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A TRIBUTE TO JUSTICE ESTHER M. TOMLJANOVICH

Justice Paul H. Anderson[†]

It is with great pleasure that I join the chorus of voices praising Esther M. Tomljanovich for her service to the State of Minnesota. Esther's career reflects her optimism, fairness, concern for others, and common sense. I have been able to observe these characteristics firsthand, having served with her for four years on the Minnesota Supreme Court. I have been asked to share with you my personal view of her tenure on the court, and I approach this project with great relish.

To do justice to this task, I must go back to a time before I first became aware of this marvelous person. To learn more about Esther's early public life, I talked with her longtime friend, neighbor, and colleague, former Minnesota Supreme Court Justice Rosalie Wahl. Not surprisingly, Rosalie said that Esther has always been the bright, spirited, and equable person who I have come to know. She noted that Esther has always been willing to take on the powers that be to advance her concept of the common good. She also remembered that, as an established but still very young attorney, Esther gave an older 1960s female law student (Wahl) invaluable encouragement and a hand up into a profession that was at that time not very friendly to women. Rosalie and Esther worked together in local politics in Lake Elmo, where Esther ran unsuccessfully for City Council, strategized when the position as Revisor of Statutes opened up for Esther, and worked tirelessly with other women lawyers for the inclusion of women at every level of society. The mutual support that Esther and Rosalie provided to each other would prove crucial to both of them as each advanced toward a career in Minnesota's judiciary.

My own awareness of Esther began when I was still practicing law with the LeVander law firm in South St. Paul. Much of our practice was centered in Dakota County and the First Judicial

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District, but we frequently made court appearances in the Tenth District due to our proximity to Washington County. We always paid attention to the Tenth District judges who chambered in Stillwater. I remember the reaction in 1977 when Esther was appointed as a district court judge in the Tenth District. There was considerable interest in her appointment, driven in part by scuttlebutt about Governor Rudy Perpich appointing her just because she was a woman and some vague notion that they both had family ties with Croatia. But, as was our firm's general practice with most new judicial appointees, we withheld judgment.

Hap LeVander was the first firm member to appear before Esther, so we were all anxious to hear his reaction. Hap came back singing Esther's praises. He told us that she was prepared, knowledgeable, and very much in control in a pleasant, unpretentious way. Former Governor Harold LeVander was the next firm member to appear before her, and he echoed Hap's sentiments. In fact, Esther and the former Governor came to enjoy their courtroom encounters. Esther saw the experience, knowledge, poise, and dignity that Harold brought to her courtroom whenever he appeared before her. Harold, on the other hand, while a bit surprised by the fact that the course of human events would lead him to appear before this diminutive and feisty female judge, appreciated Esther's competence, preparation, and knowledge. He particularly appreciated her understanding of the role of government and what it means to be a public servant. Harold was known as the "citizen governor" and had a strong, well-defined notion of what it meant to serve the public—to give something back. He understood that Esther shared this notion, and this accounted in part for their high level of mutual respect.

By the time I first appeared before Esther, her reputation as a good judge was well-established. I knew that I could always count on getting a fair hearing when I appeared before her. On these occasions, I witnessed firsthand one of her most endearing characteristics—her complete lack of pretense. With Esther, what you see is what you get. She is incapable of taking on airs or taking herself too seriously—a refreshing trait that we all appreciated. She had a way of making lawyers feel comfortable in her courtroom. We all knew that she would never do anything to purposely embarrass lawyers in front of their clients. She understood that if the lawyers appearing before her felt comfortable, they would do a good job, which in turn would help her to reach the right decision.

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She treated everyone with respect. Criminal defendants often thanked her, even when she had imposed on them a stiff prison sentence.

Esther had very quickly proved herself to be a highly competent and well-respected judge. As for that early scuttlebutt about why she was appointed, Justice Wahl says that it was clearly put to rest in 1978 when Esther ran for election and not a single lawyer in the Tenth Judicial District filed to run against her.

As a person who had felt the sting of gender discrimination, Esther brought a fresh perspective to the bench. She knew what it was like to be on the outside looking in—to be ignored or, even worse, treated as invisible. This background made her courtroom and chambers different. Often the differences were subtle, but profound, in their impact. In Esther's domain, sexist attitudes and comments were not tolerated. She had a heightened sensitivity to the problems of domestic abuse and child abuse. She showed great sensitivity to the child care needs of employees and jurors. Some of us even observed that meetings in her chambers were as likely to involve an exchange of family pictures as they were a discussion about the most recent sporting event.

Esther challenged long-standing approaches to problem solving. A former colleague of hers believed "a wise old man and a wise old woman will come to the same conclusion." This comment bothered Esther. Her retort was that if this statement was correct, then "a lot of us wasted our time trying to assure the appointment of women to the bench." Esther's view was that a wise woman on the bench can influence and may even change the opinion of a wise man—and vice versa. Further, she asserted that while a wise man and a wise woman may often reach the same conclusion, they frequently use different problem-solving models to get there. She touts this diversity of approach as having an inherent value to the judicial decision-making process.

While serving as a district court judge, Esther had a role in selecting and mentoring applicants for the district court bench. In 1983, Governor Perpich established a commission composed of citizens from all over the state to review and recommend applicants for the district court. The Governor appointed Esther as the only sitting judge on this committee. Former Chief Justice Sandy Keith, who served with Esther on the commission, said that she "was one of the most effective and influential members of the commission. She obviously knew what a judge did and she provided enormous

insight into the process we developed over the next six or seven years.” Esther would make time in her busy schedule to personally interview judicial candidates. Most often she did this during the noon hour as she was presiding over cases in Washington County. Governor Perpich made over 150 judicial appointments and, in Sandy’s words, “Esther proved to be a great source of strength, insight, and knowledge in recommending able people to take on this important job.”

Governor Perpich appointed Esther to the supreme court in 1990 after Justice Glenn Kelley resigned. Esther would explain her appointment with characteristic humility. After referencing her work experience first as a staff member in the Revisor of Statutes’ office and then as Revisor, she related how her experience in that office led to her appointment. She would inform young lawyers that when you work with the Legislature, you have the potential to meet a future governor. She would then go on to say that it was during this time in her life that she had the good fortune to meet and become friends with a young Legislator who would become governor—Rudy Perpich. We all knew there was much more to her appointment than her friendship with Governor Perpich, but we nevertheless acknowledged that her friendship with the Governor did not hurt her chances for an appointment to the court.

Esther took her seat on the Minnesota Supreme Court on September 1, 1990. Little did I know how important that appointment would be to me within two short months and how it would affect my own future. At the time of Esther’s appointment to the court, I was balancing the demands of my law practice with duties related to Arne Carlson’s campaign for governor. Arne finished second in the 1990 Republican Party primary—in essence, his campaign and dream of becoming Minnesota’s governor appeared to end on the second Tuesday of September 1990. But, after the Republican Party’s nominee encountered some personal issues that put his candidacy and electability in doubt, the Carlson campaign quickly reconstituted itself and sought to establish Arne as the most electable alternative. This effort led to two ballot questions being argued before the supreme court within one week of the November election. One of my duties was to lead the team of lawyers advancing the Carlson campaign’s legal claims; thus, I was in the courtroom when both cases were argued.

The second and most crucial argument for Carlson’s campaign occurred after the Republican Party’s nominee withdrew from the

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race nine days before the election. On the Wednesday just six days before the election, Secretary of State Joan Growe indicated that it was her intent to place Arne's name and the name of his lieutenant governor running mate, Joannell Dyrstad, on the ballot. The Republican Party's nominee for lieutenant governor claimed that her name should remain on the ballot and brought an action before the supreme court to see that this was done. Further, an intervener in the action filed documents advancing the argument that the Secretary of State had no authority to place Arne's name on the ballot. It was a high profile, complex, and very tense legal battle with Esther squarely in the middle.

I watched the justices during the arguments and thought about what it must be like to face such a decision. In particular, I looked at Esther and imagined how difficult it must be for her—she had been on the court for less than two months and she was appointed by Governor Perpich, Arne's likely DFL rival in the election. I reflected upon my experiences when I had appeared before her in district court, remembering her sense of fairness, common sense, and willingness to make tough decisions. I believed that she would ultimately do what she thought was right. We won that case, and the rest is history. Esther was part of a five-two court majority allowing Arne's and Joannell's names to appear on the ballot. Her decision was a disappointment to her friend and mentor, Governor Perpich, but despite what must have been some extraordinary personal pressures, she had done the right thing for the citizens of Minnesota by making an unbiased decision based on the law. This was just one of many occasions when I witnessed firsthand her independence and integrity.

In September 1992, I became the third Chief Judge of the Minnesota Court of Appeals. Esther warmly welcomed me to Minnesota's judicial family and graciously assured my future colleagues that I should do well in the position. I immediately began work on a number of court initiatives and outreach efforts which started a long and enduring relationship with Esther that continues to this day.

One of our shared initiatives is the supreme court's program of holding hearings off-site, usually at schools. The court of appeals regularly holds hearings in greater Minnesota, and I have seen firsthand how these hearings help to make the work of the court more understandable to a broad base of citizens. I often wondered why our supreme court did not do something similar,

especially after I learned that a few other supreme courts held off-site hearings. In July 1994, I joined the supreme court as an Associate Justice, and I immediately floated the idea that we hold hearings out state. I soon learned that most members of the court found the idea appealing, but that at least one senior justice was strongly opposed and that this opposition would surely doom the idea. I needed a strategic ally, and I found an enthusiastic one in Esther. Together we devised a plan.

Olmsted County in the Third Judicial District had recently constructed a new courthouse in Rochester, the home town of Chief Justice Sandy Keith. Rochester would be an ideal location for our first out-state visit. It would provide an opportunity to honor the Chief Justice and thank the county commissioners and the citizens of Olmsted County for their willingness to support the judiciary. But how could we get this done? As the newest justice, I was too junior to lead the effort, so Esther needed to be the court's point person. We agreed that someone from the Third Judicial District needed to start the ball rolling. At a district judge's meeting, we approached former State Senator and then-Chief Judge of the Third Judicial District, Harold Krieger, about the idea. Harold's chambers were located in Rochester, and he quickly embraced our plan. He agreed to send a letter to Sandy inviting the court to Rochester, and he would be sure to send a copy of the letter to Esther as well.

Harold sent the letter, but we heard nothing about it until Esther approached Sandy about Harold's letter; he then agreed to poll the court. There were five strong yeas and one strong nay, so we went to Rochester in February 1995. The visit was a resounding success, starting one of the most beneficial of the court's outreach efforts. Since then, we have made more than twenty similar visits. The Rochester visit was especially gratifying for Esther and me because it allowed the court to acknowledge the contributions of Chief Judge Krieger. Harold was suffering from cancer, which was in remission at the time of our visit. Shortly thereafter, the cancer came back with a vengeance and Harold died within two months of our visit. Fortunately, we all had an opportunity before his death to thank him publicly for his service to Minnesota.

Esther and I worked on many other court initiatives over the years. One of particular note is the effort to eliminate racial bias in the legal system. The Minnesota State Bar Association had presented the court with a proposal to provide "diversity" training

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to lawyers as part of the continuing legal education program. Unfortunately, the diversity proposal, while well-intended, was not necessarily well-designed to fit into a continuing legal education (CLE) program. We knew that diversity programs had encountered a number of problems and, when implemented, were oftentimes divisive among members of the legal community. Working with the CLE Board Chair Phil Bruner and CLE Executive Director Peg Corneille, Esther and I worked hard to change the focus of the initiative to one of the elimination of bias in the legal system—a subject more appropriate to a continuing legal education requirement. Esther's efforts were essential to this program getting off to a good start.

I always viewed Esther as a valuable and delightful colleague in the court's judicial decision-making process. She brought us the practical perspective and experience of a trial court judge. When we sought to decipher the actions of a trial court judge, she would say to us, "Ohhhh! Let me tell you what is really going on here," and then she would proceed to explain why a trial court judge had taken a particular course of action. On this point, former Justice Edward Stringer says,

I was appreciative of the rich and thoughtful observations she shared with us about the pressures of time, emotional stress, and fatigue of trial court judges. She understood the deference that should be accorded to trial judges because of their unique opportunity to observe witnesses and tailor rulings to the pace of the proceedings. Her trial court experience provided us with valuable insight into the trial court rulings under review.

Without a doubt, countless trial court judges should be grateful for Esther's lucid explanations of what it is like to be a trial judge.

Esther was constantly watching out for the interests of the average citizen who, often through no particular fault of his or her own, may have become overwhelmed by the legal system. On criminal matters, she was very much aware of the human condition and our fallibility as human beings. She knew people were capable of making serious mistakes and society's need to have them repay society for those mistakes. Her colleagues on the court were never in doubt where she stood on issues of individual rights. This view was reflected in the case of *State v. Carter*, 569 N.W.2d 169, 179 (Minn. 1997), in which, writing for the court, she rejected the State's argument that a warrantless search was permissible because it was only minimally intrusive. She said, "we once again reject the

notion that a little bit of information justifies a little bit of a search.”

Esther was always careful to make sure that any punishment meted out to a defendant was both warranted and fair. For her, true justice always needed to be tempered with common sense, mercy, and compassion. She cherished both the United States and Minnesota Constitutions and was aggressive in ensuring that the individual rights guaranteed by these documents were preserved. While reluctant to use the Minnesota Constitution to challenge statutes, she did not hesitate to use it when necessary. Former Justice James Gilbert remembers her fierce independence and recalls her saying “we need to do what we need to do. If the United States Supreme Court overturns us, so be it. We nevertheless need to do what we do and they will do what they do.”

Esther’s concern for those who encountered trouble with the law did not end when a defendant left her courtroom. She knew that most persons sentenced to prison would be returning to society and that it was important that they get help with the transition. This concern led to her active involvement with AMICUS, a nonprofit organization dedicated to mentoring prisoners and assisting them with their transition back to society. She served on the AMICUS board and was very dedicated to seeing that its goals were achieved. It was while serving as a fellow AMICUS board member that former Chief Justice Kathleen Blatz first got to know Esther well. Kathleen recalls how much she admired Esther’s concern and dedication and how much she enjoyed her personal warmth. When Kathleen was a trial judge and fellow AMICUS board member, Esther used to invite Kathleen to her chambers where the two of them would conduct business over “high tea.” Kathleen says Esther was “so welcoming that you could not help but feel better in her presence.”

On the civil side of the court calendar, Esther was also aware that individuals could be overcome by the power of vested interests and that on occasion the court needed to step in to protect an individual’s rights. In a dissent in the case of *Smith v. Brutger Cos.*, 569 N.W.2d 408, 417 (Minn. 1997), she admonished the district court for dismissing a claim before a factual record had been developed. She said, “[f]or us to dismiss the case at this time, however, is not only an injustice to the plaintiffs, it is an intolerable foray into the realm of fact finding. Predicting the future might be big business for soothsayers, but it is not a very equitable method of

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jurisprudence.”

While almost everyone would agree that Esther was an active judge, she cannot be described as a “judicial activist.” Quite the contrary, Esther believed that the issues of constitutional law and the separation of powers needed to be approached with great delicacy. Even though she always had a strong desire to do justice, she acknowledged that the judiciary could not provide the solutions to most social problems. She had a clear sense that the responsibility of the judiciary was to interpret and apply the law, not to create it. When our court held, for the first time, that a claim of injury for invasion of privacy would be recognized in Minnesota, Esther dissented, observing, “[a]s much as we deplore such [invasive] conduct, not every contemptible act in our society is actionable.” *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998).

Esther expressed this attitude again and perhaps reflected it even better in her concurrence in the case of *Bilal v. Northwest Airlines, Inc.*, 537 N.W.2d 614 (Minn. 1995). The *Bilal* case involved a claim for intentional public accommodation discrimination under the Minnesota Human Rights Act. The case focused on Northwest Airlines’ dress code and the complainant’s failure to comply with the specific requirements of that code. When confronted about her attire, the complainant, who was Muslim, asked how she should dress. The airline employee who confronted the complainant responded by saying “You should dress as if you were going to church.” The complainant was offended by the use of the word “church,” sued, and prevailed in the district court and the court of appeals. Our court reversed in a 7-0 decision.

The opinion dealt directly with the issue before the court, but the court attempted to draft it in a way that showed our sensitivity to the complainant’s concerns. The opinion was circulated within the court. I remember Esther coming to my chamber one afternoon to tell me that she thought my draft of the opinion for the court lacked something. She then said: “I have drafted this snippy little concurrence and would be interested in what you think of it.” I read the concurrence and went to her chamber to tell her that I liked it and thought it fit like an exclamation mark at the end of a strong sentence.

Esther began her concurrence, which was less than one page in length, by saying that, while she agreed with the majority, she wrote separately because of her “concern that this matter ever

reached the courts.” She acknowledged the importance of being sensitive to racial, religious, and gender differences and the need to avoid discrimination, but went on to state that this case defied common sense. She said,

The majority points out that the word “church” does not possess the inherent derogatory qualities of an epithet. I agree. I believe that a chance remark such as the one in this case that was not motivated by any discriminatory intent should not be actionable just because it includes the word “church.”

We must eliminate the use of language that diminishes another person’s humanity, but this surely was not such language. How much better it would have been when Ms. Bilal was offended by Ms. Patrick’s reference to church if she had sat down with Ms. Patrick and her supervisors and explained her feelings. An apology and a better understanding of the situation would, no doubt, have resulted. *The courts simply cannot be the arbitrator of all hurt feelings.*

It is important that we communicate our feelings to one another, but if we must live in fear that a lawsuit will result each time we make a comment or use a word that someone, somewhere, sometime might find offensive, all human exchange of words and ideas will cease, and our world will be a worse place in which to live.

Bilal, 537 N.W.2d at 620 (emphasis added).

The concurrence in *Bilal* is the quintessential Esther Tomljanovich, both in use of language and jurisprudence. Her comments garnered a positive reaction and resulted in an editorial in the *St. Paul Pioneer Press* entitled *Common-Sense Justice*. Many commentators came to believe that she, not I, was the actual author of the *Bilal* opinion, which led me to kiddingly admonish her for using me as her “straight man.”

The *Bilal* concurrence captures some of Esther’s feistiness, which manifested itself in strong beliefs and a willingness to stand up for her particular view on an issue. She has both the passion and compassion that good judges must have. But she has not let these traits override her sense of right and wrong. Justice Alan Page fondly remembers her frequent observation that as justices we need to have the ability to distinguish between “those we are angry at and those we are afraid of.” She is quite capable of making this distinction.

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Esther's quick mind and good sense of the bottom line served her well on the court. Nevertheless, some persons were prone to underestimate her. Normally, she would tolerate any dismissive behavior and let her ability speak for itself. However, on a few occasions, it would bother her enough that she would call the offending party to task. I have seen her do this on a few occasions, and I can assure everyone that she is very capable of defending herself when necessary. Fortunately, these occasions were few and far between, in large part because of her attitude and the fact that most treated her with the respect she deserved.

Esther brought to the court an interest that went beyond the cases argued in our courtroom. She had a deep and longstanding interest in the success of William Mitchell College of Law, her alma mater. She taught at the law school and served on the Board of Trustees. She was active in the many administrative problems faced by the court and played an important role in making sure that the court kept current with its rules. For many years, she served as chair of the Criminal Rules Committee, where she earned the respect and affection of her fellow committee members with her dedication, practical insights, and delicious treats that she provided at the committee's Saturday morning meetings. She did all of this while keeping on top of her legal work on the court. Former Chief Justice Keith says that he always appreciated the way she "made sure that her opinions were well-written and on time." He says that "I never had any trouble getting the work out when it was assigned to Esther." Chief Justice Blatz concurs with this assessment and notes how much she appreciated Esther's "incisive and decisive approach to issues."

Esther's contributions to the legal and judicial community often extended beyond Minnesota's borders. The personal attributes that made her such a valued member of our court also served her well when she engaged in these extra duties. As one of the nation's pioneering women judges, she played an active role in the National Association of Women Judges and served as chair of its Women Offenders subcommittee. She took on special assignments for the court such as traveling to Maryland, Virginia, and Washington, D.C., to assess the merit and viability of doing arraignments using interactive television. She returned with a healthy skepticism for the process, noting many of the shortcomings that she observed.

Esther was also in demand to judge moot court competitions

both locally and nationally. One of her favorite national competitions was the Products Liability Moot Court held in Cincinnati, Ohio. Justice William M. Barker of Tennessee's Court of Criminal Appeals, who served with Esther at these national moot court competitions, describes her as "memorable" and "an excellent representative of Minnesota." Justice Barker recalls that Esther was a "well-prepared, well-informed judge who asked the students numerous relevant broad-based questions on the issues being argued at the moot court competition." Justice Barker also recalls that Esther was a "true delight" to be with, whether it was at a social function with the students or with other judges. Whatever the situation, he says Esther's personality always would "shine through."

As I indicated earlier, with Esther what you saw is what you got. Former Justice Stringer observes, "Esther—she is a person of high principles that she articulates consistently and well and does not compromise, and she is straightforward—some might even say blunt." Justice Alan Page says, "the beauty of Esther as a colleague was that you always knew what she was thinking—there were never any hidden agendas with her. Whether you agreed or disagreed with her, you never second-guessed her motives." She lived the adage that appellate judges must learn how to disagree in an agreeable manner.

One privilege of being a justice on the supreme court is that we are able to hire and work with law clerks who are among the top law school graduates. Esther enjoyed working with her clerks. She was a good mentor and ultimately most were treated like members of her family. Former Associate Justice Sandra Gardebring had a unique opportunity to observe Esther's approach to working with law clerks. Sandra notes that

Justice Tomljanovich and I shared a law clerk for all of the time we were on the court together. I approached the first discussion on this issue with a little trepidation, not knowing Esther well, and wondering if we would have a common approach to clerk selection. As it turned out, we did, and we often used that choice to provide a clerking opportunity to a young lawyer who might not have otherwise had the chance to serve at the supreme court. We had single moms, clerks who had gone back to school after other careers, young lawyers from ethnic and cultural groups not well-represented in the legal community—they were all terrific and brought a

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wonderful dimension to our work. Even today, Esther has rich relationships with her law clerks and the “grandclerks,” as she calls them.

When you serve on a seven-member appellate court that meets on an almost daily basis, you get to know your colleagues quite well. Often there are personal traits that endear these people to you, and your appellate court colleagues frequently become close friends. There are so many things that I miss about Esther. Her engaging smile. Her pink suit that made her stand out such that it was nearly impossible to compete with her for attention. Her daily walks to downtown St. Paul which she used to keep her mind, spirit, and body in shape, even though her sartorial splendor was sacrificed for the comfort of her high-topped white walking shoes.

I remember how Esther used to curl her legs up under herself in the conference room or in her office, because most of our furniture was designed for six-foot tall men, not a five-foot tall woman. Her informal hospitality when guests visited her chamber. Her attentiveness to the social aspects of court life that so enhanced our professional relationship. Her concern that women and people of color always got a fair shake. Her performances at the Ramsey County Bar Association Judges’ dinner where she would “sing-speak” slightly off key while dressed in a mini skirt, fishnet stockings, and a feather boa. I admit that on these occasions, I often held my breath out of concern that her performance might stray outside the envelope of judicial propriety, but my concern was unwarranted, because it never did.

Esther really likes people, and it shows in so many endearing ways. She loved to meet with lawyers, law students, and members of the public. The two of us had a friendly rivalry as to which one of us would be the last to leave a court event. Most often, our competition ended in a draw as we left together. I was recently reminded of this rivalry when I was the last justice to leave a gathering of students at William Mitchell College of Law following our court’s annual argument at that school. It was about 9:20 p.m. as I left the building and went to my car. As I walked across the parking lot, I was fondly remembering how Esther and I usually left these gatherings together. Just as I opened my car door, Esther jumped out of the vehicle next to mine and said “Ahhh, I win this time,” and flashed her impish grin. She was hosting a law student that evening and saw my car, so she pulled up next to me and waited to ambush me upon my departure. I gave her a big hug and

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told her how much I missed her as a colleague.

Esther was a trailblazer and a role model for many women lawyers. She broke considerable ground for women in the legal profession, paving the way for eventual equality. She has forgotten more slights and indignities than most of us have experienced. She has blazed a trail for others with passion, compassion, a sense of humor, dignity, and a *joie de vivre* that is enviable. She stands tall among her fellow trailblazers—Rosalie Wahl, Susanne Sedgwick, Diana Murphy, Harriet Lansing, Ann Montgomery, and many others. Those women who follow her must be grateful, because she has made the road easier for them to travel. I am privileged to call Esther my friend and colleague, and I shall cherish forever the opportunity I had to serve with her on Minnesota's highest court.