HON. THOMAS A. BALMER*

A Life in the Law

Holmes asked himself—and all of us—how one could "live greatly in the law":

> How can the laborious study of a dry and technical system, the greedy watch for clients and the practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?[1]

Well, one answer would be the varied career of Jack Landau, who, since he enrolled at Lewis & Clark Law School in 1977, has lived a rich and full "life in the law." It is altogether fitting and proper that the *Oregon Law Review* should recognize Jack with this issue, including in it assorted tributes and Jack's comprehensive article on statutory interpretation.

Jack's diverse experiences as a judicial clerk, a lawyer in private practice and public service, an academic, and an Oregon Court of Appeals and Supreme Court judge span much of the wide world of law, from the most quotidian tasks of a new associate working with a tiresome client on mundane business matters to arguing before the United States Supreme Court. But certain themes emerge from his almost forty years as a lawyer and judge: an organized and logical mind; a rare clarity of expression; a love of history, in its own right and as a tool for understanding—but never dictating—answers to legal questions; and an abiding commitment to judging and to the critical assessment of how appellate courts—and the Oregon courts in particular—decide cases.

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[1] O.W. HOLMES, THE PROFESSION OF THE LAW: CONCLUSION OF A LECTURE DELIVERED TO UNDERGRADUATES OF HARVARD UNIVERSITY (1886), *reprinted in* O.W. HOLMES, COLLECTED LEGAL PAPERS 29 (1921); *see* Thomas A. Balmer, *Holmes on Law as a Business and a Profession*, 42 J. LEGAL ED. 591 (1992).

Most of us can only wish for as organized and intentional a life as Jack has led. I will put to one side his (or, perhaps, Diane's) household accounting acumen, where each paycheck is automatically allocated into different sinking funds for housing expenses, vacation, and retirement, or his methodical habits in caring for, and trading in at the optimal time, a series of fine cars. A monthly poker game, a quarterly dinner with friends, well-planned and thoughtfully scheduled vacations—the regularity of Jack's life is something to behold. Closer to his work life, I have envied Jack's clean desk, his hundreds of carefully shelved books (virtually all of which he actually has read), and his meticulous notes from oral arguments and post-argument conferences. It is no surprise that one of his earliest law review articles was an extended plea for teaching logic to first-year law students, in the hope that they could learn to apply the tools of logic to avoid fuzzy thinking and sloppy habits in reasoning and writing.[2]

Jack's writings, both as a judge and *ex cathedra*, are models of clear thinking and expression. One example is *Young v. State of Oregon*,[3] a decision by a three-judge panel of the court of appeals that featured a unanimous ruling but three different opinions. The issue was the interpretation of a statute that the legislature adopted to provide overtime pay for certain state employees but, through a drafting mistake, also provided the extra compensation for a group of management-level employees that the legislature plainly had not intended to cover. The State refused to pay, and the management employees sued.[4] In an opinion by Presiding Judge Paul De Muniz, the court of appeals held that the statute had to be applied as written, despite the general recognition that the legislature clearly had not intended it to apply to the management employees. In a concurring opinion, Judge Rick Haselton, Jack's long-time friend and former private practice partner, issued a punchy, one-page retort, focusing on *PGE v. Bureau of Labor and Industries*,[5] the controlling Supreme Court case. Essentially, *PGE* directed courts to focus on text and context when interpreting statutes and, only if the text was ambiguous,

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2 Jack L. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59 (1981).

3 161 Or. App. 32, 983 P.2d 1044 (1999).

4 In the interest of full disclosure, I should acknowledge that both Jack and I were members of the putative class of management employees who should have received overtime compensation, but, if memory serves, neither of us received any damages when the plaintiffs eventually prevailed. Additional disclosure: I was the Oregon Deputy Attorney General (succeeding Jack in that position) during part of the time that the case was pending.

5 317 Or. 606, 859 P.2d 1143 (1993).

to consult or rely on legislative history. Judge Haselton's concurrence begins:

> *PGE* is authoritative. Accordingly, I concur. But only a fool or a knave would pretend that our result today bears any relationship to the legislature's actual intent.
>
> This case is just the latest, if perhaps the most egregious, of a series of cases in which fidelity to *PGE* has driven our court to patently silly results. Does anyone really believe that the 1995 legislature intended to confer a multi-million dollar windfall on state white-collar employees? Of course not. Does *PGE* permit any other result? No.[6]

On this important application of central principles of statutory interpretation, Jack, of course, had to respond, and he did so in an equally vigorous separate concurring opinion.

> Judge Haselton suggests that this case is but the latest in a long line of "patently silly" decisions required by adherence to *PGE* . . . and calls for adoption of a rule that would permit courts to redraft statutes to effectuate apparent—but unexpressed—legislative intentions. . . . With respect, I think his proposal is ill-advised and that our decision is neither patently silly nor compelled by *PGE*. Our decision recognizes the uncontested fact that, in this case, the legislature made a significant mistake in its enactment of ORS 279.340 and applies the long-acknowledged legal principle that we are unable to redraft a statute to remedy such a mistake.
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> *PGE* cannot be blamed for everything, certainly not for the inability of courts to redraft legislative enactments. The incapacity is compelled by ORS 174.010, which antedates *PGE* by some 150 years.[7]

Jack went on to root the principles of statutory interpretation adhered to by the Oregon courts not just in prior court decisions and statutes, but more centrally in the separation of powers and the structure of the Oregon Constitution.

> By constitutional definition, legislation consists of language reduced to writing and approved by two houses of the Legislative Assembly and the governor (or, if the governor does not approve, a veto override by both houses). Or Const. Art IV, § 25, Art V, § 15b. Legislative intentions that have not been reduced to writing and subject to the constitutional approval process are not law, and for the

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6 *Young*, 161 Or. App. at 42, 983 P.2d at 1050 (Haselton, J., concurring).

7 *Id.* at 40, 983 P.2d at 1049 (Landau, J., concurring).

> judiciary to give legal effect to such inchoate intentions would amount to an end-run around the constitutional enactment process.[8]

His concurring opinion in *Young* is classic Jack Landau: direct and to the point; sometimes colorful; always grounded in constitutional and statutory principles and text; cognizant that the legislative and executive branches, not just the judicial branch, play key roles in state government and the legal system. *Young*—a case viewed as so significant that Attorney General Hardy Myers argued it personally—also illustrates Jack's willingness (and that of Judges De Muniz and Haselton) to follow the law and the better analytical path, even if the result was unsettling to important constituencies.

Another such case was *Tanner v. Oregon Health Sciences University*,[9] where Jack's opinion for the court of appeals broke important ground in ensuring equal rights for gays and lesbians. The novelty and political impact of the case were irrelevant to Jack's analysis and conclusion, although it was that context that made the opinion the subject of national media attention. Without hyperbole or rhetorical excess, Jack dispassionately analyzed the claims of gay and lesbian employees of Oregon Health Sciences University (OHSU) that its denial of insurance benefits to their same-sex domestic partners was unlawful. He rejected various procedural objections by the State and the argument that the policy violated state statutes prohibiting sex discrimination in employment. His opinion for the court held, however, that the policy was a straightforward violation of Article I, section 20, of the Oregon Constitution, which prohibits laws that grant "to any citizen or class of citizens privileges and immunities, which, upon the same terms, shall not equally belong to all citizens." The "equal privileges and immunities" provision, the Oregon courts had previously held, prohibited the government from treating certain groups of people, defined by race, gender, or similar characteristics, less favorably than other groups. OHSU argued that it did not treat homosexual employees less favorably than others; rather, it said, eligibility for insurance benefits was determined on the basis of marital status, not sexual orientation, and such a classification was permissible. Any discrimination was not the result of OHSU's policy, it argued, but of the State's prohibition on same-sex marriage, which, it

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[8] *Id.* at 40–41, 983 P.2d at 1049.

[9] 157 Or. App. 502, 971 P.2d 435 (1998).

acknowledged, had the effect of preventing homosexual employees from obtaining insurance for their same-sex partners.

Jack's opinion for the court rejected this defense. OHSU's "facially neutral classification" had the unintended side effect of discriminating against same-sex couples, because they were not allowed to marry.[10] He noted that the equal privileges and immunities provision did not prohibit only *intentional* discrimination and then turned to the ultimate question under Article I, section 20.

> OHSU insists that in this case privileges and immunities are available to all on equal terms: All married employees—heterosexual and homosexual alike—are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.[11]

Jack's opinion in *Tanner* followed oft-stated principles of statutory and constitutional construction. Moreover, particularly in its handling of the plaintiffs' constitutional claim, it managed to turn a potentially difficult and politically fraught issue into a syllogism that led to an ineluctable logical conclusion. But that elegant logic was informed by an understanding of the real-world interaction between changing social mores, the marriage statutes, and the Oregon Constitution. Jack brought both of those sensibilities to this thoughtful, correct, and instantly accepted opinion.

Many of Jack's opinions for the Supreme Court were equally noteworthy, but some of his most thoughtful—and, potentially, consequential—opinions were concurrences, where he was freer to express his own views about legal issues that the majority had decided not to address. In *State v. Hemenway*,[12] for example, he agreed with the majority in a search and seizure case under Article I, section 9, of the Oregon Constitution and with the majority's rejection of a request by the State that the court reexamine its search and seizure cases in light of the original intent of the framers of the constitution. He wrote separately, however, to highlight his disagreement with earlier cases cited by the State in which the court had suggested that it should (and that it could) apply constitutional provisions as they had been intended

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[10] *Id.* at 524, 971 P.2d at 447.

[11] *Id.* at 525, 971 P.2d at 448.

[12] 353 Or. 129, 154, 295 P.3d 617, 632 (2013) (Landau, J., concurring) *vac'd* 353 Or. 498, 302 P.3d 413 (2013); *see also* Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819 (2008).

by the members of the constitutional convention in 1857, or by the voters who had approved the constitution that year: "In my view, the idea that the original state constitution means no more than what it meant to its framers in 1857 is untenable."[13] He went on to explain the absence of any suggestion from the framers that they intended the document to be so construed; the lack of any indication as to what their intent might have been as to the many provisions that were discussed only briefly, if at all, at the constitutional convention; and the general and sometimes vague words and phrases that were often used.[14] Not only was original intent an incorrect approach in most cases but it often was difficult to apply, including with respect to Article I, section 9.

Jack also concurred in two important cases interpreting the remedy clause, Article I, section 10, of the Oregon Constitution: *Klutschkowski v. PeaceHealth*,[15] and *Horton v. Oregon Health Sciences University*.[16] Both cases involved tort claims and the issue of whether a legislative limit on noneconomic damages for certain torts violated the constitutional edict that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."[17] Jack used those concurrences to explain his views on stare decisis, constitutional interpretation, and the use of history generally. Those views—well thought-out, informed but not dictated by historical research—have been and will continue to be cited and followed by Jack's successors on the Oregon appellate courts for years to come.

But Jack Landau's thinking about statutory and constitutional interpretation has an audience—and an influence—beyond Oregon lawyers pursing their clients' interests in Oregon courts. The mantle of Hans Linde, the undisputed leader and intellectual founder of modern state constitutional law, has been passed to a pair of accomplished judges and scholars, Jack Landau and David Schuman. Despite their work on busy appellate courts, Jack and David followed in Linde's footsteps, explaining Oregon law, and state constitutional law principles generally, through law review articles, lectures, and symposia. Two of Jack's articles in particular—parts of his LL.M. thesis at the University of Virginia Law School—have been cited frequently in many briefs and court opinions and by other scholars.

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13 353 Or. at 156, 295 P.3d at 633.

14 *Id.* at 156–58, 295 P.3d at 633–35.

15 354 Or. 150, 177, 311 P.3d 461 (2013) (Landau, J., concurring).

16 359 Or. 168, 254, 376 P.3d 998 (2016) (Landau, J., concurring).

17 OR. CONST. art. I, §10.

Some Observations About Statutory Construction in Oregon,[18] which appeared in the Willamette Law Review in 1996, was the basis for much later work, by Jack and others, including the article that appears in this issue. A close reader of Oregon cases interpreting statutes—which, as Jack observed in the article, is the largest single category of cases decided by the Oregon appellate courts—will see the article's influence on dozens of opinions from the Oregon courts—and not just those that Jack wrote! His analysis of Oregon constitutional law as it emerged, cultivated by Linde and others, in the last decades of the twentieth century, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*,[19] is a systematic analysis of the strengths and weaknesses of Oregon's approach to constitutional law. If the article succeeds as an exposition and critique of Oregon's developing constitutional law and is less compelling in offering alternative approaches to the problems and inconsistencies it identifies, that barely diminishes its impressive contribution to the debate over competing principles of state constitutional interpretation.

Over almost four decades as a lawyer, judge, teacher, and legal scholar, Jack Landau has helped to shape Oregon law. His work has given judges and lawyers here something that many states lack—thoughtful, sustained, scholarly assessment of state court opinions and the development of state law. Jack's ongoing teaching and writing, as well as his existing opus of articles and opinions, will ensure that his thoughtful analysis and clearly articulated positions will be consulted and relied upon by the legal community for decades to come. That is surely enough to answer in the affirmative Holmes's question of whether one can "make out a life"—and even "live greatly"—in the law.

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18 32 WILLAMETTE L. REV. 1 (1996).

19 79 OR. L. REV. 793 (2000).