Jacobs perception of substantive law, though grounded in the real experiences of ordinary life and built on knowledge in all its forms, is uplifting. His view of the judicial role propels the judiciary in the direction of justice, fairness, and the public good and continues to impress us with the concerns for legitimacy and accountability. Moreover, his own distinctive way of judging has provided a dynamic for the discovery and determination of the law, for its conception, consolidation, continuity and change. Justice Jacobs was inspired in his own life by the thought that justice is the unquestioned right of the people, that judges are totally committed to making that right a reality. So he inspires us.