HON. DAVE BREWER

My Tribute to Jack

When I first worked with Jack Landau as a colleague at the Oregon Court of Appeals, I immediately realized that he was one of the smartest people I had ever known. Much more importantly, though, nineteen years later, when our daily work together was done, I knew that I had never seen a better judge.

Jack joined the Oregon Court of Appeals in 1993, and he authored 1137 majority opinions overall, more opinions per year throughout his eighteen-year tenure on that court than any judge in its history. During his time there, he wrote extensively on search-and-seizure law, statutory construction, and state constitutional history. He was tough but always fair with his observations about the state of the law, including when he sometimes rightly pointed out that constitutional law in Oregon was, putting it kindly, "a bit of a muddle."

He was revered on the Court of Appeals as a superb teacher and mentor, and he was beloved by his clerks, staff attorneys, and judicial assistants and colleagues. He always was focused, courteous, highly productive, possessed of a trenchant and self-effacing wit, and he had an unerring ability to follow the law to its logical conclusions, which made him hard to pigeonhole. For example, in *Tanner v. Oregon Health Sciences University*, he wrote the opinion for the court, which held that employers cannot discriminate against gay and lesbian couples when providing health benefits.[1] That 1998 ruling was revolutionary at the time, and it electrified the left. By contrast, he pleased more conservative court-watchers with a holding that public sex acts are not constitutionally protected "speech."

What must be understood is that Jack never tried to please any particular group when he wrote an opinion. A good appellate judge, Jack has always believed, is first and foremost fair and impartial. Or as

[1] Tanner v. Or. Health Sci. U., 157 Or. App. 502, 971 P.2d 435 (1998).

he said it best, "The Court of Appeals isn't a good place for anyone with an agenda." In addition, he set a tone for hard work that nobody has ever touched. I'll never forget him telling people that during his years on the bench he had read a stack of briefs more than twenty stories tall, until one of the staff attorneys corrected him, saying that it was more like thirty stories. He also understood that it was indispensable to be collegial. He explained that "appellate courts work in panels, so you must be able to get along well with your colleagues, even in the face of vigorous disagreement. Otherwise you'll end up spending all your time writing nothing but dissents." He also consistently embodied the virtues that a good appellate judge must have: a "passion for the law" and a love of writing. Because he practiced what he preached, he always achieved his paramount goal in opinion writing: "Whether or not you agreed with it, and you almost always did, you only had to read the opinion once to understand it."

If you'll indulge me, I'd like to mention two of Jack's greatest gifts to Oregon law and jurisprudence, gifts that we cannot afford to lose going forward. The first is epitomized by what he wrote in a 2012 article about the thorniest problem of state constitutional interpretation:

> [I]n cases involving older rights provisions that are broad and open-ended, courts will confront the problem of generalization; that is, at what level of generality or specificity should the court describe the principle that the wording and the history of a state constitutional provision reveal? The problem, as I have earlier noted, is unavoidable. Unless, for instance, a nineteenth-century right to bear arms provision is to be limited to nineteenth-century weapons technology—a position that I assume to be obviously untenable—some sort of generalization is necessary to apply the provision to modern circumstances. . . . I am not aware of anything about the nature of state constitutions that intrinsically favors one approach over another. What I do contend, however, is that, whatever a court determines is the appropriate consideration or set of considerations in deciding these hardest of hard cases, it should be candid about what it is doing. Once again, my concern is legitimacy. Even in cases in which rules fail . . . it seems to me important for courts to be transparent about their reasoning. Because the principal rationale for judicial review is that the interpretation of constitutions entails the application of legal principles, courts should explain their interpretive decisions, so that it is clear that they have a basis in reason and not merely the personal policy preferences of the judges involved. Moreover, because of the fact that so many state court judges are elected, it becomes especially important for them to lay bare their decisions in a candid way, so that those decisions may be fairly evaluated by the electorate. Aside from that, candor in judicial decision-making is critical to providing guidance to future litigants;

> if the decisions are being made for reasons other than those stated, then the stated reasons may serve only to lead future litigants astray.[2]

Beautifully written and exactly right, but this isn't just the way that Jack has talked to academic audiences throughout his career. It's the way that he has walked the walk as a sitting judge. This insistence on transparency and the use of principled reason has been one of his great gifts to his colleagues, the lawyers and litigants who have appeared before him, his students, and the public that must live with our decisions.

Jack's second great gift has been staving off the erosion of legal history and the precision of language in the rule of law. Douglas Hyde once wrote that, if "our language wanes and dies, the golden legends of the far-off centuries will fade and pass away."[3] No one will see their influence on culture; no one will see their educational power. Hyde's fear has never come to fruition on Jack's watch. Jack has been a preeminent master of language and the import of words in judging, and he has always used the lessons of history to explain and guide the course of the law, without being shackled by anachronism.

Consistent with those gifts, I'll conclude with a few of Jack's more notable quips that reflect deeper truth and must never be lost in Oregon's appellate courts.

First, when you don't know the answer to a legal problem, admit it. Or, as Jack expresses true uncertainty in prefacing a question at oral argument, "I ask because I really don't know."

Second, be gracious when you're reversed or, worse still, when you're truly schooled by a reviewing court. Or, as Jack would never say, "What are we, chopped liver?"

Third, admit it when you've made a mistake and be willing to learn from your mistakes. Or, as Jack occasionally would exclaim, "I should have had a V-8!"

Fourth, be gentle with your colleagues when they stray from the path of reason. Above all, don't use this snarky line from the Roman author Aulus Gellius, "I see the beard and cloak, but I do not yet see the philosopher."[4] Be assured, Jack never did that.

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[2] Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 872–74 (2011).

[3] DOUGLAS HYDE & BREANDÁN CONAIRE, LANGUAGE, LORE, AND LYRICS: ESSAYS AND LECTURES 73 (1st ed. 1986).

[4] 2 AULUS GELLIUS, ATTIC NIGHTS 157 (Loeb Classical Library ed., John C. Rolfe trans., Harvard Univ. Press 1927).

And, finally, revel in the daily rhythm of judging and in the privilege of doing the people's work with wonderful colleagues. Or, as Jack often has said with feeling at the end of a long day on the bench, "And a good time was had by all!"

I can't wait to read Jack's next chapter, whatever the subject may be. As a wise person once said, "Thank you for everything forever."